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)

REPLY IN SUPPORT OF PLAINTIFFS' SECOND CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The primary issue in this case is whether the steps necessary to produce 27 fields of electronically stored information that defendant Immigration and Customs Enforcement (ICE) had provided in response to previous FOIA requests from plaintiffs but refused to provide in response to plaintiffs' identical August 2016 FOIA request (the "disappearing fields") constitute the creation of new records. The FOIA request at issue seeks records involving individuals removed as a result of IDENT/IAFIS interoperability matches under the Secure Communities (SC) program. ICE concedes that it *can* produce the requested data, but ICE argues that doing so requires actions that exceed the agency's obligations under FOIA. After denying ICE's first motion for summary judgment, the Court ordered additional summary judgment briefing to give ICE a second chance to explain the nature of the efforts purportedly required to produce each of the 27 disappearing fields. *See* Mem. Op. at 10, ECF No. 20.

In its opening memorandum in support of its second motion for summary judgment, ECF No. 53-1, ICE again failed to provide such explanations and instead relied on the same factual assertions the Court already found insufficient to sustain ICE's burden. ICE's statement of material facts, ECF No. 53-2, does not mention any of the 27 disappearing fields and it is completely silent as to the steps needed to compile the requested records.

In its reply and opposition, ECF No. 60, ICE asserts for the first time that SC data is not contained in either of ICE's integrated databases and that plaintiffs' requests instead require that data be pulled from a completely different dataset that ICE never mentioned before and does not identify by name. ICE's new argument cannot support its second motion for summary judgment because ICE raises it for the first time in its reply, because it contradicts sworn statements in declarations ICE submitted with its opening memorandum, and because it cannot be reconciled

with the undisputed fact that ICE produced SC removal information in response to the parts of plaintiffs' FOIA request that are not at issue. Indeed, even the most cursory review of the Integrated Decision Support System (IIDS) database schema shows that IIDS contains SC data. Moreover, even if ICE could prove that production of the disappearing fields would necessitate that ICE use the previously unmentioned dataset to identify responsive records in IIDS, FOIA would require that it do so because that step would not amount to creation of records: The records produced would still consist entirely of existing records in IIDS.

The Court should grant plaintiffs' cross-motion for summary judgment because ICE has failed to provide any support for its position that the production of the disappearing fields requires the creation of new records. ICE's submissions fail to demonstrate a genuine dispute over any of the facts on which plaintiffs rely, and those facts establish that ICE can extract and compile the disappearing fields using routine computer programming.

ARGUMENT

I. ICE's new assertion that SC information is not contained in EID or IIDS does not demonstrate that production of the requested records would involve creation of records.

In the supplemental de Castro declaration filed in support of ICE's reply and opposition, ECF No. 60-2, ICE asserts for the first time in over three years of litigation that "there is no way, using data only from IIDS, to even identify which removals are SC Removals," *id.* ¶ 13, because "records contained in the EID and IIDS databases do not contain labels or other indicators that a certain detainer, arrest or removal was related to Secure Communities," *id.* ¶ 21. ICE asserts that "how IIDS is organized is immaterial to this case since *IIDS does not identify any persons or events as either related on unrelated to SC*." *Id.* ¶ 23 (emphasis in original); *id.* ¶ 24 (same). ICE asserts that it cannot produce the disappearing fields, or any fields relating to the SC removals, without

using "*data from a law enforcement sensitive source outside of the EID and IIDS databases*." *Id.* ¶ 20 (emphasis in original). ICE's reply and opposition rest on de Castro's new assertions:

> ICE's submissions confirm, in no uncertain terms, that SC interoperability does not exist in *any* record in relation to removals, detainers, or related matters. Since an officer cannot locate an SC Removal anywhere in front-end applications, ICE databases do "not contain" the items at issue.

Def. Reply at 13 (emphasis added). These new assertions do not create an issue of fact over whether production of the disappearing fields would require creation of new records.

A. ICE waived the argument that its databases do not contain SC information by repeatedly failing to raise it at earlier stages of this litigation.

ICE cannot rely on its assertion that the EID and IIDS do not contain SC data and that ICE cannot identify SC removals without reference to a separate, previously undisclosed, law-enforcement-sensitive dataset, because it made the assertion for the first time in its reply/opposition on the parties' *second* cross-motions for summary judgment. "It is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief." *Benton v. Laborers' Joint Training Fund*, 121 F. Supp. 3d 41, 51 (D.D.C. 2015) (cleaned up) (collecting cases). Such arguments are forfeited. *Conservation Force v. Salazar*, 916 F. Supp. 2d 15, 22 (D.D.C. 2013). A court's refusal to consider arguments made so belatedly is particularly appropriate where the new argument is, as demonstrated below, inconsistent with the party's prior position, and when the party has had multiple opportunities to present its arguments. *Benton*, 121 F. Supp. 3d at 51–53.

B. ICE's assertion that IIDS does not contain any SC removals information is contradicted by declarations it filed with its opening memorandum, its production of the non-disappearing fields, and the IIDS database schema.

The FOIA requests at issue sought 77 items about each person removed as a result of the SC program. The starting point for producing *any* responsive records had to be the identification

of individuals whose removal could be matched to the SC program. ICE produced many of the requested fields, and plaintiffs' challenge is limited to ICE's refusal to produce 27 fields provided in response to plaintiffs' January 2016 FOIA request but missing from ICE's response to plaintiffs' identical August 2016 FOIA request.

Until it filed its second reply and opposition, ICE officials consistently swore under penalty of perjury that IIDS *does* contain the information ICE has continued to provide about individuals with SC removals. *See, e.g.*, Decl. of Catrina Pavlik-Keenan, ECF No. 53-4, ¶¶ 28–36 (explaining that "ICE conducted searches of the IIDS to obtain matches of the data associated with removal cases," and the requested removal information ICE produced came from IIDS). Similarly, Marla Jones swore in her first declaration, ECF No. 53-5, that in responding to both the January and August 2016 requests, ICE pulled "all available responsive removal information as requested from IIDS," *id.* ¶¶ 15 and 36, including data points that "*existed in the IIDS database*," *id.* ¶ 20 (emphasis added) and were "responsive to the requested item based upon the Secure Communities Removals reporting," *id.* ¶ 41. The first example Jones offered of information produced in response to the January 2016 request was "state and county where SC referral that generated submission originated from." *Id.* ¶ 21; *see id.* ¶ 42 (describing same information produced in response to August 2016 request as "state and county that originated the fingerprint submission resulting in Alien IDENT Match").

If ICE's new assertion that IIDS does not contain any SC removals information were true, ICE would not have been able to produce *any* of the SC removals data that Jones swore were pulled straight from IIDS without need for the "analysis" or "calculations" that ICE contends constitutes creation of records, because *all* records responsive to the FOIA request relate to individuals identified as SC matches. But in addition to admitting that the records that were produced were

contained in IIDS, Jones, also expressly admitted that the information about SC removals that ICE continued to supply in response to the August 2016 request did "*not* require additional research, analysis, assumptions and/or calculations, or the creation of a new record." *Id.* ¶ 17 (emphasis added). ICE's belated attempt to contradict that sworn admission with its new assertion that identifying *any* SC removal requires analysis or calculations that constitute creation of a new record does not suffice to create an issue of fact.

Moreover, even when Jones asserted that data points that ICE formerly provided required analysis and calculations, she did not assert that producing the records required that ICE use data from any source outside of the EID and IIDS databases. *See id.* ¶¶ 22, 24, 43, 45. Rather, Jones explained that ICE currently provides Excel spreadsheets of records "the same or substantially similar" to those requested by plaintiffs where "the data point exists within IIDS." *Id.* ¶ 57. If it were true that IIDS does not contain SC removals information, ICE would not be able to produce such data at all without taking steps that it characterizes as creating new records.

ICE's new assertion that IIDS does not "contain labels or other indicators that a certain detainer, arrest or removal was related to Secure Communities," Suppl. De Castro Decl. ¶ 21, and that "IIDS does not identify any persons or events as either related on unrelated to SC," *id.* ¶ 23, is also belied by the IIDS database schema admitted in evidence in *Long v. ICE*, No. 14-109, 2020 WL 2849904 (D.D.C. June 2, 2020) (attached as Exhibit 1 to the Third Long Decl., ECF No. 54-1). The schema's introduction states that IIDS includes "Secure Communities (SC)" data and has among its sources "SC Interoperability Controlling Agency Identifier (CRI) Master List, and Automated Biometric Identification System (IDENT)." Schema at 1. The SC program is mentioned throughout the schema. For example, § 5.1.4 discussed SC interoperability between the IAFIS and IDENT systems; § 5.1.4.1 discusses SC sources and interoperability searches that

transmit data to IIDS; § 5.1.4.2 explains that IIDS integrates information related to each person identified as an SC match; § 5.1.4.3 describes "SC Associated Activities" including removals; and § 5.1.4.4 describes how the "SC Removal Cases Rollup Dimensional Model supports the reporting of interoperability searches and their related activities." *Id.* at 9–12. The schema's Figures 11–14 show that IIDS contains dozens of dimensions involving the SC program. *Id.* at 9–14. And many of the tables and fields displayed in the graphical depiction of the schema relate directly to the SC program. *See, e.g.*, schema pages at ECF No. 54-1 pages 114–15. Thus, ICE's assertion that IIDS "do[es] not label events as related to SC," Suppl. de Castro Decl. ¶ 23, and that "SC interoperability does not exist in any record in relation to removals, detainers, or related matters," Def. Reply at 13, is contradicted by the IIDS database schema.

C. FOIA requires the production of existing records even if the agency must cross-reference two different data sources to identify them.

ICE rests much of its argument on its claim that the requested data do not exist "in IIDS" or "in EID," which is incorrect as explained above. But even if producing the disappearing fields required ICE to match records held in two different data sets, FOIA would require that ICE do so.

For example, suppose DOJ had a set of files on all cities that received a DOJ law enforcement grant and a separate list of cities that had a DOJ investigation of a police shooting. If DOJ received a request for the file of every city that received a DOJ grant and that was also the subject of a DOJ investigation, it would have to use the list to identify and gather the responsive files but doing so would not involve the creation of new records. Such matching does not result in the creation of new data; rather, it sorts existing data based on the parameters of the request. Plaintiffs' request for the 27 disappearing fields is no different. The data already exist and are in ICE's possession and can be produced using computer codes to compile the information electronically.

In their opening memorandum, plaintiffs explained that extracting and compiling records that exist and are possessed by an agency does not constitute the creation of new records, even if the agency must engage in computer programming to do so, *Long v. CIA*, No. 15-1734, 2019 WL 4277362, *4 (D.D.C. Sept. 10, 2019), and even if the agency has to consult numerous records to compile the data and "the net result of complying with the request will be a document the agency did not previously possess," *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125, *3 (D.D.C. Apr. 4, 2000). ICE's only response is to continue to repeat its conclusory assertion that producing the disappearing fields requires analysis and calculations that constitute record creation, and to cite the D.C. Circuit's recent decision holding that where an agency did not possess the requested records in an electronic format, but would have to *manually* sort thousands of files and compile new lists, that process would entail the creation of new records rather than the disclosure of preexisting ones. Def. Reply at 12–13 (citing *Nat'l Security Counselors v. CIA*, No. 18-5047, 2020 WL 4590548, *2 (D.C. Cir. Aug. 11, 2020)). The D.C. Circuit's decision in *National Security Counselors* is easily reconciled with the decisions in *Long v. CIA* and *Schladetsch*, both of which addressed an agency's obligation to compile extant electronic data. As the court in *National Security Counselors* acknowledged, it had no occasion to consider whether sorting information in an electronic database would involve the creation of new records because the agency did not possess the requested information in an electronic format. *Id*. Here, there is no doubt that ICE can use computerized queries to sort and produce the information in electronic format: It did so before the August 2016 request and again in providing plaintiffs with a sample data release. Def. Resp. to Pls. Stmt. of Facts, ECF No. 60-1, ¶¶ 85–87.

II. ICE's assertion that it has no operational need to compile an SC Removals Report is irrelevant.

ICE claims that it no longer has an operational need for SC data, but ICE admits that it retains the information and can compile it using algorithms that continue to exist. Def. Reply at 15–16. Whether ICE needs SC information for its own purposes is irrelevant. FOIA requires that agency records be produced regardless of whether the agency has a current need to pull the requested information from its records for its own purposes.

More fundamentally, ICE continues to assert that it has no obligation to produce records that are not contained in discrete extracts of data pulled from its integrated databases using canned queries designed to create its own internal management reports. As plaintiffs explained in their opening memorandum, ICE's claimed inability to produce each of the 27 disappearing fields without creating new records is based on ICE's position that the records must be pulled from the "SC Removals Report" (also called the "SC Match Removals Population" or "SC Removals Population") that is separate from EID or IIDS. But plaintiffs never asked ICE to produce the disappearing fields from such a report, and there is no reason ICE must construct such a report as an intermediate step before producing the disappearing fields. Rather, ICE can go straight to the source and extract and compile the requested records from EID or IIDS using routine queries.

In support of its second cross-motion for summary judgment, plaintiffs submitted a declaration from Dr. Paul C. Clark, an expert in database design and implementation. ECF No. 55-2. Dr. Clark explained that the SC Removals Report does not have the same content or structure as IIDS and EID, which are integrated, relational databases with built-in links among the tables and fields, which allow a user to query the databases to extract and compile information using routine computer programming. *Id.* ¶¶ 9–17. In its reply and opposition and supporting supplemental declaration, ICE completely ignores the Clark declaration and plaintiffs' arguments

that rely on it. Because ICE failed to address these arguments, the Court may treat them as conceded. *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 34 (D.D.C. 2013).

III. Using applications and multiple identifiers is no impediment to producing the disappearing fields.

ICE makes two arguments in an attempt to avoid the impact of ICE official Curtis A. Hemphill's testimony explaining that a number of software applications, including the ENFORCE Alien Removal Module (EARM), can pull from the EID all information related to a particular individual, using any number of personal identifiers. Tr. of Hr'g of Aug. 15, 2019 (attached as Exhibit 3 to Third Long Decl., ECF No. 54-1) at 23:11–14; 24:20–23; 25:10–12; 55:19–21. Neither argument has merit.

First, ICE claims that applications like EARM can only return one record at a time and therefore cannot be used to generate the requested records. Def. Reply at 10. In fact, as explained in Dr. Clark's supplemental declaration, "once a routine is written that executes by finding all data related to one individual, it can be repeated for each additional individual in sequence on a list" using a "loop." Suppl. Clark Decl. ¶ 4. Using a loop "to extract the data to be released has the advantage of grouping together all records of ICE activity associated with the same person, even where there are multiple records of the same type associated with the same individual. ICE could use the same list of individuals that it compiled for the fields it has produced as input to the loop that will extract the data that has been requested but not yet provided." *Id.* ¶ 5.

Second, ICE notes that there is not a "single person-centric identifier across all records in the databases." Def. Reply at 11 (Suppl. De Castro Decl. ¶ 24). But whether there is a *single* person-centric identifier is not the point. Rather, it is undisputed that the EID provides users the capability of accessing person-centric data using any number of potential unique identifiers, "such as an alien number or an FBI number, or a subject ID." Tr. of Hr'g of Aug. 15, 2019, at 24:20–

23. And, as Dr. Clark explained in his first declaration, running queries to extract the requested fields does not require that only a single identifier be used because the identifiers themselves are linked to one another in the database. Clark Decl. ¶ 18. ICE provides no response.

IV. ICE's arguments regarding the adequacy of its search are inapposite because ICE admits that the requested records can be produced.

ICE concedes that it previously provided the 27 disappearing fields and that it retains the capability to do so. Def. Resp. to Pls. Stmt. of Facts, ECF No. 60-1, ¶¶ 85–86. In fact, ICE provided a sample release of the data as part of the parties' settlement efforts. *Id.* ¶ 87. Because ICE knows where the requested data reside and how to extract and compile the information electronically, plaintiffs do not challenge the reasonableness of ICE's search, as the Court has acknowledged. *See* Mem. Op. at 9 n.7. Nevertheless, ICE devotes an entire section of its reply to this nonissue. *See* Def. Reply Part II; *see id.* at 8 (characterizing plaintiff's evidence as "insufficient for [plaintiffs] to raise any challenge to the adequacy of ICE's search for responsive documents").

V. The Court should enter summary judgment for plaintiffs because ICE failed to properly dispute any of the facts on which plaintiffs rely.

As demonstrated above, Dr. de Castro's declarations fail to create a genuine issue of material fact because they contradict the government's prior admissions in this case, ignore other undisputed evidence demonstrating that the information requested can be extracted from IIDS, and rest on a legally erroneous concept of what constitutes creation of records. In addition, the facts set forth by plaintiffs in support of their second cross-motion for summary judgment may be treated as admitted and form the basis of summary judgment for plaintiffs because ICE failed to dispute any of plaintiffs' facts with citations to the record as required by Federal Rule of Civil Procedure 56(c)(1)(A) and Local Civil Rule 7(h)(1). *See* ECF No. 60-1. Indeed, ICE not only ignored the applicable procedural rules, it violated this Court's specific order mandating compliance with

Local Civil Rule 7(h) and requiring that responsive statements "include a precise citation to the portion(s) of the record upon which the party relies in fashioning the response." Order of Aug. 21, 2017, ECF No. 9, at 2. As a consequence, "the Court may assume that facts identified by the moving party in its statement of material facts are admitted." LCvR 7(h)(1); *see* Fed. R. Civ. P. 56(e) ("If a party fails to … properly address another party's assertion of fact as required by Rule 56(c), the court may: … (2) consider the fact undisputed for purposes of the motion.").

"The procedure contemplated by Local Rule 7(h) is not an empty formality. It serves a critical function by helping to crystallize for the district court the material facts and relevant portions of the record, instead of forcing the court to waste efforts sifting and sorting through the record itself." *Butt v. DOJ*, No. 19-504, 2020 WL 4436434, *3 (D.D.C. Aug. 3, 2020) (cleaned up); *see Buzzfeed, Inc. v. FBI*, No. 18-2567, 2020 WL 2219246, *3 n.2 (D.D.C. May 7, 2020) ("A party ignores at its peril the requirements of applicable procedural rules, particularly Federal Rule of Civil Procedure 56(e)(2) and LCvR 7(h)(1), which are intended to ensure clarity as to disputed issues."); *McClanahan v. DOJ*, 204 F. Supp. 3d 30, 38 n.2 (D.D.C. 2016) (deeming uncontroverted facts admitted due to party's failure to comply with Local Civil Rule 7(h)(1)).

ICE's failure to comply with Local Civil Rule 7(h)(1) in responding to plaintiffs' cross-motion for summary judgment is particularly egregious because plaintiffs noted in their opposition to ICE's motion for summary judgment that ICE had violated Local Rule 7(h)(1) by submitting a fact statement that did not address the critical issue identified in the Court's first summary judgment ruling. Pls. Opp. at 5 n.2. ICE's only response is to assert that such shortcomings should be tolerated because the Court in *Butt* tolerated such a deficiency in the court filings made by a *pro se* prisoner, and, according to ICE, the government is entitled to the same leeway. Def. Reply at 4 n.4. But the federal government is not a *pro se* litigator, and its continued failure to follow the Court's rule

governing fact statements even after its noncompliance has already been pointed out to it deprives its request for leniency of any semblance of justification.

CONCLUSION

ICE admits that it has the data necessary to produce the disappearing fields and that it did so for several years. ICE has failed to establish that extracting and compiling the requested information from its database constitutes the creation of new records. 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: August 26, 2020

Respectfully submitted,

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