UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR LEAVE TO TAKE LIMITED DISCOVERY

Plaintiffs Susan B. Long and David Burnham request that the Court enter an order allowing plaintiffs to take two depositions to attempt to resolve, or at least sharpen, the factual disputes that preclude summary judgment on the present record in this Freedom of Information Act (FOIA) case. Specifically, plaintiffs seek leave to depose Patricia J. de Castro, Ph.D., the employee of defendant Immigration and Customs Enforcement (ICE) who recently submitted a supplemental declaration in this case, and a deposition of ICE under Fed. R. Civ. P. 30(b)(6) on any topics that Dr. de Castro is unable to address fully during her deposition. As reflected in the joint status report filed on October 9, 2019, ECF No. 45, counsel for the parties have conferred and ICE will oppose this motion.

BACKGROUND

Since 2012, plaintiffs have regularly submitted FOIA requests to ICE seeking anonymous information about each person deported as a result of the Secure Communities Program. ICE maintains such data in its Enforcement Integrated Database (EID), from which it takes a snapshot of a subset of the data three times a week, called the ICE Integrated Decision Support (IIDS)

system. Until the August 2016 request at issue here, ICE had produced data responsive to plaintiffs' requests. According to ICE, such responses were discretionary and exceeded the requirements of FOIA because extracting the requested fields from the database involves "analysis, calculations, and the creation of new records," de Castro Decl. ¶ 11, and ICE decided in July 2016 to discontinue such discretionary productions, *id.* ¶ 15. As a result, beginning with plaintiffs' August 2016 request, ICE has refused to produce 27 fields that it had previously provided to plaintiffs (the "disappearing fields").

Plaintiffs filed their complaint on June 8, 2017, ECF No. 1, and the parties filed cross motions for summary judgment, ECF Nos. 11, 12, 16, 19. On September 28, 2018, the Court denied the parties' motions without prejudice, concluding that the matter "cannot be resolved on the present record" because "there remains a genuine dispute of material fact concerning whether the requests at issue require ICE to create new records." Mem. Op. at 4, ECF No. 20; *see id*. at 10 ("On the present record, a genuine dispute of material fact remains as to whether producing the 'disappearing fields' and corresponding data elements in response to Plaintiffs' August 2016 Request would require ICE to manipulate data in a way that 'crosses the all-important line' between searching the EID and extracting and compiling existing data, on the one hand, and either creating a record or conducting research to answer a question, on the other.") (citing *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 270–71 (D.D.C. 2012)).

There is no question that ICE has the technical capability to produce the requested data: "ICE previously provided data in response to virtually identical requests to those at issue here," *id.* at 9, and "ICE provided plaintiffs with a sample release of [the] data" at issue here, *see* Joint Status Report of April 22, 2019, ECF No. 34. Rather, the issue is whether the specific steps needed to extract and compile the requested data amount to the creation of a new record. *See* 6 C.F.R.

§ 5.4(i)(2)(ii) ("Creating 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 when necessary to respond to a FOIA request); *see also* Def. Mem. in Support of Summ. J. at 7 (ECF No. 11) (conceding that "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").

In denying ICE's motion for summary judgment, the Court identified "several shortcomings" in the declarations ICE submitted in support of its motion. Mem. Op. at 11. For example, the Court found that ICE's declarant had failed to explain the nature of the "additional analysis" purportedly required to respond to each request, explaining that, "[i]n a case such as this one, where ICE previously has provided fields and data elements in response to virtually identical requests, individualized explanations as to why FOIA does not obligate ICE to produce the same fields and data elements are essential." *Id.* Further, the Court found that the declarations "lack sufficient detail" and "fail to adequately support the agency's position," *id.* at 12, and do not explain with precision the "additional efforts" purportedly needed to produce the requested records, *id.* at 15.

Because ICE failed to carry its burden to demonstrate that producing the disappearing fields would require the creation of new records, the Court could have entered summary judgment for plaintiffs and ordered ICE to produce the data. *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."); *Soto v. U.S. Dep't of State*, 118 F. Supp. 3d 355, 361 (D.D.C. 2015) ("To meet its burden, the government must generally submit 'relatively detailed and non-conclusory' affidavits or declarations") (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). The Court, however, granted ICE an additional opportunity to try to meet

its burden by submitting a supplemental declaration to address the shortcomings in its earlier declarations. The initial deadline for ICE to submit its supplemental declaration, December 14, 2018, was deferred while the parties attempted to negotiate a settlement. *See* Minute Orders of Oct. 10, 2018, and Feb. 21, 2019. After eight months of negotiations, settlement efforts failed and the deadline for ICE to file its supplemental declaration was set for October 4, 2019. *See* Minute Entry of Sept. 4, 2019.

ICE filed a portion of its supplemental declaration on October 7, 2019, and the remainder the following day. *See* Decl. of Patricia J. de Castro, ECF Nos. 42-1 and 43-1. The supplemental declaration suffers from the same shortcomings that the Court identified with respect to ICE's previous declarations: It is conclusory, lacks detail, and does not describe with precision the steps necessary to extract the requested data from the database. For example, the declarant asserts that producing the records at issue would require an analyst to "create new data combinations through extensive programming, analysis, calculations, and the creation of new reports," *id.* ¶ 12, but she does not describe what such efforts would entail. Further, with respect to each of the disappearing fields, the declarant states in conclusory fashion that the item "does not exist in IIDS." *Id.* ¶¶ 67–99. It is undisputed, however, that the items *can* be extracted and compiled from information that exists in ICE's databases because "ICE previously has provided fields and data elements in response to virtually identical requests." Mem. Op. at 11. Thus, the issue in this case is not whether the data exist; the issue is whether the process for extracting the data requires the creation of a new record.[1]

[1] Dr. de Castro's statement that "[n]one of the items [at issue] exist in the database," de Castro Decl. ¶ 67, is apparently based on the contention that although the component data points that comprise each item exist, they "are not automatically connected in the database," *id.* ¶ 56, and in the absence of an "automatic" connection, any action needed to extract the items amounts to the creation of a record.

ARGUMENT

Because the supplemental declaration fails to resolve the "genuine dispute of material fact concerning whether the requests at issue require ICE to create new records," Mem. Op. at 4, the "additional round of summary judgment briefing" the Court anticipated ordering after submission of the declaration, Tr. of Hr'g of Oct. 10, 2018, ECF No. 22, at 5:16, will not resolve this case. Rather, discovery is necessary to develop an adequate summary judgment record, or at least to identify with particularity the factual disputes that may have to be resolved by trial.

In general, parties may obtain discovery on matters that are nonprivileged and relevant, so long as the discovery is proportional to the needs of the case.[2] Fed. R. Civ. P. 26(b)(1). "In the FOIA context, a district court has broad discretion" to manage discovery. *Budik v. Dep't of the Army*, 742 F. Supp. 2d 20, 39 (D.D.C. 2010) (denying plaintiff's request for discovery in a FOIA case with leave to renew the request after the agency had an opportunity submit supplementary materials). Discovery is "sparingly granted" in FOIA cases and is typically not available where the agency's declarations are detailed and non-conclusory and there are no factual disputes. *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 997 F. Supp. 56, 72 (D.D.C. 1998), *rev'd in part on other grounds*, 185 F.3d 898 (D.C. Cir. 1999). Discovery is allowed in FOIA cases where, as here, the agency's declarations lack detail, the agency has already had an opportunity to submit supplemental materials, and factual disputes exist that preclude summary judgment. *See, e.g.*, *Pulliam v. U.S. Envtl. Prot. Agency*, 292 F.Supp.3d 255, 260–61 (D.D.C. 2018) (granting discovery where question of fact remained after agency submitted supplemental declaration); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Veterans Affairs*, 828 F. Supp. 2d

[2] This motion is not brought under Federal Rules of Civil Procedure 56(d), because there is no pending motion for summary judgment.

325, 334 (D.D.C. 2011) (denying agency's renewed motion for summary judgment and ordering depositions of two agency employees following submission of supplemental declarations); *Bangoura v. Dep't of the Army*, No. 05-0311, 2006 WL 3734164, *6 (Dec. 8, 2006) (granting discovery where agency declarations lacked detail and did not explain why the initial search missed responsive documents); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, No. 05-2078, 2006 WL 1518964, *3 (D.D.C. June 1, 2006) (granting discovery where, "even after a full round of briefing and a motions hearing, there still remain[ed] unanswered questions regarding the government's position"); *Campbell v. U.S. Dep't of Justice*, 193 F. Supp. 2d 29, 36 (D.D.C. 2001) (granting discovery as to the location and contents of requested files); *see also Weisberg v. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (reversing grant of summary judgment and holding that district court should have allowed depositions of agency personnel where the declarations did not "provide information specific enough to enable [the plaintiff] to challenge the procedures utilized" by the agency in its document search).

Unlike a typical FOIA case where discovery is not necessary because detailed agency declarations show that "there is no factual dispute remaining," *Bangoura*, 2006 WL 3734164, at *2, here the Court should enter an order allowing limited discovery because ICE has repeatedly failed to submit declarations adequate to establish that there is no genuine dispute of material fact as to the steps needed to extract the requested data from ICE's database, including the effort required to activate links between data points. Thus, plaintiffs seek leave to depose Dr. de Castro to distill the missing detail regarding the steps needed to extract and compile the requested data, and to understand the basis of ICE's litigation position that such data "does not exist."

In addition, plaintiffs anticipate that Dr. de Castro will be unable to provide the necessary detail due to a lack of technical expertise and personal knowledge regarding the specific steps

required to extract the requested items from ICE's databases. For example, in her testimony in *Long v. ICE*, No. 17-506 (N.D.N.Y.), Dr. de Castro emphasized that she is "not a computer programmer," Tr. of Hr'g of Aug. 15, 2019 (excerpts attached as Exhibit 1) at 81:8, and is "not familiar with computer programming," *id.* at 81:23–24. She has no education with respect to SQL languages, *id.* at 81:1–18, and she does not know what "integrated" means as it used in the ICE Integrated Decision Support (IIDS) system, *id.* at 86:3–7, or in the Enforcement Integrated Database (EID), *id.* at 88:20–25. Dr. de Castro does not know whether "querying a database" is the same as "searching that database for its contents," *id.* at 86:17–20, she has never queried the IIDS to respond to a FOIA request, *id.* at 87:11–13, nor has she directed other ICE employees to do so, *id.* at 87:14–16. Dr. de Castro testified that she has only a "general awareness" of how the IIDS is structured. *Id.* at 88:9–10. When shown a sample of the IIDS database schema, Dr. de Castro testified that she had not seen it before, *id.* at 94:19–20, did not know the meaning or significance of the information on the schema, *id.* at 95:2–97:11, and did not know what the document is, *id.* at 97:22. Asked to describe the analysis needed to create connections between data for different law enforcement actions, Dr. de Castro was unable to explain what analysis is required, *id.* at 101:1–102:2, even though her declaration, and ICE's case theory, rests principally on the conclusory assertion that the producing the data requested by plaintiffs would require analysts "to take disparate data sets and create new, temporary connections between data that exist, unconnected, in separate areas of the database," de Castro Decl. ¶ 11.

Until such facts are revealed, this case will not be ripe for resolution on renewed cross-motions for summary judgment. The depositions sought by plaintiffs will either establish the facts that the Court will use to determine the legal issue of whether plaintiffs' FOIA request calls for the creation of records, or, if the depositions establish that factual disputes remain, allow for a

focused evidentiary hearing to resolve any such disputes. Thus, the Court should order the depositions. In the alternative, because ICE failed to submit a supplemental declaration that meets its burden to demonstrate that producing the disappearing fields would require the creation of new records, the Court should enter summary judgment for plaintiffs.

CONCLUSION

The Court should enter an order granting plaintiffs leave to take the deposition of Patricia J. de Castro, Ph.D., and a deposition of ICE under Fed. R. Civ. P. 30(b)(6) on any topics that Dr. de Castro is unable to address fully during her deposition.

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Respectfully submitted,

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