IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' opening brief explained in detail that the numbered requests in plaintiffs' August 2016 Request at issue in this case reasonably describe fields and data elements that exist in ICE's Enforcement Integrated Database (EID). Pls. Mem. 22-32.[1] From 2012 through January 2017, ICE responded to substantively identical requests by providing fields and data elements directly corresponding to those identified in plaintiffs' August 2016 Request. *See id.* Plaintiffs explained in their initial brief that production of the "disappearing fields" does not require ICE to create records, but only to extract existing records from the EID, and that ICE had failed to satisfy its burden under FOIA to demonstrate the contrary. *See id.* ICE's memorandum in opposition and reply (Def. Opp.) barely addresses the points made in plaintiffs' brief. ICE's brief fails to substantiate its rhetorical assertion that plaintiffs' requests seek "abstract information"; to demonstrate that the fields and data elements corresponding to each disappearing field do not exist in the EID, even though they were routinely provided in the past; or to explain how producing any single disappearing field would require creation of records. Instead, ICE's brief is filled with conclusory pronouncements that fail to rebut plaintiffs' arguments or advance ICE's position.

Plaintiffs also demonstrated in their initial memorandum that ICE has acted in bad faith and has conceded the unlawfulness of its withholding of several of the disappearing fields. Pls. Mem. 33-40. ICE's opposition brief does not respond to these points. ICE employee Marla Jones, however, has submitted a second declaration in an effort to cure the inaccuracies and contradictions that plaintiffs demonstrated pervaded her first declaration. *See* Pls. Mem. 37-38. Jones's second

[1] Throughout this memorandum, plaintiffs use capitalized terms that were defined in their opening brief. As noted in plaintiffs' opening brief, plaintiffs refer to the EID as the relevant database that contains the requested records because ICE concedes that the ICE Integrated Decision Support System (IIDS) is a "snapshot" of the EID. Pls. Mem. 2 n.1.

declaration not only fails to explain away her previous inconsistencies, but adds to them. She now asserts in conclusory fashion that none of disappearing fields exists in the EID, although she stated exactly the opposite in her previous declarations in this case and the New York case, and her statement is inconsistent with ICE's contrary position in an earlier case from Connecticut. Jones also attempts to draw a distinction between the August 2016 Request and the request at issue in the New York case that supposedly explains her contradictory statements in the two cases, but that distinction falls apart upon scrutiny. Jones's second declaration only further illustrates ICE's shifting and contradictory explanations for its refusal to provide the disappearing fields in response to plaintiffs' requests. Ultimately, because ICE is refusing to provide records that indisputably exist in a well-structured database and that it provided for several years, plaintiffs are entitled to summary judgment, and ICE's motion for summary judgment must be denied.

ARGUMENT

I. Plaintiffs' Requests for the Disappearing Fields Seek the Extraction of Existing Records.

Under FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). "To meet its burden, the government must generally submit 'relatively detailed and non-conclusory' affidavits or declarations," *Soto v. U.S. Dep't of State*, 118 F. Supp. 3d 355, 361 (D.D.C. 2015) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)), and it must "describe 'the documents and the justifications for nondisclosure with reasonably specific detail, [and] demonstrate that the information withheld … [is] not controverted by either contrary evidence in the record nor by evidence of agency bad faith," *Shapiro v. Dep't of Justice*, 205 F. Supp. 3d 68, 72 (D.D.C. 2016) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). ICE's brief never mentions any specific requests or any of the disappearing fields. Instead, the brief is littered with pronouncements about FOIA divorced from any facts. When these

background principles are applied to the August 2016 Request, they require summary judgment for plaintiffs, not ICE.

A. Plaintiffs' requests seek and describe records that exist in the EID.

The Electronic FOIA Amendments of 1996 "expanded the definition of 'record' to include 'any information that would be an agency record … when maintained by an agency in any format, *including an electronic format*." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 269 (D.D.C. 2012) (codified at 5 U.S.C. § 552(f)(2)(A)) (emphasis added). The Amendments codified long-standing law in this Circuit that the evolution from "locating and retrieving manually-stored records" to "accessing information from computers … may not be used to circumvent the full disclosure policies of the FOIA." *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1983). Accordingly, ICE does not contest that "extracting and compiling data does not amount to the creation of a new record as to any discrete pieces of information that the agency does possess in its databases and which are sought by Plaintiffs." Def. Mem. 7 (citing *Shapiro v. HUD*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000)); *see* Pls. Mem. 20-22; *see also Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272 ("FOIA requires agencies to disclose all non-exempt data points that it retains in electronic databases."). ICE's latest brief affirms that "a search for 'data points' or 'points of data' means a search for records." Def. Opp. 4 (citing *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271). Yet ICE continues to resist the application of these basic principles to the requests at issue here. Each of its asserted reasons for doing so is unsupported.

1. Plaintiffs' requests seek records, not "abstract information."

It is undisputed that the EID is an electronic database containing fields and data points relating to investigation, arrest, booking, detention, and removal of persons in ICE investigations and operations. *See* Jones Decl. ¶¶ 6-8. The EID also includes comprehensive criminal history

information for all people arrested for administrative violations of the Immigration and Nationality Act (INA). *See id.*; Def. Statement of Material Facts (Def. Statement) ¶¶ 26-29; Plaintiffs' Response to Defendant's Statement of Material Facts (Pls. Resp.) ¶¶ 26-29. These fields and data points in the EID, and the discrete pieces of information they record, are all "records." *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271-72.

Plaintiffs' requests consist of an itemized list of concrete fields and data points from the EID about individuals removed pursuant to Secure Communities. *See, e.g.*, Second Long Decl. ¶¶ 13-14. For example, request 25 seeks, "[f]or each individual removed," the "[c]ode of the jail or facility in which the individual was detained where the [detainer] was sent." Long Decl. Ex. B. And request 26 seeks, "[f]or each individual removed," the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent." *Id.* Plaintiffs' requests for fields and data points from the EID are all requests for records. *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271-72.

Until now, ICE had conceded that plaintiffs' requests seek records, but argued that records responsive to certain requests do not exist. *See, e.g.*, Def. Mem. 3-6 (arguing ICE conducted a reasonable search for records in response to plaintiffs' request); *id.* 10-18 (arguing certain records requested did not exist in the EID); Jones Decl. ¶¶ 52-53 (arguing that for certain requests, including request 26, the data requested does not exist). For the very first time in its reply brief, ICE claims that plaintiffs' requests were "flawed at the outset" because they did not even seek records, but instead "abstract information." *See* Def. Mem. 2-3 (citing *Goldgar v. Office of Admin., Executive Office of the President*, 26 F.3d 32 (5th Cir. 1994)).

ICE, however, offers no explanation for its contention that certain requests seek "records" and others "abstract information," and the facts in this case contradict any such distinction. For

example, ICE does not explain why plaintiffs' request 26 for the EID field or fields recording the "[c]ity, county and state of the jail or facility in which the individual was detained" is a request for "abstract information," whereas request 25 for the "[c]ode of the jail or facility in which the individual was detained" is a request for records. Yet ICE provided plaintiffs with fields and data elements responsive to request 25, while fields and data elements responsive to request 26 are among the disappearing fields. Indeed, ICE provided plaintiffs with records responsive to request 26 and the other disappearing fields for years and never before indicated that plaintiffs' previous requests were not requests for records. *See* Second Long Decl. ¶¶ 15-19.

ICE's primary citation for its "abstract information" position—aside from being a *per curiam*, off-point decision from another circuit—in-fact demonstrates that plaintiffs' requests seek records. In *Goldgar*, the Court of Appeals for the Fifth Circuit explained that FOIA "obligates [an agency] to provide access to those [records] which it in fact has created and retained," but "does not obligate agencies to create or retain documents." 26 F.3d at 34 (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980)). There, a *pro se* purported telepath requested information about the government entity that he claimed had been supervising secret therapy upon him. 26 F.3d at 34. When the agency responded that it had no records responsive to the request, Goldgar sued claiming he was not seeking agency records, but only information, and that "'his fame as a telepath and as subject of this government therapeutic project is so widespread that virtually every reasonably well informed adult citizen in the United States possesses the information he seeks,' and thus, 'it is inconceivable that any officer of the federal government could lack the information." *Id.* The Fifth Circuit held that the plaintiff's concession that he did not seek records was fatal to his FOIA claim because FOIA only deals with "agency records." *Id.*

Here, by contrast, plaintiffs' requests seek information recorded in fields and data elements the agency has "retained" in the EID and that plaintiffs have received in response to past requests. Second Long Decl. ¶¶ 13-14, 18-19; *see infra* pp. 6-8. Far from "abusing and misusing the FOIA," Def. Mem. 2 (quoting *Goldgar*, 26 F.3d at 35), plaintiffs properly seek records, and ICE is obligated under FOIA to respond to the requests by providing responsive fields and data elements from the EID.

2. Plaintiffs' requests describe records that exist in the EID.

ICE has refused to identify the precise fields and data points that exist in the EID. *See* Def. Response to Pls. Resp. (Def. Resp.) ¶¶ 89-90; Pls. Resp. ¶¶ 89-90. Thus, plaintiffs cannot request fields and data points in the EID by name. *See* Def. Resp. ¶ 91; Pls. Resp. ¶ 91. Although plaintiffs could ask ICE "to hand over the contents of [the] entire database[] of information," *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272, plaintiffs' August 2016 Request, like plaintiffs' prior requests, instead describes specific fields and data elements plaintiffs seek from the EID. Pls. Mem. 22-24.

Until the events giving rise to this litigation, and in accordance with the mandate that an "agency must use some measure of 'common sense' in interpreting a FOIA request, and ambiguities in the request must be interpreted 'liberally,'" *Pinson v. U.S. Dep't of Justice*, 69 F. Supp. 3d 125, 133 (D.D.C. 2014) (citations omitted), ICE had no trouble understanding that plaintiffs' requests reasonably described the disappearing fields, Long Decl. ¶ 27.[2] Indeed, ICE

[2] Plaintiffs previously refuted ICE's claim that it was required to provide records only "[1] if the data point existed within IIDS and [2] *did not require additional analysis, calculations, assumptions, or the creation of a new record*." Pls. Mem. 22 (citing Def. Mem. 9 (emphasis added)). FOIA limits the inquiry to the first part of this purported test. *See id.* In her second declaration, Ms. Jones claims to "add to" this test, but in effect concedes that, as plaintiffs explained, the proper standard is limited to the first prong. Second Jones Decl. ¶ 7. Because, as discussed below, plaintiffs' requests seek only fields and data points that exist in the EID, "extracting and compiling [that] data does not amount to the creation of a new record." Def. Mem. 7 (citing *Schladetsch*, 2000 WL 33372125, at *3).

admits that several of plaintiffs' requests reasonably describe fields and data elements that exist in the EID. *See* Def. Resp. ¶¶ 96-99; Pls. Resp. ¶¶ 96-99. For example, ICE concedes that in response to plaintiffs' requests in their December 2015 Request for any fields or data elements from the EID containing information related to whether each individual deported was "ordered removed by court, where the order has become final (yes/no)" (request 66) and whether that individual was "[a]dministratively ordered removed, where order has become final (yes/no)" (request 68), ICE provided "one field containing data from the EID that ICE's spreadsheet labeled 'Final Order Yes No.'" Pls. Resp. ¶¶ 96-97; Def. Resp. ¶¶ 96-97. Similarly, in response to a request in the December 2015 Request for the "[c]ity, county and state of the jail or facility in which the individual was detained prior where the [detainer] was sent" (request 26), "ICE provided two fields with data from the EID, described in its Excel spreadsheet as 'Detainer Facility City' and 'Detainer Facility State.'" Pls. Resp. ¶ 99; Def. Resp. ¶ 99. However, in ICE's response to the August 2016 Request, which was issued within eight days of its response to the December 2015 Request, ICE withheld all three of these fields, along with the twenty-four other disappearing fields. *See* Long Decl. Ex. F. Because ICE's brief provides no basis for this Court to conclude that plaintiffs' requests do not reasonably describe fields and data points that exist in the EID, FOIA requires that ICE produce the disappearing fields to plaintiffs.

Although ICE's brief no longer argues that common-sense interpretations of plaintiffs' requests require "assumptions" or "interpretations" that result in creation of records, Ms. Jones has doubled down on that misguided stance. With respect to a request for the "earliest date reflecting presence in the U.S."—a request not at issue in this case—Jones asserts that although "entry date," a data field that exists in the EID, is a "reasonable substitute" for plaintiffs' request, and is a field that ICE has provided to plaintiffs in response to this request, ICE's practice of providing "entry

date" entails discretionary creation of records, and is not required under FOIA, because there is no specific data point in the EID that "measure[s] this concept of 'earliest date reflecting presence in the U.S.'" Second Jones Decl. ¶ 11. Jones is wrong. *See* Pls. Mem. 22-23. ICE has an obligation to construe plaintiffs' requests "liberally," especially when ICE refuses to provide the specific names of the fields and data elements in the EID. *Pinson*, 69 F. Supp. 3d at 133. The same is true for the requests at issue in this case, and Jones fails in her efforts to demonstrate the contrary.

B. Plaintiffs' requests do not require ICE to "reorganize its systems," and ICE's use of basic programming to extract fields and data elements that exist in the EID does not constitute the creation of records.

Under the E-FOIA Amendments, "'an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.'" *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 269-70 (quoting 5 U.S.C. § 552(a)(3)(C)). DHS's FOIA regulations provide, consistent with these amendments, that "[c]reating a computer program that produces specific requested fields or records contained within a well-defined database structure is usually considered business as usual," and is required under FOIA. 6 C.F.R. § 5.4(i)(2)(ii). In its initial memorandum, ICE conceded that "sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record because, as Congress noted in the legislative history to the E–FOIA Amendments, '[c]omputer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information.'" Def. Mem. 7 (quoting *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270 (quoting H.R. Rep. 104–795, at 22, 1996 U.S.C.C.A.N. 3448, 3465)). And in its opposition brief, ICE has again affirmed that "a requester may be entitled to an extract of information from a data system." Def. Opp. 3. ICE's

efforts to explain why these principles do not entitle plaintiffs to the records they seek here fail to carry its burden of justifying its withholding of those records.

1. Plaintiffs' requests require ICE to extract records from the EID in the same manner that they are stored there.

Records in the EID are accessible in "person-centric" views. Jones Decl. ¶¶ 6, 7. In other words, a user accessing an individual's file in the EID has access to all data points in the EID related to the investigation, arrest, booking, detention, and removal of that individual. *Id.*; Def. Statement ¶¶ 26-29; Pls. Resp. ¶¶ 26-29. ICE's Information Technology Specialist, Karolyn Miller, has explained that information is stored in the EID "in such a way that it can easily be managed, updated, and searched for specific information." Second Long Decl. ¶ 50, Ex. 5 ¶¶ 7-8. Plaintiffs' requests seek anonymized person-centric records from the EID reflecting steps in the removal process in order to replicate ICE's person-centric view of each individual removed. *See id.* ¶ 39. Thus, contrary to ICE's bald assertion, plaintiffs' requests do not require ICE to "create new methods of organizing archival data" or "reorganize its systems." Def. Opp. 3; *see id.* at 6 (citing *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272). ICE's brief unsurprisingly fails to provide even a single example from plaintiffs' requests to support that assertion. Rather, because plaintiffs seek fields and data elements that exist in the EID, *see supra* pp. 3-8; Pls. Mem. 22-33, ICE's application of basic codes and programming to retrieve this information is required under FOIA.

ICE's claim that plaintiffs' requests corresponding to the disappearing fields require ICE to "reorganize its systems" is particularly implausible when one compares the fields ICE concedes it is required to provide—and that it does not contend require it to "reorganize its systems"—with the fields being withheld. For example, in response to plaintiffs' previous requests, ICE provided fields and data elements reflecting, for each individual removed, information about the most serious criminal conviction, including the date, the charge, and the sentence, as well as the same

types of information about every other criminal conviction. *See* Long Decl. Ex. F; Second Long Decl. ¶ 52. However, with respect to the August 2016 Request, ICE provided only the information about the most serious criminal conviction and withheld fields reflecting the same types of information about every other criminal conviction. *See* Long Decl. Ex. F; Second Long Decl. ¶ 52. Similarly, in response to plaintiffs' previous requests, ICE provided fields and data elements reflecting, for each individual removed, the detainer detention facility, facility code, facility city, and facility state where individuals were detained. *See* Long Decl. Ex. F. However, with respect to the August 2016 Request, ICE provided only the information about the detainer detention facility and facility code, and withheld data elements reflecting the detainer facility city and state. *See* Long Decl. Ex. F; Second Long Decl. ¶ 51.

In light of ICE's implicit concession that the extraction of records from the EID about the most serious criminal convictions, detainer detention facility, and detention facility code do not require the "reorganization" of the EID, there is no apparent reason why the extraction of records from the EID about the rest of removed individuals' criminal convictions or the city and state of the detainer facility do require such a reorganization, and ICE has failed to supply any basis for believing that such a distinction exists. Indeed, because all of the detainer-related fields and data elements appear to have their origin in the same detainer form, there is no reason why providing the additional information from that form should pose a different challenge to ICE. Second Long Decl. ¶ 51, Ex. 4. Although plaintiffs' requests may require "the application of codes or some form of programming to retrieve the information" from the EID, ICE is obligated to take those steps because the requests seek the "contents of the database." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270.

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

Plaintiffs previously explained in step-by-step detail that ICE's processes of extracting fields or data elements that exist in the EID do not create records. Pls. Mem. 26-29. In her second declaration, Jones reiterates the very same multi-step processes—formerly featured in ICE's brief but now unmentioned—that plaintiffs showed to be nothing more than elaborate window-dressing for a description of extraction of existing records. *See* Second Jones Decl. ¶¶ 17, 19 (discussing requests 74 and 55); Pls. Mem. 26-29 (explaining why requests 74 and 55 do not require creation of records).[3] Jones adds one new "example" (request 75), but it is substantively identical to request 74, and only supports plaintiffs' position that these requests seek extraction of records in the EID, not creation of records.

Request 75 seeks, for each individual removed, the fields or data elements in the EID reflecting the "date of latest prior removal." Long Decl. Ex. B. In the past, ICE provided two EID fields labeled "Prior Removal" and "Most Recent Prior Depart Date." *See* Long Decl. Ex. F. Jones now claims that although ICE provided these fields in response to the December 2015 Request, ICE was not required to do so because ICE must take three different "steps" to extract the data from the EID:

> (1) Build a new data model concept to comprehensively identify an "alien" record and all reported removal history recorded for the "alien" record in the system through several different conditions in 3 separate derived queries;
> (2) Build calculated items and requirements to "flag" a prior removal in the assumed alien's history as logged within the ICE database;

[3] Despite plaintiffs' prior correction, *see* Pls. Mem. 28 n.22, Jones again incorrectly cites to request 18 instead of request 74, Second Jones Decl. ¶ 17. Request 18 sought the fields or data elements in the EID related to whether an individual had a "prior removal *or return* (yes/no). *See* Long Decl. Exs. B, C (emphasis added). Request 74 sought the fields or data elements in the EID related to whether an individual had a "prior removal (yes/no)." *See id.*

> (3) Create calculated items to pull the "latest" date of prior removal comparative to the reported record and rename "latest" creating a new record for a data point that did not exist in the EID.

Second Jones Decl. ¶ 19. Nowhere in this description is there any indication that the requested information is not recorded within a field or data element in the EID, let alone that the two fields of information previously provided in response to this request do not exist. Indeed, this description implicitly acknowledges that the database contains the discrete pieces of information responsive to request 75, and that responding to the request involves only "identifying," "flagging," and "pulling" data that exists in the EID.[4] And as ICE concedes, "extracting and compiling data does not amount to the creation of a new record as to any discrete pieces of information that the agency does possess in its databases." Def. Mem. 7 (citing *Schladetsch*, 2000 WL 33372125, at *3).

To the extent Jones is claiming that plaintiffs' request required her to "rename" the fields or data elements in the EID that are the "latest" of the prior removal dates, and that this turned the extraction of records into the creation of records, she is wrong as a matter of fact and law. Factually, plaintiffs have not received any fields from the EID renamed "latest prior removal," but received fields labeled "Prior Removal" and "Most Recent Prior Depart Date." *See* Long Decl. Ex. F. Plaintiffs are not asking ICE to "rename" a field, and certainly not to reorganize their database with a field limited to the most recent removal. They are just asking ICE *not* to provide all the other removal records for a person. And legally, ICE cannot circumvent FOIA by choosing to rename fields because it refuses to release the fields' real names and simultaneously claiming that the renaming of those fields amounts to the creation of records.

[4] ICE's claimed need to "identify" the "aliens" is particularly absurd because all of plaintiffs' requests seek information about individuals removed pursuant to Secure Communities, all of whom are "aliens." Thus, the first "step" would apply to all of plaintiffs' requests.

3. ICE's claim that the burden involved in the extraction of the requested records amounts to creation of records is legally and factually inaccurate.

As plaintiffs noted in their opening brief, ICE did not argue in its motion for summary judgment that extracting any of the disappearing fields from the EID would go beyond "business as usual," require "special services," 6 C.F.R. § 5.4(i)(2)(ii), or "significantly interfere with the operation of the agency's automated information system," 5 U.S.C. § 552(a)(3)(C). *See* Pls. Mem. 26 n.21. Moreover, plaintiffs do not seek a real-time "data link," *see* Def. Opp. 3, and ICE has never before indicated that it construed their requests as seeking one. Second Long Decl. ¶ 34.

In any event, these new arguments do nothing to advance ICE's position. Any small burden associated with extracting existing records from the EID does not transform the extraction of the records into the creation of records. *Cf. Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272 (noting that requesters may seek "reams of data underlying" a database, or even "the contents of entire databases," although such a request would impose a production burden on the agency). Further, because plaintiffs' requests are substantively identical, the computer program used to extract the fields and data elements can be rerun for subsequent requests to produce updated responsive extracts; no new programming is necessary and no additional burden is imposed. Second Long Decl. ¶ 33.

Jones's claims that plaintiffs' requests are burdensome are facially implausible. Jones claims that the average time to respond to one of plaintiffs' FOIA requests in FY2016-2017 was 14 employee hours, but then speculates that a response including the disappearing fields might require 50 hours. *See* Second Jones Decl. ¶ 23. However, ICE provided the disappearing fields in response to many requests throughout FY 2016 up until January 2017—the second quarter of FY 2017—and each of those responses, per Jones, took only 14 employee hours on average. Second

Long Decl. ¶¶ 30-32. And Jones does not claim that, since ICE ceased providing the disappearing fields, the time to process plaintiffs' requests has been reduced. *Id.*

C. Plaintiffs' requests do not require ICE to "answer questions."

As plaintiffs previously explained, many fields and data elements in the EID indicate the existence or nonexistence of events or states of fact, and when ICE has provided those fields and data elements in the past, ICE frequently labeled them "Yes No." *See* Pls. Mem. 30-32 (citing Jones Decl. ¶ 43 (admitting there is a field or data element in the EID "Detention Involved Yes No"); Long Decl. Exs. N & O (ICE spreadsheets of data that it admitted exist in the EID, thirty-five of which are maintained in the same "Yes No" format)). Similarly, in an earlier FOIA case, *American Immigration Council v. Department of Homeland Security*, No. 3:12-cv-00355-WWE (D. Conn.) (the Connecticut Case), as part of a 2013 settlement, ICE agreed to produce records included in over a hundred separate IIDS fields, including seven "Yes No" fields. Second Long Decl. ¶ 37, Ex. 3. ICE now concedes that fields and data elements in the EID are sometimes used to record which checkbox was checked on an official ICE form giving the reason(s) for an enforcement action, or to record a particular category it used for management reporting purposes, and it is undisputed that the data in these fields may be recorded in the EID with "yes"/"no" or "T"/"F" (for true or false) entries, or in entries where yes is indicated by a specific code (such as a "1," a "Y," or a "Yes"), while the absence of any entry would signify a no. *See* Pls. Resp. ¶¶ 112-13; Def. Resp. ¶¶ 112-13.[5]

[5] ICE's response to paragraph 113 fails to include any reference to the portion of the record upon which ICE relies to dispute plaintiffs' statement. It is therefore properly deemed an admission. *See* Order, ECF No. 9, at II(B); LCvR 7(h)(1); *see Telesford v. Maryland Provo-I Med. Servs., P.C.*, 204 F. Supp. 3d 120, 124 (D.D.C. 2016); *Fudali v. Pivotal Corp.*, No. CIV.A. 03-1460(EGS), 2005 WL 607880, at *2 (D.D.C. Mar. 16, 2005).

Only six of the 27 disappearing fields correspond to requests in which plaintiffs' description of the fields and data elements sought use the phrase "Yes No." Second Long Decl. ¶ 53.[6] ICE does not contest that, as plaintiffs previously explained, the requests that use the "yes/no" formulation have been understood by ICE to reasonably describe records in the EID that were maintained in that "Yes No" format or where the presence of information in the field was equivalent to a yes. *See* Pls. Mem. 30-32. These requests use a "Yes No" formulation *only because* ICE previously provided fields and data elements from the EID using the "Yes No" construction, and plaintiffs were reasonably describing the same fields and data elements that ICE had provided in the past. *See id.*; *see also* Long Decl. ¶¶ 22-23.

In her second declaration, Jones claims, without explanation, that the contested requests "pose questions." Second Jones Decl. ¶ 9. That claim effectively concedes that ICE is attempting to circumvent its obligations under FOIA by claiming that plaintiffs who request information maintained by the agency in "Yes No" or similar fields and data elements are necessarily seeking answers to questions and thus requiring the "creation of new records." *See id*. ¶ 9 ("ICE considers providing yes/no responses in place of empty data sets to be questions requiring the creation of new records").[7] Plaintiffs, however, have never sought answers to questions; rather, plaintiffs reacted to the form in which ICE provided fields and data elements in its prior responses by

[6] These six disappearing fields are: Non-Criminal ICE Priorities, Charged with Crime, Aggravated Felon, Final Order Yes No, Reinstated Final Order, and Prior Removal. Second Long Decl. ¶ 53.

[7] ICE's claim to be "renaming" fields and data elements is highly suspect in light of the records plaintiffs have previously received that indicate that ICE did not replace fields and data elements from the EID with "yes" and "no." For example, for the disappearing field "Final Order Yes No," the records provided in the field in response to plaintiffs' December 2015 request contained a total of 1,639 entries with the value of "NO" recorded, 71,698 entries with the value of "YES" recorded, and 316,002 entries that were blank. Second Long Decl. ¶ 55. The distribution of "YES," "NO" and blank entries in this field is inconsistent with ICE's claim that it created a field with yes/no entries that had not previously existed. *Id.*

mimicking those fields and data elements in their requests. Long Decl. ¶¶ 22-23. Plaintiffs' requests seek records in whatever coding form is used in the EID, so long as ICE extracts the records plaintiffs have described from the EID in response to plaintiffs' requests. *See id*.; Second Long Decl. ¶¶ 54-55.

At bottom, it is apparent that ICE's objection is to providing the records, and not to the form of the requests. After receiving the response to the August 2016 request at issue in this case, plaintiffs reworded their requests to avoid the "yes/no" language on which ICE bases its assertion that plaintiffs seek answers to questions. Second Long Decl. ¶ 20. ICE's response was unchanged. *See id.*; Long Decl. Exs. I, J. Ultimately, because plaintiffs' requests can be and *have been* reasonably construed by ICE to seek the fields or data elements indicating the existence or nonexistence of events or facts, and not answers to questions, ICE is required to extract these fields and data elements from the EID. *See Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270-72.

D. ICE still fails to provide detailed and non-conclusory justifications for withholding the disappearing fields.

Plaintiffs explained in their opening brief that ICE has failed to meet its burden to demonstrate that the requests corresponding to the disappearing fields require the creation of records because ICE's opening memorandum addressed only one request raised in the Complaint—request 22—and ICE's arguments with respect to that single request were controverted by contrary evidence in the record. Pls. Mem. 33-37. ICE's memorandum in opposition lowers the bar yet further, as it fails to address even a single request raised in the Complaint, explain why any of the requests require the creation of records, or rebut any of plaintiffs' arguments.

Both Jones declarations are similarly lacking in detail with respect to the disappearing fields. Plaintiffs explained that the summary lists in the first Jones declaration were not "reasonably

detailed" and fail to satisfy the agency's burden under FOIA. Pls. Mem. 26-29, 34. In her second declaration, Jones makes a token effort to satisfy ICE's burden but falls short. Jones provides cursory explanations for six of the requests that are at issue in this case, five of which are identical to explanations that plaintiffs previously rebutted in their opening brief. *Compare* Second Jones Decl. ¶¶ 9, 17, 19 (requests 22, 55, 57, 70, 74, and 75), *with* Pls. Mem. 26-29, 32, 35 (explaining why requests 22, 55, 57, 70, and 74, did not require the creation of records). The only new explanation Jones offers is for request 75, which as explained above does not require the "creation of records," but only the extraction of existing records from the EID. *See supra* pp. 11-12.

For the great majority of the requests at issue, Jones again provides a summary list of requests that she claims in conclusory fashion seek fields that "do not exist" in the EID for the same reasons. *See* Second Jones Decl. ¶ 14. Because ICE has neither submitted "relatively detailed and non-conclusory" declarations, *Soto*, 118 F. Supp. 3d at 361 (internal quotation marks and citation omitted), nor "described … the justifications for nondisclosure with reasonably specific detail," *Shapiro*, 205 F. Supp. 3d at 72 (internal quotation marks and citation omitted), ICE has failed to meet its burden to demonstrate that the disappearing fields require the creation of records.

II. Jones's Shifting and Contradictory Declarations Demonstrate the Agency's Bad Faith in Responding to the August 2016 Request.

In their opening memorandum plaintiffs rebutted the presumption of good faith that normally would attach to ICE's response to plaintiffs' FOIA request, through "'specific facts' [showing] … that there is a genuine issue with respect to whether the agency has improperly withheld extant agency records." *Span v. U.S. Dep't of Justice*, 696 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)). Plaintiffs pointed to "contradictory evidence in the record" to demonstrate that ICE acted improperly, *Island Film, S.A. v. Dep't of the Treasury*, 869 F. Supp. 2d 123, 132 (D.D.C. 2012) (quoting *Williams v. FBI*,

69 F.3d 1155, 1159 (D.C. Cir. 1995)), namely Jones's shifting and contradictory explanations related to identical requests in the December 2015 Request, the August 2016 Request, and the New York case. *See* Pls. Mem. 37-39. ICE's brief relegates any mention of these inconsistencies to a single conclusory sentence. *See* Def. Opp. 9. Jones's second declaration, though attempting to rehabilitate her first, fails even to address many of the contradictions previously pointed out by plaintiffs, and the inadequate explanations it offers for those it does address only further demonstrate the agency's bad faith.

A. Jones's declarations have pervasive shifting and contradictory statements.

Jones's second declaration does not attempt to rebut significant contradictions and discrepancies identified in plaintiffs' opening memorandum.

- **Contradictions from December 2015 to August 2016:** Plaintiffs explained that for the three disappearing fields corresponding to requests 60, 64, and 66, Jones reached opposite conclusions in response to the December 2015 and August 2016 Requests. Pls. Mem. 15-16, 38.

- **Shifts from December 2015 to August 2016:** Plaintiffs explained that Jones changed her rationale for why identical requests 17, 18, 19, 60, 63, 64, 66, 68, and 71 required the creation of records in the December 2015 Request and August 2016 Requests. Pls. Mem. 15-16, 38 (*comparing* Jones Decl. ¶¶ 21-30, *with* Jones Decl. ¶¶ 50-55).

- **Shifts from August 2016 to New York Case:** Plaintiffs explained that Jones changed her rationale for why requests 17, 18, 20, and 74 in the August 2016 Request and the identical requests in the New York case required the creation of records. Pls. Mem. 38 (*comparing* Jones Decl. ¶¶ 50-55, *with* Long Decl. Ex. M (Jones NY Decl. ¶¶ 27, 40)).

- **Contradiction about Citizen Spouse:** Jones's declaration also stated that with respect to a request seeking "citizen spouse (yes/no)," "there was no data set in any ICE system where ICE records the existence of a spouse." Pls. Mem. 38 n.28 (citing Jones Decl. ¶ 50). Plaintiffs explained that in another case, plaintiffs have received a field from the EID that includes information about spouses. *See id.* (citing Long Decl. Ex. Q). Although the request does not relate to the specific requests and fields at issue in this case, it further undermines Jones's credibility.

Neither ICE's brief nor Jones's second declaration mentions these requests or attempts to explain the contradictions.

Further, to the extent Jones is asserting that "data elements" responsive to plaintiffs' requests literally do not "exist in the EID," Second Jones Decl. ¶ 14, her claim is shocking. It is contradicted not only by ICE's production of the disappearing fields to plaintiffs for years in response to plaintiffs' substantively identical requests, *see* Long Decl. Ex. F, but also by ICE production of many of the disappearing fields in the New York case, *see* Long Decl. ¶¶ 49-52, Exs. N, O, as well as ICE's production of a dozen fields in the Connecticut case—including "Criminal Charge Code" and "Final Order Yes No"—whose labels are strikingly similar to the labels for the disappearing fields (and thus presumably recorded in the same place within the IIDS), *see* Second Long Decl. ¶¶ 35-36.

B. Jones's attempt to harmonize the contradictions that plaintiffs exposed in their opening brief does not bear scrutiny.

Plaintiffs previously explained that Jones's contradictory explanations for ICE's responses in the New York case are impossible to reconcile with the explanations she provided in this case. Pls. Mem. 16, 37-40. In her second declaration, Jones claims that these contradictions are actually consistent because the requests deal with "different sets of data from two separate population types," Second Jones Decl. ¶ 28: The New York case involved requests for information from the EID about persons subject to immigration detainers, whereas this case involves requests for information from the EID with respect to persons who were removed following immigration detainers issued because of fingerprint matches under Secure Communities. *See* Second Jones Decl. ¶¶ 25-30. Jones's explanation makes no sense because while it is true that the requests have a different focus, it is inaccurate that requests relating to detainers and removals seek records regarding separate "population types." Detainers and removals are not people, but enforcement

actions. Each action may have separate forms and specific recorded information, but the EID is set up to centralize the data and allow the agency to follow an *individual* through the entire enforcement process. Def. Statement ¶¶ 26-29; Pls. Resp. ¶¶ 26-29; Jones Decl. ¶ 7; Second Long Decl. ¶¶ 38-41. Fields containing information maintained in the database about a person who has been subject to a detainer do not disappear when the person is also removed, though additional information may be added to records about that person to reflect the additional processes to which he or she has been subject. *See* Second Long Decl. ¶¶ 38-41.

Plaintiffs' request sought fields and data elements from the EID about individuals who were removed pursuant to *immigration detainers* issued to local law enforcement agencies because of fingerprint matches carried out under Secure Communities from fiscal year 2015 through August 2016. Long Decl. Ex. B. In the New York case, plaintiffs' request sought fields and data elements from the EID related to *each immigration detainer* that ICE issued for fiscal year 2015 through November 2016. *See id*. Ex. K. The two requests involve some overlap: for fiscal year 2015 through August 2016, any fields or data elements in the EID related to an immigration detainer that was issued because of fingerprint matches carried out under Secure Communities are potentially responsive to *both* requests.

Nonetheless, Jones now claims that the four detainer-related fields corresponding to requests 22, 23, 26, and 27, "exist with respect to Detainers because they are specific values entered by the officer at the time of the detainer form being prepared and related specifically to preparing the detainer, and not as they relate to Removals because ICE may never actually assume custody of the alien who is the subject of the detainer." Second Jones Decl. ¶ 26. Jones's response makes no sense because if ICE does not "actually assume custody" of the noncitizen, then that noncitizen was not removed through the Secure Communities program, and the fields and data elements

related to the immigration detainer would plainly not be *responsive* to plaintiffs' request. Jones's explanation says nothing at all about those fields and data elements related to the individuals over whom ICE *did* assume custody pursuant to an immigration detainer issued because of a fingerprint match carried out under Secure Communities. For those individuals—the only individuals relevant to plaintiffs' request—the contradiction in Jones's explanations between this case and the New York case remains striking.[8]

Moreover, ICE's provision of several detainer-related fields from the EID in response to plaintiffs' requests *in this case*, such as the "Detainer Detention Facility Code," makes it implausible that other detainer-related fields would not exist. *See* Second Long Decl. ¶¶ 42-45. With respect to request 26, in particular, Jones's claims are even contradicted by ICE's own simultaneous admission in its Response to Plaintiffs' Statement of Material Facts that in response to the identical request in the December 2015 Request, ICE "provided two fields with data *from the EID*, described in its Excel spreadsheet as 'Detainer Facility City' and 'Detainer Facility State.'" Pls. Resp. ¶ 99 (emphasis added); Def. Resp. ¶¶ 99. And in the Connecticut case, ICE listed "Detention Facility," "Prepare Date," "Detention Facility Type," "Detention Location," "Detention Facility Code," and "Detainer COL" among the "List of IIDS Fields." *See* Second Long Decl. Ex. 3.

Similarly, plaintiffs explained that Jones's assertions that fields and data elements

[8] Jones also claims that "there is no data value in [the EID] to identify if a removal is a *result* of a detainer form being prepared operationally." Jones Decl. ¶ 26 (emphasis added). That assertion is irrelevant because plaintiffs seek records related to detainers issued for individuals before their removal, *not* whether individuals were removed *because* of detainers. Second Long Decl. ¶ 46; *see also* Long Decl. Ex. B (listing requests). No causal relationship is required or implied in the request. *See* Second Long Decl. ¶ 46. Jones avoids saying that ICE does not have that data in the EID, and based on ICE's provision of fields and data elements for the past several years about removals pursuant to detainers issued because of fingerprint matches carried out under Secure Communities, such a claim, if made, would be highly implausible. Indeed, if true, it would mean that ICE could never have provided any data at all.

responsive to certain requests in the New York case did not exist in the EID are in conflict with her declaration in this case dealing with four corresponding requests that the fields and data elements do exist in the EID. Pls. Mem. 15-18, 37. Jones now claims that "these fields cannot be reported for the Detainers population because there is no data field in the [EID] that exists in relation to 'most serious criminal conviction' *at the time of the detainer prepared*." Jones Decl. ¶ 27 (emphasis added). This distinction is not relevant because plaintiffs do not seek the fields and data elements from the EID *at the time the immigration detainer was prepared* in the New York case. Plaintiffs' requests seek fields and data elements in the EID at the time the search of the EID was conducted, and here both searches were conducted around eight days apart and included overlapping date ranges. *See* Second Long Decl. ¶¶ 44-45.

Jones's attempt to harmonize her shifting and contradictory explanations for request 57 fares no better. Request 57 seeks the EID field or data elements with information about whether a removed individual was an "aggravated felon (yes/no)." This field appears to reflect a specific checkbox on the detainer form that asks an officer to indicate whether the individual sought to be detained "has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction." *See* Second Long Decl. ¶ 48, Ex. 4. Plaintiffs previously explained the myriad contradictions in Jones's response:

3 Different Responses to Request for "Aggravated Felon (yes/no)"		
Response to December 2015 Request	**Response to August 2016 Request**	**Response to New York Request**
The field or data element "does not exist" in the EID and "required ICE to create a new record to satisfy the question or implied question." Jones Decl. ¶¶ 22-23.	The field or data element "does not exist" in the EID and "require[d] ICE to make interpretations and assumptions before building a new record based off of additional analysis and calculations." Jones Decl. ¶¶ 52-53.	Jones claimed that the field or data element "asks a question or is an implied question that does not exist" in the EID and "would lead to the creation of a new record," *See* Long Decl. Ex. M (Jones NY Decl. ¶¶ 24-25).

Pls. Mem. 18, 37-38. Those discrepancies might have been forgiven had not ICE itself contradicted Jones's assertion in the New York case that the field or data does not exist *by providing it in that case*. *See* Long Decl. ¶¶ 50-51, Exs. L at 7 n.2; *id.* Exs. N and O (exhibits provided in the New York case of fields containing data elements in the EID including "Aggravated Felony Yes No"); *see* Pls. Mem. 36-37; Second Long Decl. ¶¶ 47-48. Jones's only response is to claim that because the New York case and this case involve requests for "data on two different sets of populations (detainers versus removals)," her responses were consistent. Jones Decl. ¶ 30. As explained above, that explanation is nonsensical.

These pervasive inaccuracies and contradictions raise substantial doubts about the agency's good faith in responding to plaintiffs' August 2016 Request, or at the very least, raise questions about the reliability of either Jones declaration. ICE's bad faith is also reflected in subsequent developments in response to FOIA requests plaintiffs have submitted since the litigation began. In response to ICE's claim that plaintiffs' requests require calculations or analysis, plaintiffs now note in their requests that if ICE believes that calculations or analysis are required to provide the underlying data elements, ICE should instead provide the records that would be the bases for the calculations or analyses to plaintiffs. *See* Long Decl. ¶ 44. The revised request has been submitted each month starting with in February 2017, but ICE has continued to claim that these requests require the creation of records. *See id.* ¶¶ 44-45. Thus, far from "repeatedly asking] prohibited interrogatories" or "refus[ing] to ask for the only thing that FOIA authorizes," Def. Mem. 7, plaintiffs have reached out to ICE and have sought to work cooperatively, Long Decl. Ex. I; *see also* Second Long Decl. ¶¶ 20-29. Unfortunately, ICE has consistently rebuffed plaintiffs' efforts to work together. Second Long Decl. ¶¶ 20-29.

III. ICE Has Not Contested the Unlawfulness of Its Withholding of Several of the Disappearing Fields.

ICE's opposition brief continues in the pattern of ICE's opening brief by providing no justification for its failure to produce records responsive to requests 7, 22, 23, 26, 27, 57, 60, 63, 64, 66, and 71. In response to request 7, plaintiffs previously received the field "Non-Criminal ICE Priorities" from the EID. *See* Long Decl. Ex. F, Pls. Mem. 9; Second Long Decl. ¶ 58. ICE's brief is silent, but Jones continues to claim without any basis that no field in the EID contains data elements responsive to request 7. *See* Second Jones Decl. ¶ 15; Jones Decl. ¶¶ 54-55. Jones also continues to claim, incorrectly, that ICE provided records in response to requests 63 (date of latest arrest) and 71 (date of latest reinstatement of prior removal order). *See* Second Jones Decl. ¶ 15. With respect to request 71, ICE has not responded to plaintiffs' contention that the data provided by ICE in response to request 71 does not provide the responsive information ICE earlier provided with respect to this same request. Pls. Mem. 10 (citing Long Decl. ¶ 34); Second Long Decl. ¶ 62.

With respect to request 63, plaintiffs explained in their opening brief that although plaintiffs did receive a field labeled "Arrest Date," plaintiffs' comparison of the "Arrest Date" field with the "Latest Apprehension Date" field ICE previously provided has led plaintiffs to conclude that the two are not coextensive. Pls. Mem. 10; Long Decl. ¶ 33; Second Long Decl. ¶ 60. ICE has not only failed to respond to this argument, but Jones's claim in the New York case bolsters plaintiffs' position. In her second declaration filed in the New York case, Jones claims that in response to plaintiffs' requests in the D.C. case (*this case*), "ICE provides the 'latest arrest date' for the removal case which is a relationship calculated in IIDS and does not require further interpretation, research or analysis…." Second Long Decl. Ex. 6 ¶ 26. Because ICE has acknowledged that a data element providing the "latest arrest date" exists in the EID, plaintiffs are at a minimum entitled to the "latest" date.

Furthermore, plaintiffs explained in their initial memorandum that at a minimum, plaintiffs are entitled to all fields and data elements ICE has admitted in this case and the New York case fall within what ICE calls "Category 1"—fields and data elements that exist within the EID, are responsive to plaintiffs' requests, and that can be provided to plaintiffs without any "additional research, data interpretation, analyses, calculations, assumptions, or other data manipulations." Def. Mem. 9. ICE admitted either in this case or the New York case that plaintiffs are entitled to all fields and data elements ICE has designated as being in Category 1, including the fields and data elements responsive to requests 22, 23, 26, 27, 57, 60, 64, and 66. *See* Pls. Mem. 39-40.

In its opposition brief, ICE has not contested (or even mentioned) any of these fields. In her second declaration, Jones only objects to plaintiffs' argument with respect to the requests in the New York case, effectively conceding that the three disappearing fields listed as Category 1 for the December 2015 Request (requests 60, 64, and 66) were unlawfully withheld. *See* Jones Decl. ¶ 28. Moreover, Jones's argument with respect to the requests in the New York case for fields and data elements related to detainers (22, 23, 26, and 27) is not persuasive. As explained above, Jones has provided no sensible account for why field and data elements in the EID related to individuals subject to immigration detainers would be in Category 1 in the New York case and yet *not exist* in this case. *See supra* pp. 19-23.

CONCLUSION

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

Dated: March 23, 2018

Respectfully submitted,

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