IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG, and DAVID BURNHAM, Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	Civil Action No. 17-1097 (APM)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiffs hereby move for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that plaintiffs are entitled to judgment as a matter of law. Defendant Immigration and Customs Enforcement (ICE) cannot provide any legal basis for withholding the requested records under FOIA.[1] Accordingly, judgment should be entered for plaintiffs.

In support of this motion for summary judgment, plaintiffs submit the accompanying Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, Plaintiffs' Response to Defendant's Statement of Material Facts as to Which there is no Genuine Issue and Plaintiffs'

[1] Plaintiffs' Complaint sought relief with respect to 27 requests. *See* Compl. ¶ 18. Plaintiffs no longer seek relief with respect to requests 67 and 69.

Statement of Additional Material Facts as to which there is no Genuine Issue, and the Declaration of Susan B. Long and exhibits annexed thereto.

Respectfully submitted,

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Dated: December 8, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENTAND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Since 2012, Plaintiffs Susan B. Long and David Burnham have submitted Freedom of Information Act (FOIA) requests to Immigration and Customs Enforcement (ICE) seeking records, including specific fields and data elements identified to the best of plaintiffs' ability, contained in ICE's Enforcement Integrated Database (EID), an electronic database that includes information related to ICE's investigations, enforcement actions, and the operation of its Secure Communities program. For several years, ICE responded to plaintiffs' FOIA requests by providing fields including data elements directly corresponding to those identified in the requests. In January 2017, however, ICE without explanation began withholding many of the fields it had previously provided.

In this litigation, although ICE has not invoked any FOIA exemption, it claims that many of the fields and data elements described by the plaintiffs' requests "do not exist" in the EID and that producing them would constitute the "creation of records." At the same time, ICE concedes that searching for and extracting fields and data elements that exist in the EID is not the creation of records. Because plaintiffs' requests reasonably describe fields and data elements that exist in the EID, ICE is obligated to extract the fields and data elements and provide the non-exempt information in them to plaintiffs.

ICE also claims that some parts of plaintiffs' requests seek the answers to questions. ICE itself, however, has long-recognized that these same requests do no such thing, but rather, read in context, seek fields and data elements in the EID that indicate the existence or nonexistence of some event or fact.

ICE has utterly failed to satisfy its burden of justifying its withholdings in this case: Of the 27 fields withheld by ICE corresponding to the requests placed in issue in the Complaint, ICE's

arguments in its memorandum in support of summary judgment address exactly *one* of them, and ICE's arguments with respect to withholding that single field are spurious. The remainder of ICE's memorandum and supporting declarations primarily discuss requests for records that are not at issue in this case. Moreover, ICE's memorandum and declarations are internally inconsistent, and inconsistent with ICE's declarations and memoranda in other cases, raising substantial doubt about the agency's good faith. ICE also appears to admit that it withheld several fields unlawfully, requiring summary judgment for the plaintiffs as to those fields.

Throughout ICE's memorandum and supporting declarations, ICE attempts to camouflage its violations of FOIA by relying on technical jargon. At bottom, though, this case is an easy one: ICE is refusing to provide records that indisputably exist in a well-structured database and that it had provided for several years. There is no genuine dispute as to any of the material facts demonstrating that ICE is withholding existing, responsive records as to which there is no claim of exemption. Plaintiffs are entitled to summary judgment, and ICE's motion for summary judgment must be denied.

BACKGROUND

I. The EID, the Secure Communities Program, and the Priority Enforcement Program

The EID is a database of all records created, updated, and accessed by software applications that capture and maintain information relating to the investigation, arrest, booking, detention, and removal of persons in the course of ICE investigations and operations. *See* Jones Decl. ¶¶ 6-8. The EID also includes comprehensive criminal history information for all people arrested for administrative violations of the Immigration and Nationality Act (INA). *See id.*[1]

[1] ICE states that, in searching for responsive records, it searched the ICE Integrated Decision Support System (IIDS), a snapshot of a subset of data from the EID that is updated regularly three days each week. Jones Decl. ¶ 9. Throughout this memorandum, plaintiffs refer to

The Secure Communities Program is one of several that have been used to target noncitizens who have engaged in criminal activity for removal. *See* Long Decl. ¶ 5. Secure Communities, along with a temporary successor called the Priority Enforcement Program (PEP), has been in operation since 2008. *Id.* ¶ 6. PEP succeeded Secure Communities from November 20, 2014, until Secure Communities was reinstated by executive order on January 25, 2017. *Id.* ¶ 6.

Secure Communities and its successor depend on the computerized automatic matching of fingerprint records submitted to the Federal Bureau of Investigation (FBI) by local law enforcement agencies. *Id.* ¶ 7. As a part of their regular routine, local law enforcement agencies fingerprint individuals taken into custody on local matters and submit these fingerprint records to the FBI to confirm their identities, and to obtain any criminal records the FBI has on them for local use. *Id.* ¶ 7. The FBI now automatically transmits the fingerprint records it receives on to the Department of Homeland Security (DHS), where that agency matches the fingerprints against its own databases and, when there is a match, determines whether the arrestee may be deportable. *Id.* ¶ 7. Based on ICE's priorities and resources, the agency may then issue an immigration detainer. *Id.* ¶ 7. The detainer is a request that the arresting agency hold the alien for a period of time beyond when the individual would be normally held to allow ICE to take that individual into its own custody. *Id.* ¶ 7.[2]

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the EID as the relevant database that contains the requested records because ICE concedes that the IIDS is only a snapshot of the EID. *Id.* If the requested records existed in the EID but not in the IIDS, ICE's failure to search the EID instead of the IIDS would plainly be unreasonable. However, ICE has not asserted that it may withhold fields or data elements that exist in the EID if they do not exist in the IIDS (or, indeed, that there are any such fields or data elements). Thus, the distinction between the two databases is not material to plaintiffs' entitlement to relief.

[2] ICE issues detainers using a form called an I-247. Over time, there have been variations to the I-247 form, which have sometimes resulted in different letter designations such as I-247D and I-247N. Unless otherwise indicated, references to "detainers" in this memorandum incorporate the I-247 as well as the variations to the form.

II. Plaintiffs' History of FOIA Requests to ICE for Fields and Data Elements Contained in the EID.

Plaintiff Susan B. Long is an Associate Professor of Managerial Statistics at the Martin J. Whitman School of Management at Syracuse University. *Id.* ¶ 1. Plaintiff David Burnham is a long-time journalist, and an Associate Research Professor at the S.I. Newhouse School of Public Communications at Syracuse University. *Id.* ¶ 4. Long and Burnham are Co-Directors of the Transactional Records Access Clearinghouse (TRAC), a data gathering, data research, and data distribution organization associated with Syracuse University. *Id.* ¶ 2. Established in 1989, TRAC's purpose is to provide the public with comprehensive and regularly updated information that allows for meaningful oversight of government agencies and officials. *Id.* ¶¶ 2-3. News organizations, public interest groups, businesses, scholars, lawyers, and the government itself are among those who rely on TRAC's data. *Id.* Immigration enforcement records are the source of a significant amount of the data TRAC gathers, regularly updates, and makes available on its public website, http://trac.syr.edu/immigration. *Id.* ¶ 3. Starting in 2006, plaintiffs began requesting database records concerning various ICE enforcement activities. *Id.* ¶ 9.

In 2012, as part of its efforts to provide the public with information on immigration enforcement practices, plaintiffs submitted to ICE a FOIA request seeking anonymous case-by-case information about each person whom ICE had deported as a result of the Secure Communities Program, including any successor programs. *Id.* ¶ 10. Since February 2013, plaintiffs have requested this data on a monthly basis. *Id.* ¶ 11. Each monthly request sought records from a predetermined start date updated through the time of the request so that the agency's response would include the most recent time period. *Id.* ¶ 11. For example, in May 2016, plaintiffs sought records from fiscal year (FY) 2015 through April 2016, and in June 2016, plaintiffs sought data from FY 2015 through May 2016. *Id.* ¶ 11.

ICE has refused to identify all the fields that exist in the EID. *Id.* ¶ 15.[3] Thus, to obtain records from the EID, plaintiffs' FOIA requests have included many numbered requests describing the fields and data elements that plaintiffs seek from the EID. *Id.* ¶ 16. For example, for each individual deported, plaintiffs' requests have included a numbered request for the fields or data elements in the EID that contain the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent." *Id*. Over time, the number of requests for fields and data elements grew as plaintiffs learned of additional relevant fields or data elements contained in the EID. *Id.*

Starting in August 2012, ICE began providing plaintiffs with computer extracts furnished as Excel spreadsheet files derived from the EID in response to each of plaintiffs' monthly requests for updated data. *Id.* ¶ 17. Because ICE would not apprise plaintiffs of the names and descriptions of all the specific fields in the EID, data elements responsive to several of plaintiffs' numbered requests could be contained within a single field in the EID. *Id.* ¶ 20. For example, in their January 4, 2016, FOIA request letter covering data for FY 2015 through December 2015 (the December 2015 Request), plaintiffs made separately numbered requests for any fields or data elements from the EID containing information related to whether each individual deported was "ordered removed by court, where the order has become final (yes/no)" (request 66) and whether that individual was "[a]dministratively ordered removed, where order has become final (yes/no)" (request 68). *Id.* ¶ 20, Ex. A. In response to these two separately numbered requests for fields or data elements

[3] Plaintiffs have sought information including the names of all fields and data elements in the EID through separate FOIA requests, but the agency has withheld those records citing FOIA exemption 7(E). Long Decl. ¶ 15. That dispute is also pending before this Court. *See Long v. ICE*, No. 14 Civ. 109 (D.D.C.).

contained in the EID, ICE provided only one field containing data from the EID that ICE's spreadsheet labeled "Final Order Yes No." *Id.* ¶ 20.

Similarly, sometimes data elements responsive to a single numbered request could be contained within multiple fields or data elements in the EID. *Id.* ¶ 21. For example, in response to a numbered request in the December 2015 Request for the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent" (request 26), ICE provided two fields with data from the EID, described in its Excel spreadsheet as "Detainer Facility City" and "Detainer Facility State." *Id.*

Over time, plaintiffs learned that the EID contains many fields and data elements that indicate either the existence or nonexistence of some event or state of facts. *Id.* ¶ 22. Plaintiffs learned that these typically were labeled by ICE as "Yes No" fields. *Id.* For example, plaintiffs discovered from ICE's responses to requests identical to requests 66 and 68 of the December 2015 Request that the EID contains a field or data element ICE has described as "Final Order Yes No" that records whether there has been an order in an individual's deportation case that has become final. *See id.*, Ex. A. The field as provided in ICE's previous responses to plaintiffs' requests contains only data indicating the existence or nonexistence of such an order. *See id.* ¶ 22. Similarly, plaintiffs discovered from ICE's responses to a request for a field or data element in the EID indicating whether removed individuals had committed aggravated felonies that the EID contains a field or data element that ICE has referred to as "Aggravated Felony Yes No," recording the existence or nonexistence of such a felony. *See id.* ¶ 22, Ex. A.

To describe the fields and data elements in the EID structured in this "Yes No" format, but without knowledge of the real names of EID fields, plaintiffs' numbered requests often describe fields and data elements by following ICE's yes/no pattern. *See id.* ¶ 23. For example, plaintiffs'

requests have sought, for each individual deported, the fields or data elements contained in the EID that indicate whether the individual was an "aggravated felon (yes/no)," whether there had been a "prior removal (yes/no)," and whether there had been a "reinstatement of prior removal order (yes/no)." *See id*. ¶ 23, Exs. A-C. The numbered requests formatted in this pattern are not questions—indeed, none includes a question mark—and ICE regularly understood and responded to these numbered requests with the fields and data elements in the EID that indicated the existence or nonexistence of the specified event or state of facts. *See id*. ¶ 23.[4]

III. ICE Fails to Produce Many Fields and Data Elements from the EID in Response to Plaintiffs' August 2016 FOIA Request.

In August 2016, plaintiffs submitted their monthly FOIA request to ICE asking for data covering FY 2015 through August 2016. *Id.* Ex. B (the August 2016 Request). The specific numbered requests in the August 2016 Request were virtually identical to the numbered requests in the December 2015 Request seeking data from the beginning of FY 2015 through December 2015. *Id.* ¶ 14, Ex. C.[5]

[4] These fields and data elements in the EID were sometimes used to record which checkbox was checked on an official ICE form giving the reason(s) for an enforcement action, or to record a particular category it used for management reporting purposes. The data elements in these fields might be recorded in the EID with "yes" or "no" entries, or "T" or "F" (for true or false), or yes would be indicated by a specific code (such as a "1" or a "Y" or a "Yes") while the absence of any entry would signify a no. Long Decl. ¶ 26.

[5] Exhibit C to the declaration of Susan Long includes a side-by-side comparison of the December 2015 Request and the August 2016 Request. The exhibit demonstrates that the only requests with substantive differences were requests 17 through 21. With respect to requests 17 through 21, in the August 2016 Request, plaintiffs elaborated on the December 2015 Request for those specific request numbers by adding subparts. Because ICE provided responses to the requests in the December 2015 Request, ICE should have at least provided responses to the portions of the August 2016 Request that were identical.

Further, a few of plaintiffs' requests in the December 2015 Request sought records about "detainers," whereas the corresponding numbered requests in the August 2016 Request sought the same records about "I-247/I-247D/I-247N" following the adoption of new "D" and "N" versions of the form. *See* Long Decl. Ex. C (compare requests 22-26, request 28, and request 77). Because, as noted above, *supra* p. 3 note 2, these letter descriptions designate types of detainer forms, ICE

In its response to the August 2016 Request, dated January 4, 2017, ICE omitted many of the EID fields it had regularly provided in response to plaintiffs' monthly requests covering earlier, overlapping time periods. *Id*. ¶ 27, Ex. F. Indeed, less than a week later, on January 10, 2017, ICE provided those very fields in response to the same requests in plaintiffs' December 2015 Request. *Id.* Specifically, even though the period covered by the requests overlapped for the 15 months from the beginning of FY 2015 through December 2015, 27 fields containing data elements responsive to 25 of plaintiffs' numbered requests were provided in ICE's response to the December 2015 Request but were not included in ICE's response to the August 2016 Request.[6] *See id.* ¶¶ 27, 31, Ex. F. Plaintiffs refer to these 27 fields as the "disappearing fields." The following table displays the fields that were omitted from the response to the August 2016 Request but provided in the response to the December 2015 Request, and identifies the specific numbered requests to which those fields were responsive:[7]

would reasonably have understood the requests, though phrased differently, to have sought the same information in both the December 2015 and August 2016 Requests. Indeed, ICE's declarant uses the language interchangeably, quoting request 22 from the December 2015 request when referring to request 22 from the August 2016 Request. *See* Jones Decl. ¶ 50. Though organized in a different manner, requests 22 and 23 in the December 2015 Request are substantively identical to requests 22 and 23 in the August 2016 Request.

[6] Although there are 27 fields and 25 numbered requests, as explained above, sometimes ICE responded to multiple requests with a single field in the EID (e.g. requests 22 and 23), while in other instances a single numbered request received multiple fields in response (e.g. request 26). Plaintiffs' Complaint inadvertently raised two additional requests (request 67 and request 69). Plaintiffs are no longer challenging ICE's response to those requests.

[7] The numbers assigned to the specific requests were generally identical in both FOIA requests. In this table, and in the remainder of this memorandum, numerical references to requests (e.g., "request 22") refer to the specific, numbered requests contained in the August 2016 and December 2015 Requests. The only exception is request 21 in the December 2015 Request: in the August 2016 Request, the December 2015 request 21 was renumbered request 20.a. *See* Long Decl. Ex. C (side-by-side comparison of requests). Request 21 of the August 2016 Request is not at issue.

"Disappearing Fields" from the EID Provided in Response to December 2015 Request but Withheld from Response to August 2016 Request.	**Corresponding Requests in Both the December 2015 Request and the August 2016 Request Describing Fields and Data Elements in the EID.**
Non-Criminal ICE Priorities	7. Priority levels based upon November 20, 2014 announced criteria.[8] 17. ICE fugitive (yes/no)… 18. Prior removal or return (yes/no)… 19. [Entry without inspection (EWI)] (yes/no)… 20. Visa Violator: a. Overstayed visa (yes/no).[9] 20. Visa Violator …b. other type of visa violator (yes/no)
Detainer Prepare Date	22. Was I-247/I-247D issued for individual before removal (yes/no), and date issued. [10] 23. Was I-247N issued for individual before removal (yes/no), and date issued.
Detainer Facility City; Detainer Facility State	26. City, county and state of the jail or facility in which the individual was detained prior where the I-247/I-247D/I-247N was sent.
Detainer Threat Level	27. Detainer Threat Level (or corresponding Notice Threat Level).
Charged with Crime	43. Charged with a crime (yes/no) [any charge, not restricted to convictions].
Criminal Charge	54. Information on every conviction not just the most serious (date of the charge, date of the conviction, NCIC code for charge, level of offense (felony, misdemeanor, citation, etc.), sentence received).
Criminal Charge Code	
Criminal Charge Date	

[8] ICE now claims that no field in the EID contains data elements responsive to this request. *See* Jones Decl. ¶¶ 54-55. Because plaintiffs have previously received the field "Non-Criminal ICE Priorities" from the EID in response to this request, *see* Long Decl. Ex. F, ICE has failed to explain or justify the withholding of this information.

[9] In the December 2015 Request, request 20.a was numbered request 21.

[10] As noted above, *see* p. 7 note 5, the December 2015 Request referred to these forms as "detainer" when requesting this same information in requests 22, 23, and 26.

Criminal Charge Status	55. Information on every charge not just the most serious for which a conviction has not occurred (date of charge, current status, NCIC code for charge, level of offense (felony, misdemeanor, citation, etc.)).
Criminal Conviction Date	
Criminal Conviction Sentence Days	
Criminal Conviction Sentence Months	
Criminal Conviction Sentence Years	
Aggravated Felon	57. Aggravated felon (yes/no).
Removal Current Program	60. Latest program code before departure.
Case Category Time of Arrest	61. Case category at the time of latest arrest.
Latest Arrest Current Program Code; Latest Arrest Current Program	62. Program code at the time of latest arrest.[11]
Latest Apprehension Date	63. Date of latest arrest.[12]
Cause Arrest Current Program	64. Name of the program or area associated with the original arrest or apprehension (criminal alien program, fugitive operations, office of investigations, border patrol operation streamline, other border patrol program, 287(g), etc.).
Latest Apprehension Method	65. The apprehension method associated with the latest apprehension.
Final Order Yes No	66. Ordered removed by court, where order has become final (yes/no). 68. Administratively ordered removed, where order has become final (yes/no).
Reinstated Final Order	70. Reinstatement of prior removal order (yes/no).
Reinstated Final Order Date	71. Date of latest reinstatement of prior removal order.[13]
Prior Removal	74. Prior removal (yes/no).
Most Recent Prior Depart Date	75. Date of latest prior removal.

[11] ICE previously provided two fields responsive to this request: "Latest Arrest Current Program Code" and the translation of that coded reference in "Latest Arrest Current Program."

[12] ICE claims that it provided records in response to request 63. *See* Jones Decl. ¶ 42. Although plaintiffs did receive a field labeled "Arrest Date," plaintiffs' comparison of the "Arrest Date" field with the "Latest Apprehension Date" field ICE previously provided has led plaintiffs to conclude that the two are not coextensive because: (1) there is nothing to indicate that it is the "latest" arrest date, as opposed to simply one arrest date among others, (2) other fields in the EID use the terms "arrest" and "apprehension," indicating that they may have different meanings in the EID, and (3) the data in the "Latest Apprehension Date" field from earlier requests that overlap with the August 2016 Request does not match the data in the "Arrest Date" field. Long Decl. ¶ 33.

[13] ICE claims that it provided records in response to request 71 "in response to other requested items." Jones Decl. ¶¶ 47-48. Contrary to ICE's claim, the data provided by ICE in response to plaintiffs' requests does not provide the responsive information ICE earlier provided with respect to this request. Long Decl. ¶ 34.

Long Decl. Ex. F. The disappearing fields had been regularly provided in ICE's responses to corresponding requests in plaintiffs' prior monthly requests. *Id.* ¶¶ 27, 35. The response letter to the August 2016 Request did not explain or even mention the omission of these fields from the Excel spreadsheet that ICE furnished. *Id*. Ex. D.

PROCEDURAL HISTORY

I. Plaintiffs' Administrative Appeal.

On January 17, 2017, plaintiffs appealed ICE's January 4, 2017, response and requested that the disappearing fields be provided. Long Decl. Ex. G. The appeal letter explained that ICE provided no reason for withholding the disappearing fields when it had routinely provided them in response to past requests for the same fields:

> The vast majority of these information categories were not provided, and for most no explanation was given. … The agency had routinely provided records covering 60 information fields to exactly identical requests that Long and Burnham had submitted covering … part of FY 2015. The response to this request covering all of FY 2015 and part of FY 2016 provided only 33 fields. For example, past releases included such items as … the detainer prepare date, the apprehension method, records on all charges (not simply the most serious criminal conviction). This information was among the long list of requested fields of information that were not provided.

Id.

In a letter dated February 14, 2017, ICE denied plaintiffs' appeal and claimed that the "fields of information that were not provided are data fields that do not exist in the EID" and that ICE was not required to "create" records under FOIA:

> It is well settled that "the FOIA imposes no duty on the agency to create records," and "an agency is not required by FOIA to create a document that does not exist in order to satisfy a request." The FOIA also does not require agencies to conduct research by "answer[ing] questions disguised as a FOIA request" and that agencies are "not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to create a document that answers plaintiff's question."

> To the extent that a data field that you have requested exists in the EID, ICE conducted a search of the database to retrieve that data field and provided that information. To the extent that your FOIA request has asked questions, ICE has not answered those questions. If the information requested does not exist in a searchable form and would require ICE to create new records via calculations or conducting data analysis, ICE has not provided that information because the agency is not obligated to create new records in response to a FOIA request.

Id. Ex. H (citations omitted).[14]

II. ICE's Motion for Summary Judgment and the Jones Declaration.

Plaintiffs' Complaint in this action challenges ICE's withholding of fields and data elements responsive to specifically identified parts of the August 2016 Request. ICE's motion for summary judgment argues that the agency was not required to provide the requested fields and data elements from the EID in response to the August 2016 Request because some of the numbered requests in the August 2016 Request called for the creation of records, failed to reasonably describe the fields and data elements sought, and sought information that did not exist in the EID.[15] Although plaintiffs challenged ICE's failure to provide information responsive to 27 specific numbered requests in plaintiffs' August 2016 Request, ICE's memorandum in support of its motion for summary judgment mentions only one of the disappearing fields at issue: Detainer Prepare Date (responsive to request 22). *See* Def. Mem. 12.[16] The rest of ICE's memorandum

[14] Plaintiffs have continued to submit requests for these disappearing fields on a monthly basis. Plaintiffs now specify in the monthly requests that if ICE contends calculations are required then ICE should provide the fields that ICE would use for these calculations. *See, e.g.*, Long Decl. Ex. I. Despite the revised requests, ICE continues to respond in the same manner as ICE responded to the August 2016 Request: ICE does not mention the disappearing fields and does not provide them in response to the request. *See, e.g.*, *id*. Ex. J.

[15] ICE also argued that it was entitled to summary judgment because the agency conducted a reasonable search. Def. Mem. 3-6. The Complaint does not challenge the reasonableness of ICE's search.

[16] As indicated above, two of the requests mentioned in the Complaint are no longer at issue. *See supra* p. 8 note 6.

discusses only numbered requests in the August 2016 Request that plaintiffs did not raise in the Complaint and are not at issue in this case.

As required by this Court's rules, ICE submitted a Statement of Material Facts to Which There is No Genuine Issue ("Statement of Material Facts"). ICE's Statement of Material Facts never once mentions any of the specific numbered requests in the December 2015 Request or the August 2016 Request. ICE's Statement of Material Facts also does not mention the disappearing fields, explain how the requests in the August 2016 Request corresponding to the disappearing fields require the creation of records, or assert that there is no genuine dispute as to any facts supporting ICE's claims that plaintiffs' requests fail to reasonably describe the fields or data elements sought or seek creation of new records.

To the extent that ICE has attempted to provide factual support for its position on those dispositive issues, it is set forth in a declaration by Marla Jones, the ICE employee responsible for overseeing the response to plaintiffs' August 2016 Request. Of the 27 disappearing fields corresponding to 25 requests raised in the Complaint, the Jones declaration discusses only Detainer Prepare Date (request 22)[17] with respect to the August 2016 Request. *See* Jones Decl. ¶ 50. Jones otherwise uses as examples numbered requests from the August 2016 Request that plaintiffs did not raise in the Complaint and that do not correspond to the disappearing fields. Jones only includes

[17] As noted above (at p. 7 note 5), Jones quoted request 22 from the December 2015 Request when discussing request 22 from the August 2016 Request. *See* Jones Dec. ¶ 50. Request 22 from the August 2016 Request sought records related to whether "22. Was I-247/I-247D issued for individual before removal (yes/no), and date issued," and not "Was *detainer* issued for individual before removal (yes/no)." Jones Decl. ¶ 50. Nonetheless, the two versions sought the same records and are substantively identical.

the numbered requests relevant to this dispute in the August 2016 Request in list form after her discussion of requests not at issue. *See id.* ¶¶ 51, 53, 55.[18]

For example, Jones claims that request 44 is an example of a request that requires "interpretations, assumptions, and calculations," and provides a paragraph-long explanation of the alleged "interpretations, assumptions, and calculations" that would be required for ICE to respond to request 44. *Id.* ¶ 52. After that explanation, Jones provides a list of other requests that also supposedly require "interpretations, assumptions, and calculations," without any similar explanation. *Id.* ¶ 53. That list includes requests related to several of the disappearing fields, among them, Detainer Facility City and Detainer Facility State (request 26), Detainer Threat Level (request 27), Aggravated Felon (request 57), and Removal Current Program (request 60). *Id.* ¶ 53. Unlike request 44—which is not at issue in this case—neither Jones's declaration nor ICE's memorandum of law provides any explanation for the conclusion that providing the disappearing fields that contain information responsive to these requests would require "interpretations, assumptions, and calculations": Throughout the declaration Jones repeats this pattern of using irrelevant requests for explanatory purposes and then listing requests corresponding to the disappearing fields at issue in summary form. *See id.* ¶¶ 50-55.

To the extent the requests related to the disappearing fields are included in list form in the summary judgment memorandum and Jones declaration, both the memorandum and the declaration acknowledge that ICE responded to the requests for the disappearing fields

[18] Jones briefly mentions two requests (55 and 18) that correspond with the disappearing fields, but she discusses them only with respect to the December 2015 Request, not the August 2016 Request. *See* Jones Decl. ¶¶ 22, 24. But even reading those discussions to apply to the August 2016 Request, Jones still fails to discuss the remaining 22 requests corresponding with 24 disappearing fields. Further, as discussed below, neither of those two requests required the creation of records. *See infra* pp.27-29.

inconsistently in response to the December 2015 Request and August 2016 Request. Because the December 2015 Request and August 2016 Request were substantively identical, any individual field or data element that was provided in response to the December 2015 Request because it existed in the EID should have also been provided in response to the August 2016 Request. Nonetheless, ICE reached different conclusions for several of the disappearing fields. *See* Def. Mem. 9 (stating that 22 fields responsive to the December 2015 Request existed and were provided in response to the request, but only 19 responsive fields existed and were provided in response to the August 2016 Request); *see also* Jones Decl. ¶¶ 20-22, 50-53 (stating that four fields responsive to the requests at issue existed and were provided in response to the December 2015 Request but were withheld from the August 2016 Request). Indeed, for the following three disappearing fields, Jones reached opposite conclusions in response to the December 2015 and August 2016 Requests:

Text of December 2015 and August 2016 Request (and disappearing field name)	**Response to December 2015 Request**	**Response to August 2016 Request**
60. latest program code before departure. (Removal Current Program)	"[T]he data provided existed in the IIDS database …. and were included in the response." Jones Decl. ¶¶ 20-22.	"[T]he data requested does not exist in the database …. and were not provided to Plaintiffs." Jones Decl. ¶¶ 52-53.
64. Name of the program or area associated with the original arrest or apprehension (criminal alien program, fugitive operations, office of investigations, border patrol operation streamline, other border patrol program, 287(g), etc.). (Cause Arrest Current Program)		

66. ordered removed by court, where order has become final (yes/no). (Final Order Yes No)	"[T]he data provided existed in the IIDS database …. and were included in the response." Jones Decl. ¶¶ 20-22.	"The data … does not exist itself in the database …. and were not provided to Plaintiffs." Jones Decl. ¶¶ 50-51.

Jones's conclusions with respect to certain requests for disappearing fields in the August 2016 Request are also in conflict with her declaration in a case pending in the Northern District of New York dealing with very similar requests. *See Long v. U.S. ICE*, No. 17 Civ. 506 (N.D.N.Y. 2017) (the New York case). The New York case involves another of plaintiffs' FOIA requests to ICE, covering the period from FY 2015 through November 2016, that included some requests that are substantially the same as those in the August 2016 Request. Long Decl. ¶ 46, Ex. K. Jones's explanations for ICE's responses to the requests in the New York case are impossible to reconcile with the explanations she provided in this case:

Text of New York Request and August 2016 Request (and disappearing field name)	**Response to New York Requests**	**Response to August 2016 Requests**
"city, county and state of the jail or facility in which the individual was detained prior where the Form I-247/I-247D was sent." (Detainer Facility City; Detainer Facility State)	"[T]he data point exists within IIDS … ICE provided the data point in in the responsive Excel spreadsheet." Long Decl. Ex. M (Jones NY Decl. ¶¶ 20, 22, 33, 35)	"[T]he data requested does not exist in the database …. and were not provided to Plaintiffs." Jones Decl. ¶¶ 52-53.
"Detainer Threat Level" (Detainer Threat Level)		
Date detainer was issued	"[T]he data point exists within IIDS … ICE provided the data point in … the responsive Excel	"[T]he data requested asks a question or is an implied question that does not exist itself in the database …. and

(Detainer Prepare Date)[19]	spreadsheet." Long Decl. Ex. M (Jones NY Decl. ¶¶ 20, 22, 33, 35)	were not provided to Plaintiffs." Jones Decl. ¶¶ 50-51.

The reverse is also true: Jones's conclusions that fields and data elements responsive to certain requests in the New York case did not exist in the EID are in conflict with her declaration in this case dealing with identical requests that the fields and data elements do exist in the EID:

Text of New York Request and August 2016 Request	**Response to New York Requests**	**Response to August 2016 Requests**
"most serious criminal conviction offense"	"[T]he data requested does not exist in the database as requested …. and were not provided to Plaintiffs." Long Decl. Ex. M (Jones NY Decl. ¶¶ 26-27).	"[T]he data provided existed in the IIDS database …. and were included in the response. Jones Decl. ¶¶ 41-42
"date of most serious criminal conviction"		
"sentence for most serious criminal conviction"		
"NCIC code for most serious criminal conviction offense"		

The Jones declarations also set forth inconsistent conclusions concerning why many of the requests corresponding with the disappearing fields supposedly required the creation of records. For example, Jones provided divergent characterizations of the reasons for ICE's response to a request seeking the EID fields or data elements with information about whether a removed individual was an "aggravated felon (yes/no)" (request 57):

[19] The requests in the New York case sought the "Date Form I-247D was issued" and "Date Form I-247N was issued," Long Decl. Ex. M (Jones Decl. ¶¶ 22, 35). The corresponding requests in the August 2016 Request (requests 22 and 23) respectively provided "Was I-247/I-247D issued for individual before removal (yes/no), and date issued," and "Was I-247N issued for individual before removal (yes/no), and date issued." *See* Long Decl. Ex B.

3 Different Responses to Request for "Aggravated Felon (yes/no)"		
Response to December 2015 Request	**Response to August 2016 Request**	**Response to New York Request**
The field or data element "does not exist" in the EID and "required ICE to create a new record to satisfy the question or implied question." Jones Decl. ¶¶ 22-23.	The field or data element "does not exist" in the EID and "require[d] ICE to make interpretations and assumptions before building a new record based off of additional analysis and calculations." Jones Decl. ¶¶ 52-53.	Jones claimed that the field or data element "asks a question or is an implied question that does not exist" in the EID and "would lead to the creation of a new record," *See* Long Decl. Ex. M (Jones NY Decl. ¶¶ 24-25), but the memorandum of law noted that the field existed and included an exhibit containing the actual spreadsheet data that was released from the EID labeled "Aggravated Felon Yes No." *See* Long Decl. Exs. L at 7 n.2, N, O.

Jones provided similar shifting explanations for ICE's responses to identical requests in the December 2015 Request, the August 2016 Request, and the request in the New York case throughout her declaration. *Compare* Jones Decl. ¶¶ 21-30 (providing reasons for withholding data responsive to certain numbered requests in the December 2015 Request), *with* Jones Decl. ¶¶ 50-55 (providing different reasons that several of the same requests in the August 2016 Request required the creation of records), and Long Decl. Ex. M (Jones NY Decl.) (providing different reasons for ICE's responses to several of the same requests in the New York case). Neither the memorandum of law nor the Jones declaration acknowledges these inconsistencies.

STANDARD OF REVIEW

Summary judgment is appropriate when "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). All reasonable

inferences should be drawn in favor of the non-movant. *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996). "FOIA cases typically and appropriately are decided on motions for summary judgment." *Pinson v. U.S. Dep't of Justice*, 160 F. Supp. 3d 285, 292 (D.D.C. 2016) (internal quotation marks and citations omitted).

ARGUMENT

FOIA provides that, upon receiving a request that "reasonably describes" the records sought, an agency is obligated to search for and disclose all responsive records "promptly." *Ctr. for the Study of Servs. v. United States Dep't of Health & Human Servs.*, 874 F.3d 287, 288 (D.C. Cir. 2017). If an agency fails to comply with its obligation to disclose records under FOIA, a requester may file suit to compel the release of information unlawfully withheld. 5 U.S.C. § 552(a)(4)(B). "[T]he burden is on the agency to sustain its action," *id.*, by "demonstrat[ing] that the records have not been improperly withheld," *Ctr. for the Study of Servs.*, 874 F.3d at 288 (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 & n.3 (1989)); *see Schladetsch v. U.S. Dept of H.U.D.*, No. 99-0175, 2000 WL 33372125, at *2 (D.D.C. Apr. 4, 2000) ("Even when the requester files a motion for summary judgment, there is a strong presumption in favor of disclosure that results in the placing of the burden on the agency to justify the withholding of any requested documents.") (internal citations omitted). Although FOIA includes nine limited exemptions from disclosure, 5 U.S.C. § 552(b), none is applicable, or at issue, in this case.

Here, plaintiffs' August 2016 Request sought fields and data elements contained in the EID. Plaintiffs had requested that ICE provide many of the same fields and data elements from the EID since 2012, and ICE had consistently disclosed responsive fields and data elements until its response to the August 2016 Request. ICE now argues that many of plaintiffs' requests require the creation of records. But as ICE's previous provision of the same information indicates, the

disappearing fields do not require the creation of records; ICE's vague and conclusory arguments fail to meet its burden to demonstrate the contrary. Indeed, ICE does not contest that some of the disappearing fields exist within the EID. Plaintiffs are entitled to disclosure of the disappearing fields under FOIA.

I. The Disappearing Fields Do Not Require the Creation of Records.

In its motion for summary judgment, ICE agrees with plaintiffs that searching for and extracting fields and data elements from within the EID in response to requests that reasonably describe those fields and data elements is required under FOIA and does not constitute the creation of records. Because the specific numbered requests in the August 2016 Request that are at issue here reasonably describe fields and data elements that exist in the EID, ICE was required to provide those disappearing fields. ICE's arguments to the contrary rely on a mischaracterization of the steps ICE must take to respond to requests in the August 2016 Request and an erroneous description of several of plaintiffs' requests.

A. ICE agrees with plaintiffs that searching for and extracting fields and data elements that exist in the EID is not the creation of records.

Most agency records are now stored electronically. It has long been established that "[a]lthough accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA." *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982). Congress codified this rule in 1996, when it amended the definition of "record" in FOIA to include electronic records. *See Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087-88 (D.C. Cir. 2006) (citing Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048, 3049, *codified as amended at* 5 U.S.C. § 552(f)(2) ("E-FOIA Amendments")). Specifically, the 1996 amendments to FOIA provide that information "maintained by an agency in any format,

including an electronic format," constitutes a "record" subject to disclosure under FOIA. 5 U.S.C. § 552(f)(2)(A). "The Amendments also added the provision that, '[i]n responding ... to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.'" *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269-70 (D.D.C. 2012) (quoting Pub. L. No. 104–231, § 5, 110 Stat. 3050, *codified at* 5 U.S.C. § 552(a)(3)(C)). Thus, while "FOIA imposes no duty on the agency to create records," *Id.* at 269 (quoting *Forsham v. Harris*, 445 U.S. 169, 186 (1980)), the E-FOIA amendments reflect the longstanding rule that "[e]lectronic database searches are ... not regarded as involving the creation of new records." *Id.* (internal quotation marks and citation omitted). Accordingly, in the memorandum in support of its motion, ICE concedes that "if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record." Def. Mem. 7 (citing *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270); *see id.* (citing *Schladetsch*, 2000 WL 33372125, at *3).

ICE further concedes that, in accordance with FOIA, "extracting and compiling data does not amount to the creation of a new record as to any discrete pieces of information that the agency does possess in its databases and which are sought by Plaintiffs." Def. Mem. 7 (citing *Schladetsch*, 2000 WL 33372125, at *3). Rather, "FOIA requires agencies to disclose all non-exempt data points that it retains in electronic databases." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272; *see also Long v. IRS*, 596 F.2d 362, 365 (9th Cir. 1979); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456 (D.D.C. 1977) *aff'd without opinion*, 574 F.2d 636 (D.C. Cir. 1978). DHS's recent amendments to its FOIA regulations are consistent with the 1996 amendments to FOIA. The regulations provide that "[c]reating a computer program that produces specific requested fields or

records contained within a well-defined database structure is usually considered business as usual," and is required under FOIA. 6 C.F.R. § 5.4(i)(2)(ii).

Despite ICE's agreement with plaintiffs on the standards applicable to searching for and extracting records contained in electronic databases under FOIA and DHS regulations, Def. Mem. 7, ICE muddies the waters, claiming, without any explanation or citation, that it was required to provide records only "[1] if the data point existed within IIDS *and* [2] *did not require additional analysis, calculations, assumptions, or the creation of a new record*." Def. Mem. 9 (emphasis added). But as ICE conceded, the proper standard is limited to the first inquiry: If a request seeks a data point that exists in a database, ICE is obligated to disclose that record, and such disclosure by definition will not constitute creation of a new record. Def. Mem. 7; 6 C.F.R. § 5.4(i)(2)(ii); *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272. Indeed, the second prong of ICE's "test" is inconsistent with the first: If the data point already exists in a database, then it cannot require any additional "calculations" or "the creation of a new record" because it already exists, and whatever "analysis" or "assumptions" may be necessary to identify it are a matter of a proper search for an existing record, not the creation of a new one. Thus, where plaintiffs' requests reasonably describe fields or data elements that exist in the EID, searching for and extracting those fields or data elements cannot constitute the creation of a record.

B. Plaintiffs' numbered requests in the August 2016 Request corresponding to the disappearing fields reasonably describe fields and data elements that exist in the EID.

Plaintiffs' monthly requests have consistently sought fields and data elements that exist in the EID, and not the creation of records. *See* Long Decl. ¶ 27. Because ICE has refused to provide plaintiffs with the precise names of the EID fields, plaintiffs' requests describe the fields and data elements sought. *Id*. ¶ 16. Until the events giving rise to this litigation, and in accordance with the

mandate that "[an] agency must use some measure of 'common sense' in interpreting a FOIA request, and ambiguities in the request must be interpreted 'liberally,'" *Pinson v. U.S. Dep't of Justice*, 69 F. Supp. 3d 125, 133 (D.D.C. 2014) (quoting *Dale v. IRS*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002) and *LaCedra v. Exec. Office for U.S. Att'ys*, 317 F.3d 345, 348 (D.C. Cir. 2003)), ICE had no trouble understanding that plaintiffs' requests reasonably described the disappearing fields, Long Decl. ¶ 27.

For example, in the August 2016 Request, as in prior requests including the December 2015 Request, plaintiffs' request 65 sought the field or data elements in the EID that records information about the "apprehension method associated with the latest apprehension" for each individual removed. *See* Long Decl. ¶ 28, Ex. F. In responses to prior requests, including the December 2015 Request, ICE recognized that this request described a field or data element that exists in the EID, referred to in ICE's spreadsheet as "Latest Apprehension Method," and provided that field in response. *See id*. Similarly, request 60 in the December 2015 and August 2016 Requests sought the field or data element in the EID that records the "latest program code before departure" for each individual. *See id*. ¶ 29, Ex. F. In response to the request in the December 2015 Request and other prior requests, ICE recognized that this request described a field or data element that exists in the EID that ICE describes as "Removal Current Program," and provided that field in response. *See id*. In its response to the August 2016 request, however, ICE withheld both these fields. *Id.* ¶¶ 28-29, Ex. F. Like "Latest Apprehension Method" and "Removal Current Program," each of the 27 disappearing fields corresponds to requests in the December 2015 and August 2016 Requests that, as ICE's prior production of responsive information effectively acknowledged, reasonably describe fields and data elements that exist in the EID. *See supra* pp. 9-10 (chart of disappearing fields and corresponding requests); Long Decl. Ex. F.

In response to the August 2016 Request, ICE appears to take the position that such common-sense interpretation of requests requires "assumptions" or "interpretations" that result in the creation of a record. For example, with respect to a request for the "earliest date reflecting presence in the U.S."—a request that is not at issue in this case[20]—ICE claims that because it does not know the date an individual entered the United States, ICE has to "*assume*" that plaintiffs are seeking the earliest date recorded in the EID. Def. Mem. 16-17; Jones Decl. ¶ 52. Plainly, "assuming" that a request for information from a database is seeking the earliest information in that database is not the creation of records. Further, although ICE argues perfunctorily that plaintiffs' requests do not reasonably describe fields or data elements in the EID, ICE does not explain how any of the specific requests corresponding to the disappearing fields at issue in this case are among them. *See* Def. Mem. 14-17 (discussing requests 39 and 44, neither of which corresponds with a disappearing field or was raised in the Complaint). Therefore, because the relevant requests in the August 2016 Request reasonably describe fields and data elements that exist in the EID, FOIA requires ICE to provide the disappearing fields that are responsive to them. *See* Def. Mem. 7; 6 C.F.R. § 5.4(i)(2)(ii); *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272.

C. ICE's determination whether a request reasonably describes a field or data element that exists in the EID is not the "creation of records."

ICE claims that Plaintiffs' requests required the creation of records because, to respond to the requests, ICE would have to engage in a three-step-process: "[1] research potential data values in IIDS," "[2] research … the operational use of those values inputted by officers that do exist," and "[3] make further assumptions that these data values would … answer questions posed by

[20] Although this specific numbered request is not at issue in this case, plaintiffs discuss the government's explanation with respect to this request because the government has not provided its reasoning with respect to the specific numbered requests that are at issue in this case. *See infra* pp. 33-35.

Plaintiffs [or] …. satisfy the intent of the requested terms." Def. Mem. 11, 13; Jones Decl. ¶¶ 50, 52. On close inspection, it is apparent that these "steps" are merely amplifications of the basic process of searching the electronic database for records that already exist and that are responsive to plaintiffs' requests and then extracting those records—steps that ICE concedes are required under FOIA and DHS FOIA regulations. *See* Def. Mem. 7-8; 6 C.F.R. § 5.4(i)(2)(ii); *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272.

An example discussed above—"Latest Apprehension Method"—provides a straightforward way to demonstrate the reality behind ICE's hyper-technical rhetoric. Request 65 in the December 2015 and August 2016 Requests seeks data from the field in the EID that records the "apprehension method associated with the latest apprehension" for each individual removed. Long Decl. Ex. C. ICE's "three-step-process," as applied to this request, would appear to proceed as follows:

(1) "Research potential data values" that exist in the database related to the "apprehension method associated with the latest apprehension date" for each individual removed: Although ICE uses the term "research," this first "step" appears to require ICE only to determine whether the request describes fields or data elements that exist in the EID. Determining whether a request describes fields or data elements in a database is not "research" requiring the creation of a record, but is instead just searching for that record. *See supra* pp. 20-24. Under ICE's description of its process, ICE would then proceed to step two:

(2) "Research" the "operational use" of the fields or data elements corresponding to "Latest Apprehension Method": ICE does not explain exactly what this step entails. It appears, however, that what ICE means is that it must determine whether the "operational use" of the fields or data elements corresponding to "Latest Apprehension Method" is in-fact to record data

describing the "apprehension method associated with the latest apprehension." This "step" is merely an elaboration and confirmation of the first step, leading into step three:

(3) Make an "assumption" that the fields or data elements corresponding to "Latest Apprehension Method" satisfy the intent of the requested terms: Once again, this purported "step" appears to be merely another description of the process of determining that the fields or data elements correspond with the request. And although ICE uses the phrase "assumption," ICE appears to mean only that it must determine whether the existing fields or data elements in the database are the fields or data elements described by the request.

Thus, despite ICE's attempt to trifurcate the issue, at bottom, the three steps collapse into one familiar requirement: ICE must search for the fields or data elements in the EID that correspond with plaintiffs' request, just as FOIA requires. *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272; Def. Mem. 7-8. ICE cannot hide behind terms such as "research" and "assumptions" to diminish its obligations under FOIA.

D. ICE's use of basic programming to extract fields and data elements that exist in the EID does not constitute the creation of records.

As noted above, DHS FOIA regulations implement the E-FOIA amendments through their requirement that "[c]reating a computer program that produces specific requested fields or records contained within a well-defined database structure is usually considered business as usual," and is required under FOIA. 6 C.F.R. § 5.4(i)(2)(ii).[21] ICE concedes that "sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record because, as Congress noted in the legislative history to the E–FOIA Amendments, '[c]omputer

[21] ICE does not claim that extracting any of the disappearing fields from the EID would go beyond "business as usual" or require "special services," 6 C.F.R. § 5.4(i)(2)(ii), or "significantly interfere with the operation of the agency's automated information system," 5 U.S.C. § 552(a)(3)(C).

records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information.'" Def. Mem. 7 (quoting *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270 (quoting H.R. Rep. 104–795, at 22, 1996 U.S.C.C.A.N. 3448, 3465)). Thus, regardless of the language ICE uses to describe its process for extracting fields or data elements that exist in the EID, ICE's extraction of the existing fields and data elements does not constitute the creation of records.

Despite FOIA's clear command in this regard, ICE again invokes technical-sounding rhetoric to argue that extracting fields and data elements in response to some requests requires the creation of records. ICE argues that the requests require ICE "to make interpretations and assumptions before building a new record based off of additional analysis and calculations," and that "this additional analysis will include the creation of calculations and new data search and query methodologies as they relate to data that ICE does not track in the manner in which the data was requested." Def. Mem. 13-14; Jones Decl. ¶ 52. ICE further claims that for these sorts of requests, it must take a number of additional "steps": "interpret or create a definition of the data element requested," "review and develop a new method to pull data under this new definition which requires technical modifications that require further validation, testing, and approval," and then "perform assumptions and calculations to create a new record." Def. Mem. 17; Jones Decl. ¶ 52. Translated into plain English, ICE appears to be explaining that it must create a program to extract the fields or data elements that exist in the database, which is precisely what FOIA requires.

For example, with respect to plaintiffs' request for the fields or data elements in the EID reflecting, for each individual removed, "[i]nformation on every charge not just the most serious for which a conviction has not occurred (date of charge, current status, NCIC code for charge, level of offense (felony, misdemeanor, citation, etc.))" (request 55), ICE has historically provided

a number of fields with data from the EID, including Criminal Charge, Criminal Charge Code, Criminal Charge Date, Criminal Charge Status, Criminal Conviction Date, Criminal Conviction Sentence Days, Criminal Conviction Sentence Months, and Criminal Conviction Sentence Years. *See* Long Decl. ¶ 36, Exs. B, C, F. Jones now claims that although ICE provided these fields in response to the December 2015 Request, ICE was not required to do so because ICE must take three "steps" to extract data that exists in the EID:

> (1) Develop new reporting requirements and reporting methodology to define all criminal charges 'not just most serious' through the creation of separate data model and specific filter conditions;
> (2) Pull the identification id's for the aliens that were identified as Secure Communities matches with Removals and import into the new query to pull all criminal history in IIDS and run while;
> (3) In the new results of the previous two steps, additional analysis was provided to de-duplicate charges and crimes and export to provide supporting details.

Jones Decl. ¶ 24. Critically, nowhere in the description of the process does Jones claim that the underlying fields or data elements do not exist in the EID.

Similarly, with respect to plaintiffs' request for the fields or data elements in the EID related to whether a removed individual had a "prior removal (yes/no)" (request 74),[22] in the past, ICE provided a field with data from the EID labeled "Prior Removal." *See* Long Decl. ¶ 37, Exs. B, C, F. Jones now claims that although ICE provided this field in response to the December 2015 Request, ICE was not required to because ICE must take three different "steps" to extract the data that exists in the EID:

> (1) Conduct analysis and identify "an alien" through several different conditions in 3 separate derived queries; as well as
> (2) Build calculated items and requirements to "flag" a prior removal in the assumed alien's history as logged within the ICE database; and

[22] In her declaration, Jones mistakenly refers to request 74 as request 18. *See* Jones Decl. ¶ 22. Request 18 sought the fields or data elements in the EID related to whether an individual had a "prior removal or return (yes/no). *See* Long Decl. Exs. B, C. Request 74 sought the fields or data elements in the EID related to whether an individual had a "prior removal (yes/no)." *See id*.

> (3) In the query results, a newly created record, named Prior Removal Yes/No, was created to assign a value of 'Yes' to any of the three derived queries that flagged a removal and satisfied the removal conditions while no matches received a value of 'No.'

Jones Decl. ¶ 22. However, ICE acknowledges that the agency possesses these discrete pieces of information—it is "flagging" data that exists in the EID. Thus, as ICE concedes, "extracting and compiling data does not amount to the creation of a new record as to any discrete pieces of information that the agency does possess in its databases." Def. Mem. 7 (citing *Schladetsch*, 2000 WL 33372125, at *3). Ultimately, because both of these sets of "steps" merely describe the process for extracting fields and data elements responsive to requests that ICE does not dispute exist in the EID, the resulting extracted disappearing fields are not "new records." Rather, creating the program to extract fields and data elements from a database is merely "business as usual" and is required under FOIA and DHS FOIA regulations. 6 C.F.R. § 5.4(i)(2)(ii); Def. Mem. 7 (citing *Schladetsch*, 2000 WL 33372125, at *3).

Indeed, ICE devotes a separate section of its brief and the Jones declaration to a small subset of six requests that it claims seek fields or data elements that *really* "do[] not exist in the database" because ICE allegedly does not track the information described in those requests. Def. Mem. 17-18; Jones Decl. ¶¶ 54-55.[23] ICE's separate argument against providing responses to requests for which it claims fields and data elements truly do not exist in the EID contradicts ICE's claims that the other requests seek data elements or fields that "do not exist."

[23] Only one of the six requests is at issue in this case (request 7), and the one that is refers to a field that was previously provided. *See supra* p. 9 note 8.

E. Plaintiffs' "yes/no" requests seek specific fields and data elements in the EID indicating the existence or nonexistence of some event or state of facts; they are not questions that require ICE to engage in computation or analysis.

ICE claims that a subset of the requests in the August 2016 Request that use a "yes/no" formulation require the creation of records because they "sought to obtain answers to questions, not the production of records." Def. Mem. 10-13. Contrary to ICE's claim, however, these requests did not seek answers to questions, but instead described fields and data elements that exist in the EID. Although ICE is correct that "'FOIA neither requires an agency to answer questions disguised as a FOIA request … or to create documents or opinions in response to an individual's request for information,'" Def. Mem. 11 (quoting *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C.1985), *aff'd*, 808 F.2d 137 (D.C. Cir.1987)), the converse is also true: ICE cannot avoid its obligations under FOIA by disguising the fields and data elements in the EID as answers to questions and then claiming that plaintiffs' requests for these fields and data elements are seeking answers to questions. Here, that is what ICE has attempted to do.

Many fields and data elements in the EID indicate the existence or nonexistence of events or states of fact. When ICE has provided those fields and data elements in the past, ICE has frequently labeled them with the phrase "Yes No." For example, in her declaration in this case, Jones admits that there is a field or data element in the EID she refers to as "Detention Involved Yes No." Jones Decl. ¶ 43. Similarly, in the New York case, ICE provided exhibits of the actual spreadsheet data providing, in response to the requests at issue in that case, fields or data elements that it admitted exist in the EID, *thirty-five* of which are maintained in the same "Yes No" format. *See* Long Decl. Exs. N, O (including fields from the EID in the "Yes No" format such as "Aggravated Felon Yes No," "Prior Felony Yes No," "Violent Misdemeanor Yes No," and "Illegal

Entry Yes No"). Twelve of the numbered requests at issue from the August 2016 Request describe fields or data elements sought in the EID with this "yes/no" formulation at least in part:

Request #	Text of Requests in August 2016 Request that are Substantively Identical Requests in December 2015 Request
17	ICE fugitive (yes/no) …
18	Prior removal or return (yes/no) …
19	EWI (yes/no) …
20.a	Visa Violator: [] Overstayed visa (yes/no)
20.b	Visa Violator: … other type of visa violator (yes/no).
22	Was I-247/I-247D issued for individual before removal (yes/no), and date issued.
23	Was I-247N issued for individual before removal (yes/no), and date issued.[24]
43	Charged with a crime (yes/no) [any charge, not restricted to convictions].
57	Aggravated felon (yes/no).
66	Ordered removed by court, where order has become final (yes/no).
68	Administratively ordered removed, where order has become final (yes/no).
70	Reinstatement of prior removal order (yes/no).
74	Prior removal (yes/no).

Over the past several years, the FOIA staff at ICE have consistently understood that these requests were describing fields and data elements that exist in the EID, and were not seeking the answers to questions.[25] *See* Long Decl. ¶ 23. Thus, in response to requests 66 and 68—"ordered removed by court, where order has become final (yes/no)," and "administratively ordered removed, where order has become final (yes/no)"—ICE previously provided a responsive field with data from the EID it called "Final Order Yes No." *Id.* ¶ 24, Exs. C, F. And in the New York

[24] In the December 2015 Request, request 22 from the August 2016 Request was spread across two requests: "22. Was detainer issued for individual before removal (yes/no)" and "23. Date detainer issued." *See* Long Decl. Ex. C. Taken as a whole, requests 22 and 23 in the December 2015 Request are substantively identical to requests 22 and 23 in the August 2016 Request.

[25] The absence of question marks, as well as the fact that the August 2016 Request explicitly referred to the requests as seeking "items of information," underscore that these requests do not seek answers to questions.

case, in response to a request identical to request 57 for "aggravated felon (yes/no)," ICE provided a field with data from the EID called "Aggravated Felony Yes No." *See id.* Exs. C, F. Further, when a field exists in the EID with responsive information to a request, but the field is not in a yes/no format, ICE FOIA staff understood that because these requests were not questions, ICE should provide the field or data element matching the request because the presence of information in the field or data element was equivalent to a "yes." Thus, for example, in response to request 70—"Reinstatement of prior removal order (yes/no)"—ICE provided a responsive field it called "Reinstated Final Order." *Id.* ¶ 25, Ex. F. And in response to requests 17 through 21 of the December 2015 Request, ICE provided a field labeled "Non-Criminal ICE Priorities," which included data that recorded whether the individual removed was an "immigration fugitive" (request 17), a "repeat immigration violator" (request 18), or an "EWI; Visa Violator or Overstay" (requests 19, 20, and 21). *See id.*

At bottom, ICE's litigation position with respect to these yes/no fields does not survive scrutiny. ICE's long history of providing fields and data elements from the EID in response to these requests demonstrates that ICE understood that the requests were describing fields and data elements that exist in the EID, not asking ICE to answer questions or create records. Moreover, all of plaintiffs' requests reasonably describe fields and data elements that exist in the EID. ICE was required only to search for the fields and data elements that most closely matched plaintiffs' requests, extract them from the EID, and provide them in response to plaintiffs' August 2016 Request. Because searching for and extracting these fields and data elements from the EID did not constitute the creation of records, ICE was required to provide the disappearing fields. *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270-72.

II. ICE Has Failed to Meet Its Burden to Demonstrate that the Requests Corresponding to the Disappearing Fields Require the Creation of Records.

Under FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). "To meet its burden, the government must generally submit 'relatively detailed and non-conclusory' affidavits or declarations," *Soto v. U.S. Dep't of State*, 118 F. Supp. 3d 355, 361 (D.D.C. 2015) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)), "describe 'the documents and the justifications for nondisclosure with reasonably specific detail, [and] demonstrate that the information withheld … are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Shapiro v. Dep't of Justice*, 205 F. Supp. 3d 68, 72 (D.D.C. 2016) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir.1981)). ICE has failed to meet its burden to demonstrate that the requests corresponding to the disappearing fields require the creation of records. ICE provided conclusory declarations that do not describe the justifications for the nondisclosure of the disappearing fields with any detail. ICE's arguments and declaration are controverted both by evidence in the record in this case and in the New York case, giving rise to substantial doubt about the good faith of the Jones declaration and the agency's arguments for withholding the disappearing fields.

A. ICE fails to provide detailed and non-conclusory justifications for withholding all but one of the disappearing fields.

Aside from the field ICE has referred to as "Detainer Prepare Date" (corresponding to request 22), ICE's memorandum in support of its motion does not address a single other request raised in the Complaint that corresponds with a disappearing field. Instead, ICE's memorandum only raises arguments with respect to requests that plaintiffs did not raise in the Complaint, do not correspond to the disappearing fields, and are not at issue in this case. ICE argues that it was not required to respond to requests 40 (Def. Mem. 13), 44 (*id.* 16), 39 (*id.* 16-17), 2 (*id.* 17-18), and

34 (*id.* 18), because they call for the creation of records. Regardless of whether responding to those requests would require the creation of records—an issue that plaintiffs do not concede, *see supra* Part I—none of them is at issue in this case. ICE's brief fails to mention the requests that were raised in the Complaint or explain why they require the creation of records. Because ICE failed to describe the reasons for nondisclosure for 26 of the 27 disappearing fields at all, let alone with "reasonably specific detail," ICE failed to meet its burden under FOIA.

Further, ICE's Statement of Material Facts is devoid of any facts material to sustaining its burden on summary judgment. ICE's Statement of Material Facts does not discuss any of the specific numbered requests in the December 2015 Request or the August 2016 Request or explain how the requests in the August 2016 Request corresponding to the disappearing fields require the creation of records. Thus, ICE's Statement of Material Facts does not even assert that the factual contentions on which it relies to argue that plaintiffs' requests call for creation of records are undisputed.

The Jones declaration is similarly lacking in detail with respect to the disappearing fields. In her declaration, Jones explains that the same requests noted in the memorandum (40, 44, 39, 2, and 34)—requests that are not at issue in this case—require the creation of records. Jones Decl. ¶¶ 50-55. Jones then provides summary lists of other requests that she claims in conclusory fashion were withheld for the same reasons. *See id.* The summary lists in the declaration are not "reasonably detailed" and fail to satisfy the agency's burden under FOIA.[26]

[26] As noted in the Procedural History, Jones's declaration addresses two additional requests (request 18 and 55) that correspond with the disappearing fields in her discussion of the December 2015 Request. *See* Jones Decl. ¶¶ 22, 24. But even liberally construing this discussion as an argument that ICE was not required to provide the fields or data elements corresponding to those two requests in response to the August 2016 Request, Jones utterly fails to address the other 22 requests and 24 disappearing fields. Furthermore, for the reasons explained above, the "steps"

Because ICE has neither submitted "relatively detailed and non-conclusory" declarations, *Soto*, 118 F. Supp. 3d at 361 (internal quotation marks and citation omitted), nor "described … the justifications for nondisclosure with reasonably specific detail," *Shapiro*, 205 F. Supp. 3d at 72 (internal quotation marks and citation omitted), ICE has failed to meet its burden to demonstrate that the disappearing fields require the creation of records.

B. ICE's arguments with respect to request 22 are controverted by contrary evidence in the record.

Although ICE specifically addresses one request that plaintiffs raise in the Complaint and that corresponds with a disappearing field—request 22, the Detainer Prepare Date, *see* Def. Mem. 12—its argument is inadequate to meet ICE's burden to demonstrate that the request requires the creation of records.

Request 22 sought the field or data elements in the EID containing records related to whether, for each individual removed, there "[w]as [a detainer] issued for individual before removal (yes/no), and date issued." Long Decl. ¶ 30, Ex. C. In response to the corresponding identical requests in plaintiffs' past monthly FOIA requests, including the December 2015 Request, ICE understood that plaintiffs were seeking the field or data elements in the EID listing the date of any detainers prepared, and ICE routinely provided a field with data from the EID called "Detainer Prepare Date." *See id.* ¶ 30, Ex. F.[27] And in response to requests in the New York case for the "Date Form I-247D was issued" and "Date Form I-247N was issued," Jones stated

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Jones describes that would be involved in responding to requests 18 and 55 do not constitute the "creation of records," but only the extraction of existing records from the EID. *Supra* pp. 26-29.

[27] As noted above, requests 22 and 23 in the December 2015 Request are substantively identical to request 22 in the August 2016 Request. *Supra* p. 31 note 24. Further, request 22 and request 23 in the August 2016 Request are identical except for the types of detainers. Request 22 requested records related to I-247 and I-247D, whereas request 23 requested records related to I-247N. *See* Long Decl. Ex. C. Because ICE responded to both requests with one field, Detainer Prepare Date, the same analysis applies to both, and plaintiffs are entitled to all records under both.

that "the data point exists within IIDS" and "ICE provided the data point in the responsive Excel spreadsheet." *Id*. Ex. M (Jones NY Decl. ¶¶ 20, 22, 33, 35). The Excel spreadsheets included the field "Prepare Date" referring to the date that both detainer types were issued. *See id.* Exs. N, O.

In its memorandum, ICE rewrites request 22 and then mischaracterizes it to support its argument that the request requires creation of records. First, ICE rewrites the request by omitting the "and date issued" portion, to read: "Was detainer issued for individual before removal (yes/no)." Def. Mem. 12. This omission is critical because ICE's prior disclosure of the "Detainer Prepare Date" field was necessarily based on ICE's understanding that, taken as a whole, the request sought the field or data elements in the EID containing information about whether a detainer was issued, and if so, when. By omitting the "and date issued" portion of the request, the government seeks to make it appear that the disappearing field, "Detainer Prepare Date," does not correspond to the request.

Even putting aside that significant omission, ICE's explanation of why request 22 requires the creation of records relies on an unreasonable interpretation of the request. Specifically, ICE claims that the request seeks a field or data elements in the EID containing information about whether an individual was removed "as a result of a detainer," and then argues that because "the EID/IIDS contains no data point to reflect that ICE removed the alien *as a result of a detainer*," satisfying the request would require "additional research, analysis, or calculations" that are not required by FOIA. Def. Mem. 12 (emphasis added). However, the request does not seek information about individuals removed "as a result of a detainer." Rather, plaintiffs seek only the very same information that ICE has understood them to be seeking in response to the identical request in past monthly requests: the date of any detainers prepared regardless of whether the individual was removed "as a result of a detainer." Thus, ICE's only argument with respect to one

of the disappearing fields is "controverted … by contrary evidence in the record": the plain text of the request and ICE's past responses to the identical request. *Shapiro*, 205 F. Supp. 3d at 72.

C. Jones's shifting and contradictory declaration casts doubt on the agency's good faith in responding to the August 2016 Request.

Although an agency is entitled to a presumption of good faith, *Safecard Servs.*, 926 F.2d at 1200, a plaintiff may challenge an agency's showing that it complied with FOIA through "'specific facts' demonstrating that there is a genuine issue with respect to whether the agency has improperly withheld extant agency records." *Span v. U.S. Dep't of Justice*, 696 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)). A plaintiff may point to "contradictory evidence in the record or … independent evidence of agency bad faith" to demonstrate that an agency acted improperly. *Island Film, S.A. v. Dep't of the Treasury*, 869 F. Supp. 2d 123, 132 (D.D.C. 2012) (quoting *Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995)); *see Porter v. United States Dep't of Justice*, 717 F.2d 787, 791-93 (3d Cir.1983) (denying summary judgment where agency's affidavits included conflicting information).

Jones's shifting and contradictory explanations related to identical requests in the December 2015 Request, the August 2016 Request, and the New York case cast significant doubt on the agency's good faith. *See supra* pp. 15-18 (tables providing side-by-side comparisons of Jones's contradictory responses). For example, Jones gave conflicting explanations for the request seeking the EID field or data elements with information about whether a removed individual was an "aggravated felon (yes/no)" (request 57). With respect to the December 2015 Request, Jones declared that the field or data point requested "does not exist" in the EID and that the request required the creation of records because it was a "question or implied question." Jones Decl. ¶¶ 22-23. In response to the same request in the August 2016 Request, Jones changed her tune, claiming that the reason the request required the creation of records was not that it was a question, but that

it "require[d] ICE to make interpretations and assumptions before building a new record based off of additional analysis and calculations." Jones Decl. ¶¶ 52-53. And finally, five days after signing the declaration in this case, in the New York case, Jones returned to her initial argument that the request required the creation of records because it was a "question or implied question." Long Decl. Ex. M (Jones NY Decl. ¶¶ 37-38). ICE itself, however, contradicted Jones's assertion that the field or data does not exist by providing it in the New York case. *See* Long Decl. Exs. L at 7 n.2; *id.* Exs. N and O (exhibits provided in the New York case of fields containing data elements in the EID including "Aggravated Felony Yes No").

Although the "aggravated felon" request is the most salient example, similar inconsistencies pervade the Jones declaration:

- **Shifts from December 2015 to August 2016:** Jones changed her rationale for why identical requests 17, 18, 19, 57, 63, 68, and 71 required the creation of records in the December 2015 Request and August 2016 Requests. *Compare* Jones Decl. ¶¶ 21-30, *with* Jones Decl. ¶¶ 50-55.

- **Shifts from August 2016 to New York case:** Jones changed her rationale for why requests 17, 18, 20, and 74 in the August 2016 Request and the identical requests in the New York case required the creation of records. *Compare* Jones Decl. ¶¶ 50-55, *with* Long Decl. Ex. M (Jones NY Decl. ¶¶ 27, 40).

- **Contradictions:** As will be discussed further below, with respect to requests 22, 23, 26, 27, 57, 60, and 64 in the December 2015 Request and/or the identical requests in the New York case, Jones conceded that fields or data elements responsive to these requests exist in the EID and stated that ICE provided these fields and data elements to plaintiffs. *See* Jones Decl. ¶ 21 (requests 60, 64, and 66); Long Decl. Ex. M (Jones NY Decl. ¶¶ 22, 35) (requests 22, 23, 26, and 27); *id.* Exs. N & O (request 57 provided). In response to these same requests in the August 2016 Request, however, Jones claimed that these fields and data elements did not exist in the EID. Jones Decl. ¶¶ 50-53.[28]

[28] Jones's declaration also states that with respect to a request seeking "citizen spouse (yes/no)," "there is no data set in any ICE system where ICE records the existence of a spouse." Jones Decl. ¶ 50. In another case, plaintiffs have received a field from the EID that includes information about spouses. *See* Long Decl. Ex. Q. Although the point does not relate to the specific requests and fields at issue in this case, it further undermines the credibility of the Jones Declaration.

These pervasive inaccuracies and contradictions raise substantial doubts about the agency's good faith in responding to plaintiffs' August 2016 Request, and at the very least, raise questions about the Court's reliance on the Jones declaration.

III. ICE Fails to Contest the Unlawfulness of Its Withholding of Several of the Disappearing Fields.

In its memorandum and the Jones declarations in this case and the New York case, ICE has admitted that several of the disappearing fields exist within the EID and/or that the corresponding requests properly seek records existing in the database. Thus, even on ICE's account, these fields should have been provided. ICE provides no explanation for its failure to provide these fields.

ICE concedes that several of the plaintiffs' requests—referred to by ICE as "Category 1" requests—sought fields and data elements that exist within the EID, are responsive to plaintiffs' requests, and that can be provided to plaintiffs without any "additional research, data interpretation, analyses, calculations, assumptions, or other data manipulations." Def. Mem. 9. Remarkably, however, despite this concession, ICE withheld several of these conceded "Category 1" fields and data elements from its response to the August 2016 Request even though it provided the same fields and data elements in response to the identical numbered requests in the December 2015 Request. Because the requests in the December 2015 Request and August 2016 Request were identical, any individual request that ICE concluded sought Category 1 fields or data elements in the December 2015 Request should have been treated as seeking Category 1 fields or data elements and provided in response to the August 2016 Request.

Specifically, ICE admitted that it provided 22 Category 1 fields and data elements in response to the December 2015 Request, but only provided 19 Category 1 fields and data elements in response to plaintiffs' August 2016 Request. *Id.* The Jones declaration similarly explained that

the three disappearing fields responsive to requests 60, 64, and 66 fell into Category 1 and were provided in response to the December 2015 Request, though the very same fields were withheld from the August 2016 Request. *Compare* Jones Decl. ¶ 21 *with* Long Decl. ¶¶ 51, 53. For example, Jones averred that request 60 in the December 2015 Request—which sought the "latest program code before departure" for each individual removed—was within Category 1 and was therefore provided to plaintiffs in response to the December 2015 Request. *Id*. ¶ 21. Thus, when the identical request 60 for "latest program code before departure" was made in the August 2016 Request, it should have also fallen within Category 1 and should have been disclosed. However, the field previously provided in response to request 60 ("Removal Current Program") was among the disappearing fields. Long Decl. ¶ 53, Ex. F. Neither ICE's brief nor Jones's declaration recognizes or explains this plain discrepancy.

Further, in the New York case involving practically identical requests, Jones contradicted her declaration in this case and conceded that certain other fields and data elements corresponding to disappearing fields here were within Category 1. Specifically, Jones's New York declaration states that requests for the "Date [detainer] was issued," the "city, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent," and the "Detainer Threat Level," sought Category 1 fields and data elements. Long Decl. Ex. M (Jones NY Decl. ¶¶ 22, 35). Here, although requests 22, 23, 26, and 27 are virtually identical to the requests in the New York case, ICE has claimed in this case, without any explanation, that they call for the creation of records. *See* Jones Decl. ¶¶ 50-53. Thus, at a minimum, plaintiffs are entitled to all fields and data elements ICE has admitted in this case and the New York case fall within Category 1, including the fields and data elements responsive to requests 22, 23, 26, 27, 57, 60, 64, and 66.

CONCLUSION

This Court should grant plaintiffs' motion for summary judgment, deny defendant's motion for summary judgment, and order defendant promptly to disclose the disappearing fields.

Dated: December 8, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG, and DAVID BURNHAM, Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	Civil Action No. 17-1097 (APM)

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE
AND
PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

I. Plaintiffs' Response to Defendant's Statement of Material Facts as to which there is No Genuine Issue.

1. Each program office within ICE has a designated point of contact ("POC"), who is the primary person responsible for communications between that program office and the ICE Freedom of Information Act ("FOIA") Office. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the Enforcement Integrated Database ("EID") in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

2. Each POC is a person with detailed knowledge about the operations of their particular program office. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

3. When the ICE FOIA Office receives a FOIA request, its first step is to identify, based on their experience and knowledge of ICE's program offices, which program offices within ICE are reasonably likely to possess records responsive to that request if any and to initiate searches within those program offices. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

4. Once the ICE FOIA Office determines the appropriate program offices for a given request, it provides the POCs within each of those program offices with a copy of the FOIA request and instructs them to conduct a search for responsive records. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

5. The POCs then review the FOIA request along with any case-specific instructions that may have been provided, and based on their experience and knowledge of their program office practices and activities, forward the request and instructions to individual employee(s) or component office(s) within the program office that they believe are reasonably likely to have responsive records, if any. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

6. Per the ICE FOIA Office's instructions, the individuals and component offices are directed to conduct searches of their file systems, including both paper files and electronic files, which in their judgment, and based on their knowledge of the manner in which they routinely keep records, would most likely be the files to contain responsive documents. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

7. Once those searches are completed, the individuals and component offices provide any potentially responsive records to their program office's POC, who in turn provides the records to the ICE FOIA Office. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

8. The ICE FOIA Office then reviews the collected records for responsiveness. Pavlik-Keenan Decl. ¶ 21.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

9. ICE employees maintain records in several ways. Pavlik-Keenan Decl. ¶ 22.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

10. ICE program offices use various systems to maintain records, such as investigative files, records regarding the operation of ICE programs, and administrative records. Pavlik-Keenan Decl. ¶ 22.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

11. ICE employees may store electronic records on their individual computer hard drives, their program office's shared drive (if their office uses one), DVDs, CDs, or USB storage devices. Pavlik-Keenan Decl. ¶ 22.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs'

reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

12. The determination of whether or not these electronic locations need to be searched in response to a particular FOIA tasking, as well as how to conduct any necessary searches, is necessarily based on the manner in which the employee maintains his or her files. Pavlik-Keenan Decl. ¶ 22.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

13. Additionally, all ICE employees have access to email. ICE uses a Microsoft Outlook email system. Pavlik-Keenan Decl. ¶ 23.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

14. Each ICE employee stores their files in the way that works best for that particular employee. Pavlik-Keenan Decl. ¶ 23.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

15. ICE employees use various methods to store their Microsoft Outlook email files: some archive their files monthly, without separating by subject; others archive their email by topic or by program; still others may create PST files of their emails and store them on their hard drive or shared drive. Pavlik-Keenan Decl. ¶ 23.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

16. ICE is the principal investigative arm of the Department of Homeland Security ("DHS") and the second largest investigative agency in the federal government. Pavlik-Keenan Decl. ¶ 24.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs'

reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

17. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now has more than 20,000 employees and offices in all 50 states and 48 foreign countries. Pavlik-Keenan Decl. ¶ 24.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

18. The ICE Office of Enforcement and Removal Operations ("ERO") oversees programs and conducts operations to identify and apprehend removable aliens, to detain those individuals when necessary, and to remove illegal aliens from the United States. Pavlik-Keenan Decl. ¶ 25.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

19. ERO manages all logistical aspects of the removal process, including domestic transportation, detention, alternatives to detention programs, bond management, and supervised release. Pavlik-Keenan Decl. ¶ 25.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

20. ERO is comprised of seven headquarters divisions, 24 field offices, and more than of 7,600 employees. Pavlik-Keenan Decl. ¶ 25.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

21. When ERO receives a FOIA tasking from the ICE FOIA Office, the request is submitted to ERO's Information Disclosure Unit ("IDU"). POCs in IDU reviewed the substance of the request. Pavlik-Keenan Decl. ¶ 26.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the

EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

22. Based on its subject matter expertise and knowledge of the program offices' activities within ERO, IDU forwards the FOIA request to specific individuals and component offices and directs specific employees or offices to conduct searches of their file systems (including both paper files and electronic files) that in their judgment, based on their knowledge of the manner in which they routinely keep records, would be reasonably likely to have responsive records, if any. Pavlik-Keenan Decl. ¶ 26.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

23. Based on their operational knowledge and subject matter expertise, employees exercise discretion in choosing the specific search terms to use in ascertaining whether or not potentially responsive records exists. Pavlik-Keenan Decl. ¶ 26.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

24. Once employees complete their searches, the individuals and component offices provide any potentially responsive records to the IDU POC, who in turn provides the records to the ICE FOIA Office. Pavlik-Keenan Decl. ¶ 26.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

25. The ICE FOIA Office then reviews the collected records for responsiveness. Pavlik-Keenan Decl. ¶ 26.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

26. The Enforcement Integrated Database ("EID") is owned and operated by ICE and is used primarily to support the law enforcement activities of certain DHS components, including ICE and U.S. Customs and Border Protection ("CBP"). Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

27. The EID is the common database repository for all records created, updated, and accessed by a number of software applications. Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

28. The EID allows ICE officers to manage cases from the time of an alien's arrest, in-processing, or placement into removal proceedings, through the final case disposition (i.e., removal or granting of immigration benefits). Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

29. The EID also contains law enforcement sensitive information relating to investigations, enforcement operations, and checks of other law enforcement databases. Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

30. The EID is a 24 hours per day, 7 days per week operational database with more than 55,000 users. Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

31. The EID houses data and business rules that are integrated with other systems through direct database connectivity or complex interfaces. Pavlik-Keenan Decl. ¶ 27.

Response: Undisputed.

32. For the two FOIA requests that are the subject of this litigation, ICE conducted searches of the Integrated Decision Support System ("IIDS"). Pavlik-Keenan Decl. ¶ 28.

Response: Undisputed.

33. The IIDS contains a subset of the EID database that is provided regularly three days a week. Pavlik-Keenan Decl. ¶ 28.

Response: Undisputed.

34. When the subset is provided, it completely replaces the older snapshot or extract with new data and older data is not retained. Pavlik-Keenan Decl. ¶ 28.

Response: Undisputed.

35. Additionally, the EID and IIDS contain information that is adapted for efficient report writing. Pavlik-Keenan Decl. ¶ 29.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they have no bearing on the issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

36. While the EID contains information needed for ICE officers and agents to advance the agency's mission to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration, the IIDS manages case information and the reporting of case information. Pavlik-Keenan Decl. ¶ 29.

Response: Undisputed.

37. The IIDS supports DHS requirements to query EID data for operational or executive reporting purposes. Pavlik-Keenan Decl. ¶ 30.

Response: Undisputed.

38. ICE queries IIDS instead of the EID to protect the integrity of the live data held in the EID operational environment and to prevent the performance of EID and the ENFORCE applications from being diminished. Pavlik-Keenan Decl. ¶ 30.

Response: Undisputed.

39. On January 4, 2016, Plaintiffs submitted to ICE a FOIA request seeking the latest anonymous case-by-case information on each removal and return for FY 2015 through December 2015 that was the result of such IDENT/IAFIS interoperability matches whether carried out under Secure Communities or under the program that is replacing Secure Communities ("FOIA Request #1"). Pavlik-Keenan Decl. ¶ 6.

Response: Undisputed.

40. In an email to Plaintiffs dated January 5, 2016, the ICE FOIA Office acknowledged receipt of FOIA Request #1. Pavlik-Keenan Decl. ¶ 7.

Response: Undisputed.

41. ICE assigned tracking number 2016-ICFO-14043 to FOIA Request #1. Pavlik-Keenan Decl. ¶ 7.

Response: Undisputed.

42. On January 5, 2016, upon receipt and review of FOIA Request #1, the ICE FOIA Office determined that ERO was the one office likely to have records responsive to Plaintiffs' request based on the subject matter of the FOIA request. Pavlik-Keenan Decl. ¶ 31.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

43. The ICE FOIA Office instructed ERO to conduct a comprehensive search for records and to provide all records located during that search to the ICE FOIA Office for review and processing. Pavlik-Keenan Decl. ¶ 31.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

44. A POC in the ERO's IDU received and reviewed the request. Pavlik-Keenan Decl. ¶ 32.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

45. Based on its subject matter expertise and knowledge of the program offices' activities within ERO, IDU determined that searches at the headquarters ("HQ") level should be conducted for potentially responsive records. Pavlik-Keenan Decl. ¶ 32.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

46. Accordingly, IDU tasked ERO's Law Enforcement and Systems Analysis ("LESA") to conduct searches because LESA was reasonably likely to have responsive records. Pavlik-Keenan Decl. ¶ 32.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

47. Upon receipt of the FOIA Request #1 from IDU on June 30, 2016, a FOIA POC in LESA reviewed the substance of the request and tasked the Statistical Tracking Unit ("STU") to search for potentially responsive documentation. Pavlik-Keenan Decl. ¶ 33.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

48. Beginning on July 5, 2016, STU conducted a line-by-line review of the requested information taking into consideration standard reporting of removal methodologies as well as consulting the database to query all available responsive removal information as requested from IIDS. Pavlik-Keenan Decl. ¶ 33.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the

request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

49. Upon completion of the search, LESA submitted one Excel spreadsheet to IDU on December 27, 2016. Pavlik-Keenan Decl. ¶ 33.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

50. In a letter to Plaintiffs dated January 10, 2017, the ICE FOIA Office responded to FOIA Request #1 and produced one (1) responsive Excel spreadsheet. Pavlik-Keenan Decl. ¶ 8.

Response: Undisputed.

51. In an email dated March 14, 2017, Plaintiffs filed an appeal of ICE's January 10, 2017, response, challenging both the withholdings and the adequacy of ICE's search. Pavlik-Keenan Decl. ¶ 9.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which are not at issue in this case.

52. In a letter to Plaintiffs dated March 17, 2017, ICE's Office of Principal Legal Advisor ("OPLA") acknowledged receipt of Plaintiffs' appeal and assigned it an appeal tracking number of 2017-ICAP-00276. Pavlik-Keenan Decl. ¶ 10.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which are not at issue in this case.

53. In a letter to Plaintiffs dated April 11, 2017, OPLA responded to Plaintiffs' appeal. Pavlik-Keenan Decl. ¶ 11.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which are not at issue in this case.

54. OPLA affirmed the adequacy of ICE's search and the withholdings applied to the Excel spreadsheet. Pavlik-Keenan Decl. ¶ 11.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which are not at issue in this case.

55. In its response, OPLA also asserted FOIA Exemptions (b)(6) and (b)(7)(C) to the columns "Case Id" and "Case ID" in the spreadsheet in addition to the already asserted FOIA Exemption (b)(7)(E). Pavlik-Keenan Decl. ¶ 11.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search and the response to the request submitted on January 5, 2016, which are not at issue in this case.

56. On August 31, 2016, Plaintiffs submitted to ICE a FOIA request seeking the latest anonymous case-by-case information on each removal and return for FY 2015 through August 2016 that was the result of such IDENT/IAFIS interoperability matches whether carried out under Secure Communities or under the program that is replacing Secure Communities ("FOIA Request #2"). Pavlik-Keenan Decl. ¶ 12.

Response: Undisputed.

57. In an email to Plaintiffs dated August 31, 2016, the ICE FOIA Office acknowledged receipt of FOIA Request #2. Pavlik-Keenan Decl. ¶ 13.

Response: Undisputed.

58. ICE assigned FOIA Request #2 the tracking number 2016-ICFO-54702. Pavlik-Keenan Decl. ¶ 13.

Response: Undisputed.

59. On December 2, 2016, upon receipt and review of FOIA Request #2, the ICE FOIA Office determined that because of the subject matter of the FOIA request, ERO was the one office likely to have records responsive to Plaintiffs' request. Pavlik-Keenan Decl. ¶ 34.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

60. The ICE FOIA Office instructed ERO to conduct a comprehensive search for records and to provide all records located during that search to the ICE FOIA Office for review and processing. Pavlik-Keenan Decl. ¶ 34.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

61. A POC in ERO IDU received and reviewed FOIA Request #2. Pavlik-Keenan Decl. ¶ 35.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the

EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

62. Based upon subject matter expertise and knowledge of the program offices' activities within ERO, IDU determined searches at the HQ level for potentially responsive records should be conducted. Pavlik-Keenan Decl. ¶ 35.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

63. Accordingly, IDU tasked LESA to conduct searches as LESA was reasonably likely to have responsive records, if any. Pavlik-Keenan Decl. ¶ 35.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case, which concerns whether searching for and extracting the requested records from the EID in response to plaintiffs' reasonably described requests for records from FY 2015 through August 2016 that exist in the EID requires the creation of records.

64. Upon initial receipt of FOIA Request #2 from IDU on September 2, 2016, a FOIA POC in LESA reviewed the substance of the request and tasked STU to search for potentially responsive documentation. Pavlik-Keenan Decl. ¶ 36.

Response: Disputed to the extent defendant is claiming that the records at issue in this matter do not exist within the EID. *See* Long Decl. ¶¶ 27-31, 33-37, Ex. F. Plaintiffs do not dispute the remainder of this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case.

65. Beginning on September 12, 2016, STU conducted a line-by-line review of the requested information taking into consideration standard reporting of removal methodologies as well as consulting the database to query all available responsive removal information as requested from IIDS. Pavlik-Keenan Decl. ¶ 36.

Response: Disputed to the extent ICE claims to have queried "all available responsive removal information as requested." ICE did not query "all available responsive removal information as requested because the fields and records requested exist within the EID and have been provided in response to plaintiffs' previous requests. *See* Long Decl. ¶¶ 27-31, 33-37, Ex. F. The remainder of this paragraph does not consist of material facts because plaintiffs it relates to the reasonableness of the search, which is not at issue in this case.

66. Upon completion of the search, LESA submitted one Excel spreadsheet to IDU on December 20, 2016. Pavlik-Keenan Decl. ¶ 36.

Response: Plaintiffs do not dispute this statement, but deny that the facts it sets forth are material because they relate to the reasonableness of the search, which is not at issue in this case. Disputed to the extent defendant is claiming that the records at issue in this matter do not exist within the EID. *See* Long Decl. ¶¶ 27-31, 33-37, Ex. F.

67. In a letter to Plaintiffs dated January 4, 2017, the ICE FOIA Office responded to FOIA Request #2 and produced one (1) responsive Excel spreadsheet. Pavlik-Keenan Decl. ¶ 14.

Response: Undisputed.

68. In an email dated January 17, 2017, Plaintiffs filed an appeal of ICE's January 4, 2017, response, challenging both the withholdings and the adequacy of ICE's search. Pavlik-Keenan Decl. ¶ 15.

Response: Undisputed that Plaintiffs filed an appeal on January 4, 2017. Disputed to the extent defendant characterizes the appeal as only an appeal of the withholdings and the reasonableness of ICE's search. *See id.* ¶ 39; Ex. G (appeal letter).

69. In a letter to Plaintiffs dated January 18, 2017, OPLA acknowledged receipt of the Plaintiffs' appeal and assigned it an appeal tracking number of 2017-ICAP-00194. Pavlik-Keenan Decl. ¶ 16.

Response: Undisputed.

70. In a letter to Plaintiffs dated February 14, 2017, OPLA responded to Plaintiffs' appeal. Pavlik-Keenan Decl. ¶ 17.

Response: Undisputed.

71. OPLA remanded the request to the ICE FOIA Office, determining that some of the information contained in the "Detainer Id" column, which was previously withheld, could be released. Pavlik-Keenan Decl. ¶ 17.

Response: Undisputed.

72. OPLA's response to Plaintiffs' appeal also affirmed the adequacy of ICE's search for records responsive to FOIA Request #2. Pavlik-Keenan Decl. ¶ 17.

Response: Undisputed to the extent OPLA affirmed its earlier decision. Disputed to the extent defendant characterizes the appeal as only an appeal of the withholdings and the adequacy of ICE's search. *See* Long Decl. Ex. G (appeal letter).

73. In a letter to Plaintiffs dated October 4, 2017, the ICE FOIA Office responded to OPLA's remand and produced one (1) responsive Excel spreadsheet. Pavlik-Keenan Decl. ¶ 18.

Response: Undisputed.

74. On June 8, 2017, Plaintiffs filed a Complaint in this action under FOIA for declaratory, injunctive, and other appropriate relief. Pavlik-Keenan Decl. ¶ 19.

Response: Undisputed.

75. On July 27, 2017, ICE filed its Answer to the Complaint. Pavlik-Keenan Decl. ¶ 20.

Response: Undisputed.

76. Plaintiffs allege that ICE has improperly withheld records responsive to Plaintiffs' FOIA requests, but they have agreed that they will not challenge the redactions employed by Defendant. Pavlik-Keenan Decl. ¶ 19 and Exhibit A.

Response: Undisputed.

II. Plaintiffs' Statement of Additional Material Facts as to which there is No Genuine Issue.

77. The Secure Communities Program implemented by defendant ICE is one of several that have been used by the agency to target noncitizens for removal who have engaged in criminal activity. Long Decl. ¶ 5.

78. Secure Communities, along with a temporary successor called the Priority Enforcement Program (PEP), has been in operation since 2008. *Id.* ¶ 6.

79. PEP succeeded Secure Communities from November 20, 2014, until Secure Communities was reinstated by executive order on January 25, 2017. *Id.* ¶ 6.

80. Secure Communities and PEP have depended upon the computerized automatic matching of fingerprint records submitted to the FBI by local law enforcement agencies. *Id.* ¶ 7.

81. As a part of their regular routine, local law enforcement agencies fingerprint individuals taken into custody on local matters and submit these fingerprint records to the FBI to confirm their identities, and to obtain any criminal records the FBI has on them for local use. *Id.* ¶ 7.

82. The FBI now automatically transmits the fingerprint records it receives on to DHS, ICE's parent agency, where that agency matches the fingerprints against its own databases and, when there is a match, determines whether the arrestee may be deportable. *Id.* ¶ 7.

83. Based on ICE's priorities and resources, the agency may then issue an immigration detainer. The detainer is a request that the arresting agency hold the alien for a period of time beyond when the individual would otherwise be held to allow ICE to take that individual into its own custody. *Id.* ¶ 7.

84. ICE issues detainers using a form called an I-247. Over time, there have been variations of the I-247 form, which have sometimes resulted in different letter designations such as I-247D and I-247N. *Id.* ¶ 8.

85. Plaintiffs began requesting database records documenting ICE enforcement activities starting in 2006. *Id.* ¶ 9.

86. In 2012, as part of TRAC's efforts to provide the public with information on immigration enforcement practices, plaintiffs submitted a FOIA request to ICE to obtain anonymous case-by-case information about each person whom ICE had deported as a result of the Secure Communities Program. *Id.* ¶ 10.

87. Since February 2013, plaintiffs have requested this data on a regular monthly cycle. *Id.* ¶ 11.

88. Each monthly request sought records from a predetermined start date updated through the most recently completed month at the time of the request. For example, in May 2016, plaintiffs sought records from FY 2015 through April 2016, and in June 2016, plaintiffs sought data from FY 2015 through May 2016. *Id.* ¶ 11.

89. ICE has refused to identify by their actual names or by other descriptors all the fields that exist in the EID. *Id.* ¶ 15.

90. Plaintiffs have sought information including the names of all fields in the EID through separate FOIA requests but the agency has withheld those records citing FOIA exemption 7(E). That dispute is also pending before this Court. *See Long v. ICE,* No. 14 Civ. 109 (D.D.C.). *Id.* ¶ 15.

91. In order to obtain fields and data elements from the EID, plaintiffs' FOIA requests have included many numbered requests describing the fields and data elements that plaintiffs seek from the EID. *Id.* ¶ 16.

92. For example, for each individual deported, plaintiffs' requests have included a numbered request for the fields or data elements in the EID that contain the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent." *Id.* ¶ 16.

93. Over time, the number of requests for fields or data elements grew as plaintiffs learned of additional relevant fields or data elements contained in the EID. *Id.* ¶ 16.

94. Starting in August 2012, ICE began providing plaintiffs with computer extracts furnished as Excel spreadsheet files derived from the EID in response to each of plaintiffs' monthly requests for updated data. *Id.* ¶ 17.

95. Because ICE kept plaintiffs unaware of the names of all the specific fields in the EID, data elements responsive to several of plaintiffs' numbered requests could be contained within a single field in the EID. *Id.* ¶ 20.

96. For example, in their January 4, 2016 FOIA request letter (the December 2015 Request) covering data for FY 2015 through December 2015, plaintiffs made separately numbered requests for any fields or data elements from the EID containing information related to whether each individual deported was "ordered removed by court, where the order has become final (yes/no)" (request 66) and whether that individual was "[a]dministratively ordered removed, where order has become final (yes/no)" (request 68). *Id.* ¶ 20.

97. In response to these two separately numbered requests for fields or data elements contained in the EID, ICE provided only one field containing data from the EID that ICE's spreadsheet labeled "Final Order Yes No." *Id.* ¶ 20, Ex. F.

98. Similarly, sometimes data elements responsive to a single numbered request could be contained within multiple fields or data elements in the EID. *Id.* ¶ 21.

99. For example, in response to a numbered request in the December 2015 Request for the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent" (request 26), ICE provided two fields with data from the EID, described in its Excel spreadsheet as "Detainer Facility City" and "Detainer Facility State." *Id.* ¶ 21, Ex. F.

100. Over time, plaintiffs learned that the EID contains many fields and data elements that indicate either the existence or nonexistence of some event or state of facts. *Id.* ¶ 22.

101. Plaintiffs learned that these typically were labeled by ICE as "Yes No" fields. *Id.* ¶ 22.

102. For example, plaintiffs discovered from ICE's responses to requests identical to requests 66 and 68 of the December 2015 Request that the EID contains a field or data element ICE has described as "Final Order Yes No" that provides whether there has been an order in an individual's deportation case that had become final. *See id.* ¶ 22.

103. The field as provided in ICE's previous responses to plaintiffs' requests contains only data indicating the existence or nonexistence of such an order. *See id.* ¶ 22.

104. Similarly, plaintiffs discovered from ICE's responses to a request for a field or data element in the EID recording whether removed individuals had committed aggravated felonies that the EID contains a field or data element that ICE has referred to as "Aggravated Felony Yes No," recording the existence or nonexistence of such a felony. *See id.* ¶ 22.

105. In order to describe the fields and data elements in the EID structured in this "Yes No" format, but without knowledge of the real names of the EID fields, plaintiffs' numbered requests often describe fields and data elements by following ICE's yes/no pattern. *See id.* ¶ 23.

106. For example, plaintiffs' requests have sought, for each individual deported, the fields or data elements contained in the EID that indicate whether the individual was an "aggravated felon (yes/no)," whether there had been a "prior removal (yes/no)," and whether there had been a "reinstatement of prior removal order (yes/no)." *See id.* ¶ 23.

107. The numbered requests formatted in this pattern are not questions—indeed, none includes a question mark—and ICE regularly understood and responded to these numbered requests with the fields and data elements in the EID that indicated the existence or nonexistence of the specified event or state of facts. *See id.* ¶ 23.

108. In response to requests 66 and 68 in the December 2015 Request—"ordered removed by court, where order has become final (yes/no)," and "administratively ordered removed, where order has become final (yes/no)"—ICE provided a responsive field with data from the EID it called "Final Order Yes No." *See id.* ¶ 24.

109. Further, when a field exists in the EID with responsive information to a request, but the field is not in a yes/no format, ICE FOIA staff understood that because these requests were not questions, ICE should provide the field or data element matching the request because the presence of information in the field or data element was equivalent to a "yes." *See id.* ¶ 25.

110. Thus, for example, in response to request 70—"Reinstatement of prior removal order (yes/no)"—ICE provided a responsive field it called "Reinstated Final Order." *See id.* ¶ 25.

111. And in response to requests 17 through 21 of the December 2015 Request, ICE provided a field labeled "Non-Criminal ICE Priorities," which included data that recorded whether

the individual removed was an "immigration fugitive" (request 17), a "repeat immigration violator" (request 18), or an "EWI; Visa Violator or Overstay" (requests 19, 20, and 21). *See id.* ¶ 25.

112. Fields and elements in the EID were sometimes used to record which checkbox was checked on an official ICE form giving the reason(s) for an enforcement action, or to record a particular category it used for management reporting purposes. *See id.* ¶ 26.

113. The data in these fields might be recorded in the EID with "yes" or "no" entries, or "T" or "F" (for true or false), or yes would be indicated by a specific code (such as a "1" or a "Y" or a "Yes") while the absence of any entry would signify a no. *Id.* ¶ 26.

114. In August 2016, plaintiffs submitted their monthly FOIA request to ICE asking for fields and data elements covering FY 2015 through August 2016. *Id.* Ex. B (the August 2016 Request).

115. The specific numbered requests in the August 2016 Request were virtually identical to the numbered requests in the December 2015 Request seeking fields and data elements from the beginning of FY 2015 through December 2015. *Id.* Ex. C.

116. Plaintiffs' monthly requests have consistently sought fields and data elements that exist in the EID, and not the creation of records. *Id.* ¶ 27.

117. Until the events giving rise to this litigation, ICE had no trouble understanding that plaintiffs' requests reasonably described fields and data elements existing in the EID. *Id.* ¶ 27.

118. In its response to the August 2016 Request, dated January 4, 2017, ICE omitted many of the EID fields it had regularly provided in response to plaintiffs' monthly requests covering earlier, overlapping time periods. *Id.* ¶ 27.

119. Indeed, less than a week later, on January 10, 2017, ICE provided those very fields in response to the same requests in plaintiffs' December 2015 Request. *Id.* ¶ 27.

120. For example, in the August 2016 Request, as in prior requests including the December 2015 Request, plaintiffs included a request (request 65) seeking the fields or data elements in the EID that records information about the "apprehension method associated with the latest apprehension" for each individual removed. *See id.* ¶ 28.

121. In responses to prior requests, including the December 2015 Request, ICE recognized that this request described fields or data elements that exist in the EID, and ICE provided a field referred to in ICE's spreadsheet as "Latest Apprehension Method" in response. *See id.* ¶ 28.

122. In response to the August 2016 Request, ICE did not provide the field "Latest Apprehension Method" or any other responsive fields or data elements. *Id.* ¶ 28.

123. Similarly, request 60 in the December 2015 and August 2016 Requests sought the fields or data elements in the EID that record the "latest program code before departure" for each individual. *Id.* ¶ 29.

124. In response to the request in the December 2015 Request and other prior requests, ICE recognized that this request described fields or data elements that exist in the EID, and ICE provided a field referred to in ICE's spreadsheet as "Removal Current Program Code" in response. *Id.* ¶ 29.

125. In response to the August 2016 Request, ICE did not provide the field "Removal Current Program Code" or any other responsive fields or data elements. *Id.* ¶ 29.

126. Request 22 of the August 2016 Request sought the fields or data elements in the EID containing records related to whether, for each individual removed, there "[w]as [a detainer] issued for individual before removal (yes/no), and date issued." *Id.* ¶ 30.

127. In response to the corresponding identical requests in plaintiffs' past monthly FOIA requests, including the December 2015 Request, ICE understood that plaintiffs were seeking the fields or data elements in the EID listing the date of any detainers prepared, and ICE routinely provided a field with data from the EID called "Detainer Prepare Date." *Id.* ¶ 30.

128. In response to the August 2016 Request, ICE did not provide the field "Detainer Prepare Date" or any other responsive fields or data elements. *Id.* ¶ 30.

129. All told, even though the period covered by the requests overlapped for the 15 months from the beginning of FY 2015 through December 2015, 27 fields containing data elements responsive to 25 of plaintiffs' numbered requests were provided in ICE's response to the December 2015 Request but were not included in ICE's response to the August 2016 Request. Plaintiffs refer to these 27 fields as the "disappearing fields." *Id.* ¶ 31.

130. Like "Latest Apprehension Method," "Removal Current Program Code," and "Detainer Prepare Date," each of the disappearing fields corresponds with requests in the December 2015 and August 2016 Requests that reasonably describe fields and data elements that exist in the EID. *Id.* ¶ 31.

131. Each of the disappearing fields and corresponding requests is set forth in the table attached to Ms. Long's declaration. *See id.* ¶ 32, Ex. F.

132. Although ICE claims that it provided records in response to request 63 for "date of latest arrest," *see* Jones Decl. ¶ 42, ICE previously provided a field it called "Latest Apprehension Date" in response to that request. *Id.* ¶ 33.

133. ICE omitted the "Latest Apprehension Date" field from its response to the August 2016 Request. *Id.* ¶ 33.

134. Although plaintiffs received a field labeled "Arrest Date," plaintiffs' comparison of the "Arrest Date" field with the "Latest Apprehension Date" field has led plaintiffs to conclude that the two are not coextensive because: (1) there is nothing to indicate that it is the "latest" arrest date, as opposed to simply one arrest date among others, (2) other fields in the EID use the terms "arrest" and "apprehension," indicating that they may have different meanings in the EID, and (3) the data in the "Latest Apprehension Date" field from earlier requests that overlap with the August 2016 Request does not match the data in the "Arrest Date" field. *Id.* ¶ 33.

135. Plaintiffs do not believe that ICE has provided fields responsive to request 63 in its August 2016 request. *Id.* ¶ 33.

136. ICE claims that it provided records in response to request 71 for the "Date of latest reinstatement of prior removal order" "in response to other requested items." Jones Decl. ¶¶ 47-48.

137. The data provided by ICE in response to plaintiffs' requests does not provide the responsive information ICE earlier provided with respect to this request, which consisted of a field ICE called "Reinstated Final Order Date." *Id.* ¶ 34.

138. ICE claims that there is no field in the EID containing records responsive to request 7 of the August 2016 Request. *See* Jones Decl. ¶¶ 54-55.

139. Plaintiffs have previously received the field "Non-Criminal ICE Priorities" in response to this request and others seeking information recorded in this field. *Id.* Ex. F.

140. The disappearing fields had been regularly provided in ICE's responses to corresponding requests in plaintiffs' prior monthly requests. *Id.* ¶ 35.

141. With respect to plaintiffs' request for the fields or data elements in the EID reflecting, for each individual removed, "[i]nformation on every charge not just the most serious for which a conviction has not occurred (date of charge, current status, NCIC code for charge, level of offense (felony, misdemeanor, citation, etc.))" (request 55), ICE has historically provided a number of fields with data from the EID, including Criminal Charge, Criminal Charge Code, Criminal Charge Date, Criminal Charge Status, Criminal Conviction Date, Criminal Conviction Sentence Days, Criminal Conviction Sentence Months, and Criminal Conviction Sentence Years. *Id.* ¶ 36.

142. In response to the August 2016 Request, ICE did not provide these fields or any other responsive fields or data elements. *Id.* ¶ 36.

143. With respect to plaintiffs' request for the fields or data elements in the EID related to whether a removed individual had a "prior removal (yes/no)" (requests 74), ICE had in the past provided a field from the EID labeled "Prior Removal," but it omitted this field from the response to the August 2016 Request and did not provide any other responsive fields or data elements. *Id.* ¶ 37.

144. The response letter to the August 2016 Request did not explain or even mention the omission of these fields from the Excel spreadsheet that ICE furnished. *Id.* ¶ 38, Ex. D.

145. On January 17, 2017, plaintiffs filed an appeal of ICE's January 4, 2017 response with the agency, requesting that the disappearing fields be provided. *Id.* ¶ 39, Ex. G.

146. In a letter dated February 14, 2017, ICE denied plaintiffs' appeal and claimed that the "fields of information that were not provided are data fields that do not exist in the EID" and that ICE was not required to "create" records under FOIA. *Id.* ¶ 40, Ex. H.

147. Plaintiffs have continued to submit requests for these disappearing fields on a monthly basis. *Id.* ¶ 44.

148. Plaintiffs now specify in the monthly requests that if ICE contends calculations are required then ICE should provide the fields and data elements that ICE would use for these calculations. *See id.* ¶ 44, Ex. I.

149. Despite the revised requests, ICE continues to respond in the same manner as ICE responded to the August 2016 Request, by not mentioning the disappearing fields and not providing them in response to the request. *See id.* ¶ 45, Ex. J.

150. On June 8, 2017, plaintiffs filed the complaint in this action alleging that ICE's failure to provide the disappearing fields violated FOIA. *Id.* ¶ 41.

151. ICE filed its answer on July 27, 2017. *Id.* ¶ 42.

152. On November 3, 2017, ICE moved for summary judgment. *Id.* ¶ 43.

153. On May 9, 2017 plaintiffs filed a complaint against ICE in the Northern District of New York related to other, partially overlapping FOIA requests for fields and data elements contained within the EID covering the period from FY 2015 through November 2016. *Long v. U.S. ICE*, No. 17 Civ. 506 (N.D.N.Y. 2017) (the New York case). *Id.* ¶ 46.

154. On November 8, 2017, ICE moved for summary judgment in the New York case. *Id.* ¶ 47.

155. In the New York case, in response to a request identical to request 57 of the August 2016 Request for "aggravated felon (yes/no)," ICE provided a field with data from the EID labeled "Aggravated Felony Yes No." *Id.* ¶ 51.

156. In the New York case, in response to requests for the "Date Form I-247D was issued" and the "Date Form I-247N was issued," ICE provided a field labeled "Prepare Date" referring to these detainers. *Id.* ¶ 52.

157. In the New York case, ICE provided exhibits of the actual spreadsheet data provided in response to the request of fields that exist in the EID, *thirty-five* of which are maintained in the "Yes No" format. *See id.* Exs. N, O.

158. On May 17, 2010, plaintiffs submitted a FOIA request to ICE for anonymous alien-by-alien data covered by the Enforcement Case Tracking System and related modules for individuals on whom charging documents were issued from October 1, 2004 to the date of the request. *Id.* ¶ 53.

159. On April 5, 2012, ICE provided its third and final response to that request, with data from the EID for calendar years 2008 through 2010. *Id.* ¶ 53, Ex. P.

160. The data provided from the EID in response to the May 17, 2010 request for calendar years 2008 through 2010 was provided as an Excel spreadsheet. *Id.* ¶ 54.

161. The spreadsheet included a field called "person relationship," and within that field were many people identified as "spouse." *Id.* ¶ 54, Ex. Q.

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Respectfully submitted,

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