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' SECOND CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs Susan B. Long and David Burnham move for summary judgment on their claims under the Freedom of Information Act against defendant Immigration and Customs Enforcement. Accompanying this motion are a memorandum in support of the motion and in opposition to defendant's second motion for summary judgment, plaintiffs' response to defendant's statement of facts and plaintiffs' statement of additional undisputed material facts, supporting declarations with exhibits, and a proposed order.

Dated: June 29, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' SECOND CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Susan B. Long and David Burnham brought this case under the Freedom of Information Act (FOIA) to compel defendant Immigration and Customs Enforcement (ICE) to produce 27 fields of electronically-stored information that ICE had provided in response to previous FOIA requests from plaintiffs but refused to provide in response to plaintiffs' identical August 2016 FOIA request. ICE claims that disclosure of these fields (the "disappearing fields") would require the creation of new records. As a matter of law, however, extracting data fields that exist in an agency's database does not constitute the creation of new records, even if the agency has to write new computer code to compile the information.

On September 28, 2018, the Court denied the parties' cross-motions for summary judgment, ECF Nos. 11 and 12, 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. In particular, the Court found that ICE could not justify its withholding of the requested records by relying on two declarations from Marla Jones. *Id.* at 10–15 (describing shortcomings in Jones's declarations).

In support of its second motion for summary judgment, ECF No. 53, ICE again relies on the *same* Jones declarations that the Court *already* found insufficient to sustain ICE's burden. ICE's motion is accompanied by a statement of undisputed facts, ECF No. 53-2, but none of the facts set forth by ICE are material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records. Indeed, ICE's memorandum in support of its second motion for summary judgment, ECF No. 53-1, is nearly identical to its first memorandum, ECF No. 11, except for the addition of scattered references to a

declaration from Patricia J. de Castro, ECF No. 53-3, which ICE first filed in October 2019, ECF Nos. 42-1 and 43-1, after the parties' efforts to resolve this case following the Court's 2018 ruling failed.

The de Castro declaration is insufficient to sustain ICE's burden. Most importantly, both the de Castro declaration and evidence presented in related cases make clear that, despite ICE's representations to the contrary, ICE has not queried either of its integrated databases to extract and compile the disappearing fields, although it is technically feasible to do so. Rather, ICE decided in 2016 to stop querying those databases to respond to FOIA requests. Instead, ICE only produces information from discrete extracts of data pulled from its integrated databases using canned queries designed to create its own internal management reports. Those data sets, which ICE refers to as "populations," are organized by law enforcement events and lack the connections built into ICE's integrated databases.

Relying on the de Castro declaration, ICE claims that the absence of such connections between the products of its preset queries makes it difficult to produce the disappearing fields, and ICE further contends that requiring it to take the steps needed to overcome its self-created problem would be equivalent to requiring it to create new records. The declaration, however, is silent as to the steps needed to extract the requested data from ICE's Enforcement Integrated Database (EID), and it is undisputed that the data sought by plaintiffs exist in the EID. Further, de Castro's assertions regarding the difficulty of extracting the requested data from the ICE Integrated Decision Support (IIDS) system because of a claimed lack of connections are simply wrong. The IIDS has such connections, and it allows for both event-centric and person-centric views of the data, as demonstrated by the IIDS database schema admitted in evidence in a related case. De Castro's assertions do not relate to the IIDS at all, but to standard reports that are outside, and

separate from, the IIDS; they thus provide no basis for ICE's contention that it cannot extract the requested data elements from the IIDS.

Finally, de Castro's specific attempts to describe ICE's purported inability to produce each of the 27 disappearing fields without creating new records fail because her explanations relate to the inability to pull the requested information from the "Secure Communities population report" or other discrete data sets, and not from the EID or IIDS.

ICE has had two bites at the apple and has failed to carry its burden. Enough is enough. It is time for the Court to enter summary judgment for plaintiffs and order ICE to produce the records requested by plaintiffs nearly four years ago.

BACKGROUND

Since 2012, plaintiffs have regularly submitted FOIA requests to ICE to obtain anonymous information from the EID about each person deported as a result of the Secure Communities Program.[1] ICE maintains such data in the EID, from which it takes a snapshot of a subset of the data three times a week, called the IIDS. 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, and ICE decided in July 2016 to discontinue such discretionary productions. As a result, beginning with plaintiffs' August 2016 request, ICE has refused to produce 27 fields that it had previously provided to plaintiffs.

There is no question that ICE *can* produce the disappearing fields: "ICE previously provided data in response to virtually identical requests to those at issue here." Mem. Op. at 9. ICE also acknowledges that it has "provided plaintiffs with a sample release of data" at issue here. Joint

[1] For a complete description of the Secure Communities Program and the history of plaintiffs' requests for fields in the EID, and ICE's responses, see pages 2–11 of the memorandum plaintiffs filed in support of their first motion for summary judgment, ECF No. 12.

Status Report of April 22, 2019, ECF No. 34. Thus, the issue is not whether the data exist and can be produced; rather, the issue is whether the specific steps needed to extract and compile the requested data amount to the creation of new records. *See* Mem. Op. at 10. ICE concedes 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 requesters." Def. Mem. in Support of Summ. J. at 7–8, ECF No. 53-1. And the FOIA regulations issued by the Department of Homeland Security, of which ICE is a part, are clear: "Creating a computer program that produces specific requested fields or records contained within a well-defined database structure" is required when necessary to respond to a FOIA request. 6 C.F.R. § 5.4(i)(2)(ii).

In denying ICE's first motion for summary judgment, the Court identified "several shortcomings" in the Jones declarations that ICE submitted in support of its motion. Mem. Op. at 11. For example, the Court found that Jones had failed to explain the nature of the "additional analysis" purportedly required to respond to each request. In that regard, the Court explained 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 Jones declarations "lack sufficient detail" and "fail to adequately support the agency's position," *id.* at 12, and that they do not explain with adequate precision the "additional efforts" purportedly needed to produce the requested records, *id.* at 15. Nevertheless, ICE's statement of undisputed facts, ECF No. 53-2, does not mention any of the 27 disappearing fields and does not address the factual dispute identified by the court after the first round of summary judgment briefing. Rather, it merely recites the same purported facts that the Court previously held

to be insufficient to justify summary judgment for ICE.[2] Thus, to the extent that ICE has attempted to remedy these deficiencies by providing factual support for its assertion that producing the disappearing fields would require the creation of new records, such support must be sought in the de Castro declaration. But the de Castro declaration does not provide that support. Once again, ICE has failed to show that producing data indisputably in its possession would require the creation of new records.

STANDARD

Summary judgment is appropriate when "there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Under FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In this case, that would require ICE to establish beyond factual dispute that the actions needed to extract and compile the disappearing fields are outside the mandate of FOIA because such actions amount to the creation of new records.

The D.C. Circuit has "discouraged serial summary judgment motions after the government's first loss." *Evans v. Federal Bureau of Prisons*, 951 F.3d 578, 587 (D.C. Cir. 2020)

[2] ICE's statement does add two paragraphs that cite the de Castro declaration, but those paragraphs are limited to the contention that ICE decided to cease creating records in response to FOIA requests. Def. Statement, ¶¶ 74–75. The statement includes nothing new regarding the actions needed to produce the disappearing fields. The complete failure of ICE's fact statement to address the critical issue identified in the Court' first summary judgment ruling is reason enough to deny ICE's motion. *See* LCvR 7(h)(1); *see*, *e.g.*, *Apollo v. Bank of America, N.A.*, No. 17-2492, 2019 WL 5727766, at *1 (D.D.C. Nov. 5, 2019). But the deficiency in ICE's showing goes deeper: The record, including ICE's own submissions in this and related cases, makes clear that the undisputed facts compel the conclusion that ICE has failed to carry its burden of establishing that producing the disappearing fields would require the creation of new records, and thus that summary judgment must be entered in plaintiffs' favor.

(citing *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 769 (D.C. Cir. 2000)). Thus, if ICE has, again, failed to carry its burden, summary judgment should be entered for plaintiffs.

ARGUMENT

I. Querying a database to extract and compile requested information does not constitute the creation of new records.

Most agency records are stored electronically, and 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 E-FOIA Amendments provide that data "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). Although FOIA does not require an agency to create new records, *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," *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269 (D.D.C. 2012) (internal quotation marks and citation omitted). Rather, "FOIA requires agencies to disclose all non-exempt data points that it retains in electronic databases." *Id.* at 272; *see Long v. CIA*, No. 15-1734, 2019 WL 4277362, *4 (D.D.C. Sept. 10, 2019) (holding that extracting data fields that exist in an agency's database does not constitute the creation of a new record even if the agency has to write new computer code to compile the information electronically).

ICE agrees 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. in Support of Summ. J. at 7 (citing *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270). ICE further concedes that "sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record," and that "[s]orting a database by a particular data field (e.g., date, category, title) is essentially 'the application of codes or some form of programming' and, thus, does not involve creating new records or conducting research; sorting is just another form of searching that falls within the scope of an agency's duties in responding to FOIA requests." *Id.* (citing legislative history of the E-FOIA Amendments, H.R. Rep. 104–795, at 22, 1996 U.S.C.C.A.N. 3448, 3465). "Further, 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 requesters." *Id.* at 7–8 (citing *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000)). DHS's regulations confirm that "[c]reating a computer program that produces specific requested fields or records contained within a well-defined database structure usually is considered business as usual" and is required under FOIA.[3] 6 C.F.R. § 5.4(i)(2)(ii); *see* Clark Decl. ¶ 11 (explaining that "the programming required to run queries to produce specific requested fields or records contained within a well-defined database structure such as the EID or IIDS is routine and is considered 'business as usual'").

[3] ICE does not claim that extracting and compiling the disappearing fields—as it did from 2012 until the August 2016 request at issue here—goes beyond "business as usual" or requires "special services," 6 C.F.R. § 5.4(i)(2)(ii), or "would significantly interfere with the operation" of ICE's databases, 5 U.S.C. § 552(a)(3)(C). Indeed, because ICE has "provided plaintiffs with a sample release" of requested records, Joint Status Report of April 22, 2019, ICE has already created the computer code needed to produce disappearing fields, and ICE can rerun it without undue burden. Clark Decl. ¶¶ 20–21. Further, the burden of retrieving and producing information that exists is an entirely separate question from creation of new records, and ICE does not separately assert, or claim entitlement to summary judgment on, a burdensomeness defense.

Nonetheless, ICE asserts that it has provided the records requested by plaintiffs only if "the data point existed within IIDS *and did not require additional analysis, calculations, assumptions, or the creation of a new record*." Def. Mem. in Support of Summ. J. at 9 (emphasis added). This approach contradicts ICE's concession that, under the case law, if a request seeks a data point that exists in a database, ICE is obligated to disclose that information, and disclosure of existing fields does not constitute creation of a new record, even if the agency must engage in computer programming in order the extract and compile the requested fields, *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272, and even if the "the net result of complying with the request will be a document the agency did not previously possess," *Schladetsch*, 2000 WL 33372125, at *3. *See* Def. Mem. in Support of Summ. J. at 7. Moreover, denying a request because disclosure would require additional analysis, calculations, or assumptions is inconsistent with ICE's concession that it must disclose existing data points in the database. If the data point already exists in a database, then additional "analysis, calculations, and assumptions" are not required to "create" it.

FOIA requires the agency to perform any "analysis, calculations, and assumptions" that are needed to access, extract, and sort extant information in a database to make it intelligible. Because the disappearing fields exist in ICE's databases, the steps needed to produce those fields do not, as a matter of law, constitute the creation of a new record.

II. The disappearing fields can be produced from the EID.

ICE's argument turns on the contention that the disappearing fields cannot be produced from the EID. The de Castro declaration, however, is insufficient to meet ICE's burden because it does not mention the EID except to assert, in conclusory fashion, that ICE "cannot report from the EID." de Castro Decl. ¶¶ 20, 30. That assertion is wrong. In a recent case, ICE was ordered to search the EID and produce unique identifiers for certain categories of individuals after ICE

asserted that such data did not exist in the IIDS. *See American Immigration Council v. ICE*, No. 18-1614, 2020 WL 2748515, *9 (D.D.C. May 27, 2020). That court noted that, as here, the FOIA request at issue was "not limited to any particular database" and that ICE had produced data from the EID in other cases. *Id.* at *8 (citing *Long v. ICE (Long I)*, 149 F. Supp. 3d 39, 55–57 (D.D.C. 2015); *Long v. ICE (Long II)*, No. 17-506, 2018 WL 4642824 (N.D.N.Y. Sept. 27, 2018)); *see* Clark Decl. ¶ 13 (explaining that ICE can query the EID to extract specific requested fields or records).

ICE's failure to utilize the EID to produce the disappearing fields is particularly troubling because its primary argument for withholding the records rests on its contention that plaintiffs "requested data in a format that does not correspond to the structure *of the IIDS*." de Castro Decl. ¶ 11 (emphasis added). Specifically, de Castro claims that the data in the IIDS is organized by "law enforcement actions and is not person-centric." *Id.* ¶ 46. According to de Castro, "enforcement events are not automatically connected in the [IIDS]," *id.* ¶ 56, and in the absence of an "automatic" connection, the steps needed to extract the requested items amount to the creation of records. Plaintiffs dispute that contention both as a matter of law and of fact. But even if it were true, ICE has failed to carry its burden because the disappearing fields *can* be extracted from the EID, which ICE admits is organized in a manner that allows a user to follow an individual through a series of enforcement events. In her declaration in *American Immigration Council*, de Castro explained:

> The EID is the common database repository for all records created, updated, and accessed by a number of software applications. 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). … The EID houses data and business rules that are integrated with other systems through direct database connectivity or complex interfaces. The EID captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration

> and law enforcement investigations and operations conducted by ICE and CBP. **The EID provides users with the capability to access a person-centric and/or event-centric view of the data.** Users can also print records containing the EID data, which are used for criminal and administrative law enforcement purposes and typically are retained in criminal investigative files, detention files, and Alien Files ("A-Files"). … The EID is used as data storage throughout the immigration enforcement lifecycle from arrest to removal or release.

Decl. of Patricia J. de Castro, *American Immigration Council*, No. 18-1614, ECF No. 27-2, ¶¶ 6–8 (D.D.C. Mar. 29, 2019) (emphasis added) (attached to Third Long Decl. as Exhibit 2); *see* Jones Decl., ECF No. 53-5, ¶¶ 6–8 (same).

Further, because the EID can be "accessed by a number of software applications," *id.* ¶ 6, there is no legitimate reason for ICE to have limited itself to retrieving data from the IIDS. As ICE official Curtis A. Hemphill testified during an August 15, 2019, evidentiary hearing in *Long II*, one of the applications that ICE uses to retrieve data from the EID is the ENFORCE Alien Removal Module (EARM). Tr. of Hr'g of Aug. 15, 2019, 23:11–14 (attached to Third Long Decl. as Exhibit 3). ICE officials have access to person-centric views of all data stored in the EID through EARM. *Id.* at 25:10–12. EARM allows a user to enter an identifier "such as an alien number or an FBI number, or a subject ID," [and] retrieve data from the EID." *Id.* at 24:20–23. Doing so "will bring up everything that's related to that A number, or everything ever populated with it." *Id.* at 55:19–21. ICE official Hemphill's testimony directly contradicts Dr. de Castro's assertion that "when ICE officers want to see all actions related to one individual, *they must request that individual's alien file from USCIS*." De Castro Decl. ¶ 30.

Because the disappearing fields exist in the EID but the de Castro declaration discusses only the supposed difficulty of retrieving the disappearing fields from the IIDS, ICE has failed to justify its withholding of the requested records. Accordingly, ICE has not met its burden, and the

Court should enter summary judgment for plaintiffs and order ICE to produce the requested records from the EID.

III. The disappearing fields can also be produced from the IIDS by using connections that already exist.

The de Castro declaration rests on the assertion that producing the disappearing fields from the IIDS would require an analyst "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. This assertion is both irrelevant and factually incorrect. It is irrelevant because creating whatever "connections" are necessary to determine that two existing pieces of data are responsive to a request because they pertain to the same individual does not constitute the creation of, or production to the requester, of *records* that did not previously exist. And it is wrong because, in fact, the IIDS already has connections built into its structure, as explained by the Deputy Assistant Director of ICE's Law Enforcement Systems and Analysis Division, Tadgh Smith, during the evidentiary hearing in *Long v. ICE (Long III)*, No. 14-109, 2020 WL 2849904 (D.D.C. June 2, 2020), and as shown by the IIDS database schema admitted in evidence without objection by the government in that case. Pls.' Hr'g Ex. DDD (attached to Third Long Decl. as Exhibit 1).

As the Court explained in *Long III*, a database schema "includes graphical depictions of the structure of the database, which includes not only the names of tables and fields therein, but also the ways in which the tables are connected to one another. In the graphical depiction of the schema, each block represents a table, the items listed within each block represent field names with a table, and arrows between the blocks represent 'linkages' between tables within the database." *Id.* at *7 (citations omitted). The database schema for the IIDS admitted in evidence in *Long III* demonstrates that the structure of the IIDS includes connections that allow disparate fields to be linked. IIDS database schema at 37–97. Such links are activated when one queries a database,

and ICE concedes that running such queries to provide data to a FOIA requester "does not amount to the creation of a new record." Def. Mem. in Support of Summ. J. at 7–8. As explained by Dr. Clark, an expert in database design and implementation, because it is an "an integrated distributed database, the IIDS already has connections built into its structure … that allow disparate fields to be linked when one queries the database." Clark Decl. ¶ 14.

Dr. de Castro's error in asserting that production of the disappearing fields would require the creation of "new, difficult connections between data that are not connected," *id.* ¶ 67, highlights her lack of technical expertise and lack of personal knowledge regarding the specific steps required to extract the requested items from ICE's databases. For example, in her testimony in *Long II*, Dr. de Castro emphasized that she is "not a computer programmer," Tr. of Hr'g of Aug. 15, 2019, 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 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, and she has not 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.

Dr. de Castro's confusion as to whether data connections exist in the IIDS apparently stems from her lack of familiarity with the IIDS itself, as opposed to extracts from the IIDS limited to discrete enforcement events that ICE uses to produce reports for its own operational purposes. In her declaration, de Castro asserts that ICE cannot connect data points that are not contained within a single enforcement-action-specific extract from of the IIDS because "those data do not exist connected in the IIDS." de Castro Decl. ¶ 31; *see id.* ¶ 46 (asserting that producing items requested by plaintiffs requires "data connections that do not exist in the database."). Dr. de Castro is wrong. The data may not be connected in the extracts from the IIDS that ICE routinely assembles for its own reporting purposes using preset queries, but the IIDS database schema shows that such connections exist within the IIDS itself and that ICE can pull data directly from the IIDS using routine queries and without having to create new connections. Indeed, that is what ICE does when it creates "ad hoc reports based on a request from ICE senior leadership, Congress, or the President." *Id.* at ¶ 29; *see Institute for Justice v. IRS*, 941 F.3d 567, 570 (D.C. Cir. 2019) (reversing summary judgment for the government where agency sought to withhold data absent from its standard reports, including data fields furnished in response to earlier FOIA requests but not found in the agency's standard reports).

That the "disappearance" of the fields at issue is attributable to ICE's failure to query the IIDS itself in favor of pulling data fields only from discrete extracts from the IIDS is confirmed by Hemphill's testimony on behalf of ICE in *Long II*. Hemphill testified that *ICE does not query the IIDS to respond to FOIA requests*, but instead limits its searches to smaller "specific populations" that are regularly created using preset queries to pull from the IIDS the data points needed to generate standard reports. As Hemphill explained: "The IIDS is populated by what's referred to as the ETL, which is a process of copying some of the data points from the EID over

into the IIDS server and refreshing that three times weekly. … We take those data points and we run queries for specific populations weekly, and those are the populations that we use to respond to FOIA requests and to create reports." Tr. of Hr'g of Aug. 15, 2019, 12:14–23. In other words, ICE does not query the IIDS to extract and compile data requested under FOIA; rather, ICE produces responsive information only to the extent that it exists in one of the reports generated by "predefined queries" that ICE uses to meet its "regular reporting obligations." *Id.* at 39:5–13. Those reports are confined to specific "populations," meaning "a grouping of records that are like in scope, in other words, detainers, arrests, encounters, removals, and those populations contain the fields that are in the IIDS that are pulled out of the IIDS each time [ICE] run[s] one of the queries in the system." *Id.* at 43:3–8; *see id.* at 43:20 (explaining that populations are "pulled out of the IIDS"); *id.* at 44:10–13 (explaining that ICE uses populations outside of the IIDS to respond to FOIA requests); *id.* at 50:5–12 (explaining that ICE does not create queries to respond to FOIA requests but only runs preset queries). Dr. Clark confirms that "ICE's data 'populations' are merely the intermediate results of its 'predefined' queries to available data sources … [that] provide predefined views of some of the data elements in the IIDS and EID." Clark Decl. ¶ 16. "Using such predefined queries or searching the resulting populations for responsive records is not the same as using queries designed to extract and compile the specific records requested." *Id.*

Here, ICE has attempted to respond to plaintiffs' FOIA request by using the "Secure Communities removal population," rather than the IIDS itself, even though plaintiffs did not limit their requests to information in that report. *See*, *e.g.*, de Castro Decl. ¶¶ 77, 88, 89, 91, 96. The facts establish that, had ICE queried the IIDS, it would have been able to produce the 27 disappearing fields.

IV. ICE has failed to meet its burden to establish, with undisputed and sufficiently detailed evidence, that the actions required to produce each of the disappearing fields constitute the creation of new records.

ICE's statement of material facts does not set forth any factual contentions to support its argument that the steps needed to extract and compile the 27 disappearing fields amount to the creation of new records, and ICE's memorandum does not address the topic until its final page. Even then, ICE does not discuss the issue other than to state that "Defendants have provided a detailed explanation addressing the items at issue and how each item requires ICE to create new records," with a general citation to the de Castro declaration.[4] Def. Mem. in Support of Summ. J. at 22.

As explained above, the de Castro declaration does not address the steps needed to compile the disappearing fields from the EID or IIDS; rather, de Castro addresses only whether the fields can be extracted using the "Secure Communities removal population," *see*, *e.g.*, de Castro Decl. ¶¶ 77, 88, 89, 91, 96—which is irrelevant. Nevertheless, plaintiffs address below de Castro's assertions with respect to the 27 disappearing fields at issue in this case.[5]

[4] ICE devotes nearly all of its memorandum to addressing topics other than the dispositive issue of fact identified in the Court's order, such as the adequacy of its search, a discussion of the fields ICE produced, whether the requests at issue seek answers to questions rather than the production of records, and whether the requested records were reasonably described. Plaintiffs do not address those issues here. To the extent those issues have not been resolved, plaintiffs incorporate by reference the arguments set forth in their first memorandum of points and authorities in support of summary judgment, ECF No. 12.

[5] Plaintiffs note that de Castro's declaration and its Exhibit A address some matters not at issue in this case. Thus, although de Castro organized her declaration and exhibit by the numbering of the original requests, there is not a one-to-one relationship between requests and disappearing fields, because a request may have sought specific information that was not previously provided and that is not, therefore, a disappearing field at issue in this case. Third Long Decl., Ex. A, n. 1. Plaintiffs have arranged their responses to track the request numbers set forth in the first column of Exhibit A to the de Castro's declaration, which is a 13-page chart beginning on page 33 of ECF

A. ICE's assertions that disappearing fields do not exist are false.

With respect to the disappearing fields responsive to Requests No. 7, 17–20, 22–23, 26, 43, 54–55, 57, 60–65, 70–71, and 74–75, de Castro asserts that each item "does not exist in the ICE database," "has not been created in the ICE database," or does not exist in the "SC Match Removals population." To the extent these statements suggest that the requested items do not exist in the EID or IIDS, they are false. ICE routinely produced these fields month after month for many years up, *see* Mem. Op. at 9, and the information continues to exist in ICE's databases. Furthermore, ICE has confirmed to the Court that it "provided plaintiffs with a sample release of data" at issue here. Joint Status Report of April 22, 2019. When it provided the sample data set, ICE confirmed that it is able to produce data corresponding to the information in all 27 disappearing fields.[6] Third Long Decl. ¶ 4, Ex. A.

Assertions that the requested items do not exist in the "SC Match Removals population" or the "SC Match Removals population report" are irrelevant. Such reports are the product of preset queries of the IIDS, do not have the same content as the IIDS, and do not have the same structure. The EID and IIDS are integrated, relational databases with built-in links among the tables and fields. Clark Decl. ¶¶ 9–17.

No. 53-3. Because the request numbers in the first column of the chart take the place of paragraph numbers, plaintiffs do not include citations to the particular pages of the chart.

[6] Plaintiffs are not using the sample data set to establish the issue in dispute—whether producing the disappearing fields requires the creation of new records—but only to confirm that it is undisputed as a factual matter that ICE can still generate the requested records. Such use of this evidence is not barred by Federal Rule of Evidence 408, which precludes the use of evidence from settlement negotiations to prove liability, but not for other purposes. *See* Fed. R. of Evid. 408 advisory committee's note to 2006 amendment (explaining that the Rule does not protect factual information simply because it was presented in compromise negotiations); *cf.* Fed. R. of Evid. 407 (allowing admission of subsequent remedial measures to establish feasibility). Moreover, ICE has already disclosed in status reports that it provided the sample data set.

B. ICE's assertions that disappearing fields were previously created within the SC Match Removals population report are irrelevant.

With respect to the disappearing fields responsive to Requests No. 7, 17–20, 22–23, 26–27, 43, 54–55, 57, 60–65, 70–71, and 74–75, de Castro asserts that each field was created through analysis and calculations within the SC Match Removals population report, or would need to be. The assertion is irrelevant because it does not address the issue of whether the data ICE formerly provided in response to that request exists in the EID or the IIDS, and the report contains only a subset of the fields in those databases. Clark Decl. ¶ 15.

C. ICE's assertions that producing disappearing fields would require analysis and calculations are false.

With respect to the disappearing fields responsive to Requests No. 17–20, 22–23, 26–27, 43, 54–55, 57, 60–65, 70–71, and 74–75, de Castro asserts that producing the disappearing field would require ICE "to create a new record through analysis and calculations." To the extent these statements refer to searching the EID or IIDS, they are false because extracting data fields that exist in an agency's database does not constitute the creation of a new record even if the agency has to write new computer code to electronically compile the information, *Long v. CIA*, 2019 WL 4277362, at *4, and even if the "the net result of complying with the request will be a document the agency did not previously possess, *Schladetsch*, 2000 WL 33372125, at *3. DHS's regulations confirm that "[c]reating a computer program that produces specific requested fields or records contained within a well-defined database structure usually is considered business as usual" and is required under FOIA. 6 C.F.R. § 5.4(i)(2)(ii).

To the extent these statements relate to what is required if ICE limits its production to data within the SC Match Removal population report, they are irrelevant. The SC Match Removal

report does not have the same content or structure as the IIDS and EID, which are integrated, relational databases with built-in links among the tables and fields. Clark Decl. ¶¶ 9–17.

ICE's claim regarding "calculations" when date comparisons are involved appears to allege that filtering records based upon their date is not part of a standard query, but instead requires the creation of a new record through performing "calculations." But whatever "calculations" are involved in determining whether a record is responsive based upon its date do not involve creation of new records. Standard FOIA searches for paper documents, for example, commonly specify the date range for the requested records, and a manual search for such records involves "calculating" whether the date of a record is within or outside the bounds of the date range. Similarly, producing the most recent document from a paper file involves comparing the dates of the documents within the file and "calculating" which is the most recent. The need to make such determinations to respond to a request does not take the request outside FOIA because the determinations do not force the agency to create and produce records that it does not already possess. Using computer algorithms to extract and compile records in electronic databases is no different, and date comparisons thus are standard means of filtering data. Indeed, specifying applicable date ranges and other temporal filters helps to restrict the scope of production and make it more efficient and therefore less burdensome for the agency.

D. ICE's assertions that it cannot produce the disappearing fields because to do so would require the use of multiple identifiers are false.

With respect to the disappearing fields responsive to Requests No. 19, 22–23, 26–27, 43, 54–55, 57, 60–62, 64–65, 71, and 74–75, de Castro asserts that producing the disappearing field would require the evaluation of multiple identifiers because a "universal individual identifier" does not exist in the ICE database or the population reports. But such identifiers are inter-linked in the EID/IIDS so all information relating to a particular person can be readily located in any search.

Clark Decl. ¶ 18. This automatic interlinkage is what ICE used in responding to Plaintiffs' requests for case-by-case information on each individual removed through the Secure Communities program. Multiple identifiers are a strength of the IIDS/EID in that the database includes the source of the information about the individual because not all sources will necessarily agree on every item of information. There is no need for ICE to "evaluate" multiple identifiers as the database itself takes care of this automatically by interlinking the IDs. For an example, see pages 42–44 of the IIDS database schema, attached as Exhibit 1 to the Third Long Declaration. It shows four tables at page 42: "EID_PERSON_DIMENSION," "ENCOUNTER_PERSON_DIMENSION," "IDENT_PERSON _DIMENSION," and "PERSON_DIMENSION." Each table has an arrow showing that the fields in each table are interlinked through the "REMOVAL_CASE_FACT" table allowing the fields for each of these tables to be automatically brought together for the same person and linked to the specific removal case. This information is particularly valuable to researchers like plaintiffs who are concerned about the accuracy and reliability of information because demographic information and other characteristics for an individual sometimes differ by source. Third Long Decl. ¶ 16.

E. ICE's assertions that it cannot produce disappearing fields that no longer have operational context for ICE are false.

With respect to the disappearing fields responsive to Requests No. 7, 17–20, 57, 61, and 75, de Castro asserts that ICE cannot produce the disappearing fields because they are no longer used for ICE operations. FOIA, however, does not limit public access to reports that the agency chooses to compile for its own purposes. The Secure Communities program is ongoing and is a centerpiece of the current Administration's immigration enforcement efforts. *See* Second Long Decl., ECF No. 19-1, ¶¶ 6–12. Secure Community removals continue to occur and to be tracked in the EID and IIDS. In addition, plaintiffs currently submit separate FOIA requests monthly for

regularly updated match-by-match spreadsheet data on "all IDENT/IAFIS interoperability matches using fingerprint-based biometric data," and spreadsheets containing this data have been produced by ICE for time periods that overlap the period covered by this lawsuit. Third Long Decl. ¶ 24, Ex. A.

F. ICE's additional assertions pertaining to individual disappearing fields are false.

In addition to the five general claims outlined above, the de Castro declaration makes additional assertions with respect to the disappearing fields responsive to specific requests, each of which is unsupported.

1. Disappearing fields responsive to Requests 17–21 (Non-Criminal ICE Priorities)

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). The requested information exists in the IIDS and can be produced as separate items. To the extent that ICE asserts that it previously created the disappearing field called "Non-Criminal ICE Priorities" by applying a hierarchy calculation so that the individual could fall into only one of the categories, even though the individual might fit into several, nothing in plaintiffs' request requires it to do so. Rather, plaintiffs requested data on each of these categories in separate, unlinked requests. Third Long Decl., Ex. A.

2. Disappearing fields responsive to Requests 22–23 (Detainer Prepare Date)

ICE's falsely asserts that it cannot produce data concerning the dates on which detainers were prepared for persons subject to removal through the Secure Communities Program because the ICE database "is not organized to determine if a detainer has been issued for in [*sic*] individual prior to removal." In fact, ICE located such a specific detainer record, and its unique identifier

("detainer_id") was not one of the disappearing fields; it was contained in the spreadsheet ICE provided in response to the August 2016 request. Because ICE has individual-specific detainer records, and the IIDS interlinks each detainer record with the removal case for that individual, providing the information requested is straightforward. The IIDS database schema (at p. 83) further illustrates this point. The table entitled "DETAINER_DIMENSION" contains a record uniquely identified by its "DETAINER_ID" for each detainer the agency prepares. Among the fields this detainer record includes is the "PREPARE_DATE." The adjacent table entitled "REMOVAL_ CASE_DIMENSION" contains a record uniquely identified by its "REMOVAL_CASE_ID" for each removal case. Both tables are interlinked through the "DETAINER_FACT" table which includes a record for each "DETAINER ID" with any corresponding "REMOVAL_CASE_ID." Contrary to ICE's claim, the IIDS database is organized to pull all detainers related to a specific individual. The same page of the IIDS database schema shows tables identifying individuals, and the same record in the "DETAINER" fact table that includes a corresponding link to the removal case also includes the corresponding link to the records on the specific individual to whom the detainer pertained. Third Long Decl., Ex. A. Moreover, ICE concedes that the EID presents a person-centric view of the data, and that it can readily search and retrieve all detainers pertaining to a given individual. *See* Hemphill Testimony, Tr. of Hr'g of Aug. 15, 2019, 55:19–24 (attached to Third Long Decl. as Exhibit 3); Second Long Decl. ¶ 42.

3. Disappearing fields responsive to Request 26 (Detainer Facility City, Detainer Facility State)

The Court has described the process used by ICE to issue detainers based on the fingerprint record submitted by a local, state, or federal law enforcement agency that has the individual in custody. *See* Mem. Op. at 2–3. As the detainer forms indicate, the detainer is sent to the law enforcement agency facility where the individual was detained. ICE previously released the name

and unique identifier for such facilities. ICE's claim that it cannot know the city and state where the facility is located is implausible, given that this is part of the address to which the detainer was sent. Third Long Decl., Ex. A. Indeed, it is indisputable that these fields exist because they were previously provided to plaintiffs and have been provided in response to plaintiffs' monthly requests on detainers. *See* Second Long Decl. ¶ 43. Further, the IIDS schema shows ICE databases contain information about each detention facility. *See*, *e.g.*, "ADDRESS_DIMENSION" table at 42–43, 46.

4. Disappearing fields responsive to Request 27 (Detainer Threat Level)

ICE admits that "this item does exist in the ICE database." De Castro Decl., Ex. A, p. 6. Indeed, the field exists in the "DETAINER_FACT" table shown on page 83 of the IIDS database schema. ICE asserts, however, that "calculations" would be needed to "define the latest detainer prepared prior to the Removals," but such a field already exists in the database. *See* "MOST_RECENT_PRIOR_DETAINER_ID" in the "REMOVAL_CASE_FACT" table, IIDS database schema at 42. In addition, there is nothing that requires ICE to select the latest; it could simply provide the detainer threat level associated with each detainer. Third Long Decl., Ex. A. In any case, as explained above, the "calculation" involved in selecting the most recent record created before a specified event is not a calculation that results in creation of a record; rather, it is no more than an algorithm that determines which existing record is responsive to a request.

5. Disappearing fields responsive to Request 43 (Charged with Crime)

Contrary to ICE's assertion that this field "has not been created in the ICE database," the IIDS database schema indicates that a table, "PERSON_CRIMINAL_CHARGE_DIM," exists that provides specific information on each criminal charge lodged against a given individual, and

unique IDs for each person, "EID_PERSON_ID," automatically link it to the removal case. *See* IIDS database schema at 44.

6. Disappearing fields responsive to Requests 54–55 (Criminal Charge, Criminal Charge Code, Criminal Charge Date, Criminal Charge Status, Criminal Conviction Date, Criminal Conviction Sentence Days, Criminal Conviction Sentence Months, Criminal Conviction Sentence Years)

Records in the IIDS table covering criminal charges include the following fields: "CRIMINAL_CHARGE," "CRIMINAL_CHARGE_CODE," "CHARGE_DT," "CRIMINAL_CHARGE_STATUS," "CONVICTION_DT," "SENTENCE_DAYS_QTY," "SENTENCE_MONTHS_QTY," and "SENTENCE_YEARS_QTY." ICE is mistaken that plaintiffs' requests restricted these fields to only those charges that occurred "prior to the Removal with SC Matches." Because the requests are not restricted to charges that occurred before the removal, ICE's assertion that it would need to apply a date filter is not correct. Third Long Decl., Ex. A.

7. Disappearing fields responsive to Request 57 (Aggravated Felon)

ICE's assertion that individuals who were removed may not have had a detainer issued for them is not a valid reason for refusing to provide an admittedly existing field for those who did have detainers issued. In addition, ICE ignores the existing field, "AGGRAVATED_FELON_TYPE," shown on page 42 of the IIDS database schema, which contains categories clearly indicating whether or not the individual was an aggravated felon (*e.g.*, "Not an Aggravated Felon"). Third Long Decl., Ex. A. ICE asserts that it "provided 'AgFelB' at its own discretion" as a substitute. That field, however, contains "T" or "F," and its values often conflict with information on whether the individual is an aggravated felon recorded in the "Aggravated Felon" field. *Id.*

8. Disappearing fields responsive to Requests 61–62 (Case Category Time of Arrest, Latest Arrest Current Program Code, Latest Arrest Current Program)

Because a table within the IIDS contains a record for each arrest for a given individual and records the date of the arrest, contrary to ICE's claims, there is no difficulty performing a computer search identifying the arrest with the most recent date, and, again, such a search involves selection of records, not their creation. Third Long Decl., Ex. A. Alternatively, ICE could simply provide all arrests with their dates because plaintiffs could easily determine the latest arrest themselves. Second Long Decl. ¶¶ 20–21.

9. Disappearing fields responsive to Request 63 (Latest Apprehension Date)

ICE continues to claim that this field was provided, but it does not address plaintiffs' evidence that the specific information recorded in the arrest date field differs from the information formerly included in the "Latest Apprehension Date" field produced in response to requests predating the August 2016 request if one compares the two records for the same time period. *See* First Long Decl., ECF No. 12-1, ¶ 33. There are distinct fields in the IIDS, one labeled "APPREHENSION_DATE" and the other "ARREST_DATE." *See* IIDS database schema at 36, 50.

10. Disappearing fields responsive to Request 64 (Cause Arrest Current Program)

Because, as ICE concedes, the IIDS automatically records the program that the individual entering the arrest or other event was assigned, and this field is interlinked with arrest or the event in question, a search of the IIDS can readily locate this information. Third Long Decl., Ex. A. Note, for example, that even the removal case has a specific field called "CAUSE_ ENCOUNTER_PERSON_ID." IIDS database schema at 42. Contrary to ICE's claims, a computer search can readily identify the arrest with the earliest date. Alternatively, ICE could simply provide

all arrests with their dates because plaintiffs could easily determine the earliest arrest themselves. Second Long Decl. ¶¶ 20–21.

11. Disappearing fields responsive to Request 65 (Latest Apprehension Method)

The "apprehension method" is a field in each apprehension record. Because a table within the IIDS contains a record for each apprehension for a given individual and records the date and method of the apprehension, a computer search can easily identify the apprehension with the most recent date. Third Long Decl., Ex. A. Alternatively, ICE could simply provide all apprehensions with their dates because plaintiffs could easily determine the latest apprehension themselves. Second Long Decl. ¶¶ 20–21.

12. Disappearing fields responsive to Requests 66–68 (Final Order Yes No)

ICE claims that because the "Final Order Date" field was provided there was no need to provide the requested field. However, the IIDS includes not simply a date but has separate yes-no fields named "FINAL_ORDER_YES_NO" and "FINAL_ORDER_EXECUTABLE_YES_NO." IIDS database schema at 43. Because the IIDS has separate yes-no fields indicating the entry of the final removal order and its execution, and such fields are responsive to plaintiffs' requests, the fields should be provided. Third Long Decl., Ex. A.

13. Disappearing fields responsive to Requests 70–71 (Reinstated Final Order, Reinstated Final Order Date)

ICE claims that because plaintiffs can create the reinstated final order date from other information provided there is no need for ICE to provide this information. That claim is not true. When a reinstated final order occurs, the immigrant has had multiple removals, but ICE has not produced the chronology that would be required to sort out the relevant events and corresponding date(s). Fields that ICE did produce in response to the August 2016 request, "Case Category" and "Processing Disposition Code," indicate whether or not the disposition was a reinstatement of a

prior removal order, but they may conflict. When one shows a reinstatement, the other can show a different type of disposition, and vice versa. Plaintiffs cannot tell whether (i) both are correct but they refer to different events, (ii) more than one category could be applicable so that a reinstatement occurred when either or both show a reinstatement, or (iii) a true conflict in the data occurred because these fields were not reliably recorded. If there are multiple removals, one cannot assume that when the latest removal is not coded as a reinstatement, that there was not a prior reinstatement for the individual. In the sample data set, ICE provided the entire chronology of prior removals and how each one was classified, showing that ICE can produce the requested information. Third Long Decl., Ex. A.

14. Disappearing fields responsive to Requests 74–75 (Prior Removal, Most Recent Departure Date)

The IIDS contains a table with a record with information for each departure of a given individual, including the departure date. *See*, *e.g.*, IIDS database schema at 42. Thus, contrary to ICE's claims, a computer search can identify data indicating a prior removal and the most recent departure date through a simple date comparison, without creation of any new records. Third Long Decl., Ex. A. Alternatively, ICE could simply provide all departure records for an individual with their dates because plaintiffs could easily run the comparison themselves. Second Long Decl. ¶¶ 20–21.

CONCLUSION

ICE has failed to establish that extracting and compiling the disappearing fields from ICE's databases would constitute the creation of new records. Instead, as the de Castro declaration makes clear, ICE's fundamental argument is that if it has chosen to generate a menu of reports with information selected for its own purposes, it can restrict a FOIA requester to choosing among its preselected combination of data points. But FOIA is not a restaurant that limits requesters to

ordering off a combo-meal menu with no substitutions allowed. A requester is free to order a la carte if the agency possesses each item requested. ICE has not carried its burden of proving that the requests here seek data it does not have. The Court should grant plaintiffs' motion for summary judgment, deny defendant's motion for summary judgment, and order defendant to produce the disappearing fields.

Dated: June 29, 2020

Respectfully submitted,

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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' RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFFS' STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts (ECF No. 53-2).

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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: Denied. ICE did not query the IIDS to extract and compile the disappearing fields, although it is technically feasible to do so. Rather, ICE relied on extracts from the IIDS that ICE routinely assembles for its own reporting purposes using preset queries. Testimony of Curtis A. Hemphill, *Long v. ICE*, No. 17-506 (N.D.N.Y.), Tr. of Hr'g of Aug. 15, 2019, 12:14–23, 39:5–13, 43:3–8, 44:10–13, 50:5–12; Clark Decl. ¶ 16; Third Long Decl. ¶¶ 18–20.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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: Plaintiffs do not dispute this statement except to the extent it suggests that ICE cannot query the EID to produce the disappearing fields. Clark Decl. ¶¶ 11–13.

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 No. 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 No. 1. Pavlik-Keenan Decl. ¶ 7.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

41. ICE assigned tracking number 2016-ICFO-14043 to FOIA Request No. 1. Pavlik-Keenan Decl. ¶ 7.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

42. On January 5, 2016, upon receipt and review of FOIA Request No. 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

47. Upon receipt of the FOIA Request No. 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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: Denied. ICE did not query the IIDS to extract and compile the disappearing fields, although it is technically feasible to do so. Rather, ICE relied on extracts from the IIDS that ICE routinely assembles for its own reporting purposes using preset queries. Testimony of Curtis A. Hemphill, *Long v. ICE*, No. 17-506 (N.D.N.Y.), Tr. of Hr'g of Aug. 15, 2019, 12:14–23, 39:5–13, 43:3–8, 44:10–13, 50:5–12; Clark Decl. ¶ 16; Third Long Decl. ¶¶ 18–20.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

50. In a letter to Plaintiffs dated January 10, 2017, the ICE FOIA Office responded to FOIA Request No. 1 and produced one (1) responsive Excel spreadsheet. Pavlik-Keenan Decl. ¶ 8.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 No. 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 No. 2. Pavlik-Keenan Decl. ¶ 13.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

61. A POC in ERO IDU received and reviewed FOIA Request No. 2. Pavlik-Keenan Decl. ¶ 35.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new 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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

64. Upon initial receipt of FOIA Request No. 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: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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: Denied. ICE did not query the IIDS to extract and compile the disappearing fields, although it is technically feasible to do so. Rather, ICE relied on extracts from the IIDS that ICE routinely assembles for its own reporting purposes using preset queries. Testimony of Curtis A. Hemphill, *Long v. ICE*, No. 17-506 (N.D.N.Y.), Tr. of Hr'g of Aug. 15, 2019, 12:14–23, 39:5–13, 43:3–8, 44:10–13, 50:5–12; Clark Decl. ¶ 16; Third Long Decl. ¶¶ 18–20.

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 they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

67. In a letter to Plaintiffs dated January 4, 2017, the ICE FOIA Office responded to FOIA Request No. 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: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

70. In a letter to Plaintiffs dated February 14, 2017, OPLA responded to Plaintiffs' appeal. Pavlik-Keenan Decl. ¶ 7.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

72. OPLA's response to Plaintiffs' appeal also affirmed the adequacy of ICE's search for records responsive to FOIA Request No. 2. Pavlik-Keenan Decl. ¶ 17.

Response: Plaintiffs do not dispute this statement, but they deny that it is material to the only issue remaining in this case: whether querying ICE's databases to compile the requested data requires the creation of new records.

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. Due to a ninety percent increase in the overall volume and complexity of FOIA requests submitted to ERO in the past several years, ERO stopped being able to go beyond the FOIA requirements to continue creating new records or conducting analysis for Plaintiffs. Decl. Patricia J. de Castro, Ph.D. ("de Castro Decl.") ¶ 14.

Response: Denied. ICE did not create new records or conduct analysis for plaintiffs when it produced the 27 disappearing fields. Rather, ICE complied with FOIA's requirement that

it disclose all responsive and non-exempt data contained in its electronic databases. As a matter of law, querying a database to extract and compile requested information does not constitute the creation of a new record. *See*, *e.g.*, *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269–272 (D.D.C. 2012); *Long v. CIA*, No. 15-1734, 2019 WL 4277362, *4 (D.D.C. Sept. 10, 2019); *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000). As a matter of fact, producing the disappearing fields does not require ICE to create new records or conduct analysis. Clark Decl. ¶¶ 12, 19.

75. On July 29, 2016, the ERO Executive Associate Director ("EAD") indicated that ERO should cease creating records in response to FOIA requests, and ERO implemented the agency's new posture on that date. de Castro Decl. ¶ 15.

Response: Undisputed except to the extent it suggests that producing the 27 disappearing fields requires the creation of new records. The disappearing fields exist in ICE's databases and querying a database to compile requested information does not constitute the creation of a new record. *See*, *e.g.*, *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269–272 (D.D.C. 2012); *Long v. CIA*, No. 15-1734, 2019 WL 4277362, *4 (D.D.C. Sept. 10, 2019); *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000). Producing the disappearing fields does not require ICE to create new records. Clark Decl. ¶¶ 12, 19.

76. 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.

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

Response: Undisputed.

78. 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.

79. The parties completed briefing on their cross-motions for summary judgment in February 2018. *See* ECF Nos. 16-17.

Response: Undisputed.

80. In a Memorandum Opinion and Order dated September 28, 2018, the Court denied the parties' cross-motions for summary judgment. *See* ECF No. 20.

Response: Undisputed.

81. In an April 8, 2020, Order, the Court set a briefing schedule for the parties to file cross-motions for summary judgment. *See* ECF No. 52.

Response: Undisputed.

Plaintiffs' Statement of Additional Undisputed Material Facts.

82. Since 2012, plaintiffs have regularly submitted FOIA requests to ICE to obtain anonymous information from the EID about each person deported as a result of the Secure Communities Program. Mem. Op. at 1–2, ECF No. 20.

83. ICE maintains such data in the EID, from which it takes a snapshot of a subset of the data three times a week, called the IIDS. *Id.* at 3 n.4.

84. Until the August 2016 request at issue here, ICE had produced data responsive to plaintiffs' requests. *Id.* at 3.

85. Beginning with plaintiffs' August 2016 request, ICE has refused to produce 27 fields that it had previously provided to plaintiffs (the "disappearing fields"). Third Long Decl. ¶ 4.

86. ICE can produce the disappearing fields. *Id.*

87. ICE provided plaintiffs with a sample release of data and acknowledged that it can produce the disappearing fields. Joint Status Report of April 22, 2019, ECF No. 34; Third Long Decl. ¶ 4.

88. Querying a database to extract and compile requested information does not constitute the creation of new records. Clark Decl. ¶ 12.

89. The disappearing fields can be produced from the EID. Clark Decl. ¶¶ 9–13.

90. The EID is organized in a manner that allows a user to follow an individual through a series of enforcement events. Third Long Decl. ¶¶ 11–14; Decl. of Patricia J. de Castro, *American Immigration Council*, No. 18-1614, ECF No. 27-2, ¶¶ 6–8 (D.D.C. Mar. 29, 2019) (attached to Third Long Decl. as Exhibit 2); First Jones Decl., ECF No. 53-5, ¶¶ 6–8.

91. The EID captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and law enforcement investigations and operations conducted by ICE. de Castro Decl. in *American Immigration Council*, ¶ 7; First Jones Decl. ¶ 7.

92. The EID provides users with the capability to access a person-centric and/or event-centric view of the data. *Id.*

93. Users can print records containing the EID data, which are used for criminal and administrative law enforcement purposes and typically are retained in criminal investigative files, detention files, and Alien Files ("A-Files"). *Id.*

94. The EID is used as data storage throughout the immigration enforcement lifecycle from arrest to removal or release. *Id.* ¶ 8.

95. The EID can be accessed by a number of software applications," *id.* ¶ 6.

96. One of the applications that ICE uses to retrieve data from the EID is the ENFORCE Alien Removal Module (EARM). Third Long Decl. ¶ 14; Testimony of Curtis A. Hemphill in *Long v. ICE*, No. 17-506 (N.D.N.Y.), Tr. of Hr'g of Aug. 15, 2019, 23:11–14 (attached to Third Long Decl. as Exhibit 3).

97. ICE officials have access to person-centric views of all data stored in the EID through EARM. Tr. of Hr'g of Aug. 15, 2019, 25:10–12.

98. EARM allows a user to enter an identifier such as an alien number or an FBI number, or a subject ID, and retrieve data from the EID. *Id.* at 24:20–23.

99. Doing so "will bring up everything that's related to that A number, or everything ever populated with it." *Id.* at 55:19–21.

100. The disappearing fields can be produced from the IIDS. Clark Decl. ¶¶ 9–12.

101. The IIDS has connections built into its structure. *Id.* ¶ 14.

102. The IIDS database schema was admitted in evidence during the evidentiary hearing in *Long v. ICE (Long III)*, No. 14-109, 2020 WL 2849904 (D.D.C. June 2, 2020), as Pls.' Hr'g Ex. DDD. It is attached to Third Long Declaration as Exhibit 1. Third Long Decl. ¶ 6; Clark Decl. ¶ 14.

103. The IIDS database schema includes graphical depictions of the structure of the database, which includes not only the names of tables and fields therein, but also the ways in which the tables are connected to one another. In the graphical depiction of the schema, each block represents a table, the items listed within each block represent field names with a table, and arrows between the blocks represent linkages between tables within the database. *Long III*, 2020 WL 2849904 , at *7.

104. The IIDS database schema demonstrates that the structure of the IIDS includes connections that allow disparate fields to be linked. IIDS database schema at 37–97.

105. Because it is an integrated distributed database, the IIDS has connections built into its structure that allow disparate fields to be linked when one queries the database. Clark Decl. ¶ 14; Third Long Decl. ¶¶ 5–8.

106. ICE did not query the IIDS to respond to plaintiffs' August 2016 FOIA request. Third Long Decl. ¶ 18; Clark Decl. ¶ 16.

107. Dr. de Castro is not a computer programmer, is not familiar with computer programming, has no education with respect to SQL languages, and does not know what "integrated" means as used in the ICE Integrated Decision Support (IIDS) system or in the Enforcement Integrated Database (EID). Testimony of Patricia de Castro in *Long v. ICE*, No. 17-506 (N.D.N.Y.), Tr. of Hr'g of Aug. 15, 2019, 81:1–24, 86:3–7, 88:20–25.

108. Dr. de Castro does not know whether "querying a database" is the same as "searching that database for its contents," she has never queried the IIDS to respond to a FOIA request, and she has not directed other ICE employees to do so. *Id.* at *id.* at 86:17–20, 87:11–16.

109. Dr. de Castro has only a "general awareness" of how the IIDS is structured. *Id.* at 88:9–10.

110. When Dr. de Castro was shown a sample of the IIDS database schema, she 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.

111. Rather than query the IIDS to respond to plaintiffs' FOIA request, ICE pulled data from enforcement-action-specific extracts from the IIDS that ICE routinely assembles for its own reporting purposes using preset queries. Clark Decl. ¶¶ 15–17; Third Long Decl. ¶¶ 18–19.

112. The "disappearance" of the fields at issue is attributable to ICE's failure to query the IIDS itself in favor of pulling data fields only from discrete extracts from the IIDS. ICE official Hemphill testified in *Long II* that ICE does not query the IIDS to respond to FOIA requests, but instead limits its searches to smaller "specific populations" that are regularly created using preset queries to pull from the IIDS the data points needed to generate standard reports. Tr. of Hr'g of Aug. 15, 2019, 12:14–23; 39:5–13; 43:3–8; 43:20; 44:10–13; 50:5–12.

113. ICE's data populations are the results of its predefined queries that provide views of some of the data elements in the IIDS and EID. Using such predefined queries or searching the

resulting populations for responsive records is not the same as using queries designed to extract and compile the specific records requested. Clark Decl. ¶ 16.

114. Had ICE has queried the IIDS instead of attempting to respond to plaintiffs' FOIA request by of pulling data fields only from discrete extracts from the IIDS, ICE would have been able to produce the 27 disappearing fields. Clark Decl. ¶¶ 12, 15–17, 19.

115. The EID and IIDS store certain identifiers associated with individual people and those identifiers serve as links between various tables of data. Because the various identifiers are linked to one another in ICE's databases, they can be used in a query to access multiple data sources. Clark Decl. ¶ 18; Third Long Decl. ¶¶ 15–16.

116. The Secure Communities program is ongoing and is a centerpiece of the current Administration's immigration enforcement efforts. Secure Community removals continue to occur. Second Long Decl., ECF No. 19-1, ¶¶ 6–12.

117. Plaintiffs currently submit separate FOIA requests monthly for regularly updated match-by-match spreadsheet data on "all IDENT/IAFIS interoperability matches using fingerprint-based biometric data," and spreadsheets containing this data have been produced by ICE for time periods that overlap the period covered by this lawsuit. Third Long Decl. ¶ 24.

Dated: June 29, 2020

Respectfully submitted,

/s/ Michael T. Kirkpatrick

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