UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG, *et. al.*, Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, Defendants.	)	Civil Action No. 1:14-cv-109 (APM)

PLAINTIFFS' INITIAL BRIEF IN RESPONSE TO THIS COURT'S ORDER DATED AUGUST 14, 2020

Scott L. Nelson
DC Bar No. 413548
Michael T. Kirkpatrick
DC Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

September 9, 2020

INTRODUCTION

Still at issue in this case are plaintiffs' Freedom of Information Act requests for records listing table names, field names, and codes used in two databases maintained by defendant Immigration and Customs Enforcement (ICE): the Enforcement Integrated Database (EID) and Integrated Decision Support Database (IIDS). After an evidentiary hearing to resolve disputed facts, this Court ruled that ICE has not shown that it has produced all reasonably segregable, nonexempt records responsive to those requests. ICE now refuses to conduct a segregability review of the records most directly responsive—namely the records in the databases that list table and field names ("data dictionaries") and that define codes used to record data ("code lookup tables"). This Court should clarify that its rulings require segregability review of those records and reject ICE's request that it be completely excused from conducting segregability review in compliance with this Court's ruling.

BACKGROUND

Following multiple rounds of summary judgment briefing, this Court held an evidentiary hearing to resolve disputed issues of fact concerning ICE's invocation of Exemption 7(E) to withhold three categories of requested information concerning the two databases: (1) records identifying database tables and fields of information in those tables; (2) code lookup tables within the databases that define codes used to record data in the databases; and (3) copies of the database schema, defined in the relevant requests as records that "set[] forth how the database tables are interlinked." Memorandum Opinion & Order 4 (June 2, 2020) (Mem. Op.). Based on the record of the evidentiary hearing, the Court found in its Memorandum Opinion and Order that

ICE had justified its refusal to release the database schemas in their entirety but had not carried its burden of demonstrating that records responsive to the other requests at issue contained no segregable, nonexempt information.

Specifically, the Court held that release of the "full suite of metadata and database schemas" could reasonably be expected to pose some risk of circumvention of the law sufficient to justify ICE's invocation of Exemption 7(E). *Id.* at 22. At the same time, the Court held that "it appears ICE may have withheld codes, code translations, field names, and table names that can reasonably be segregated from otherwise properly exempt materials." Mem. Op. 2. The Court found that ICE's witness at the evidentiary hearing, Tadgh Smith, had conceded that "the codes and code translations within certain code lookup tables could be released without creating an unacceptable threat to the security of the EID and IIDS databases, *see* Day 1 Tr. at 66:24–67:10, and that any other metadata contained within the tables that might pose a risk could be easily redacted, *see id.* at 70:9–71:6." *Id.* at 22–23. Similarly, the Court found that ICE's witness had "acknowledged that the disclosure of actual field names will not always create an independent threat to the security of the databases"; had "explained that the 'sensitive' field names are those that could indicate, 'through coding best practice,' how the databases are connected to one another"; and had "testified that if ICE were to produce to Plaintiffs an Excel spreadsheet that contained those field names that show linkages between multiple database tables, the agency could redact those field names while still producing others." *Id.* at 23 (citing Day 1 Tr. at 41:20–42:5, 42:6–43:25, 71:7–12).

Based on these admissions, and other evidence including ICE's ongoing practice of releasing table names, field names, and codes and code translations, the Court held that it "cannot conclude that ICE has released all reasonably segregable material." *Id.* at 25. The court concluded that while "database schemas (which, by definition, describe the structure of ICE's databases)" are subject to withholding under Exemption 7(E), "the other categories of information requested by Plaintiffs—field and table names, codes, code translations, and code lookup tables—do not appear to uniformly pose such a risk." *Id.* at 25. The Court ordered ICE to "conduct a segregability analysis" as to those categories, *id.*, and to "evaluate whether the requested metadata that does not link to other portions of the databases or otherwise reveal the databases' structure can be released, and whether linkage fields and other sensitive data can be redacted," *id.* at 27. The Court added that "ICE need not conduct an additional segregability analysis as to the database schemas, however." *Id.*

Following the Court's decision, ICE filed a "segregability analysis" claiming that a segregability review of materials listed in ICE's Vaughn indexes would, under the standards set forth in the Court's decision, take more than 66 years. At the Court's direction, the parties met and conferred, and plaintiffs proposed that ICE start its segregation and production with three steps that would expedite the process of segregation and release of information, focus on the core information that was the subject of the evidentiary hearing and the Court's ruling, and have the potential to abbreviate ICE's projected 66-year segregation project by avoiding the need to proceed with review of the bulk of the information listed in ICE's Vaughn indexes.

1. Plaintiffs suggested ICE begin by producing current EID and IIDS tables identifying and describing the tables and fields that the database comprises. That is, plaintiffs requested that ICE produce tables providing the same type of information it had earlier produced for a portion of the databases, and that plaintiffs introduced at the evidentiary hearing as Plaintiffs' Exhibit AA. That information was the specific subject of the testimony cited by this Court in which Mr. Smith conceded that ICE could readily redact field names that showed linkages while producing the remaining information set forth in the table. Plaintiffs further suggested that for this first step in segregation and production, ICE could avoid making item-by-item segregability determinations by redacting literal table and field names from these EID and IIDS tables entirely and limiting production to other information in the tables, including the comments column, which contains plain-language descriptions of the tables and fields that ICE has not claimed are exempt.

2. Plaintiffs proposed that ICE next produce code translation tables from the EID database, materials as to which Mr. Smith had identified no security issues and that would require minimal, if any, redaction.

3. Plaintiffs proposed that ICE then proceed to make segregability determinations regarding the table and field names redacted from the tables produced in the first step of the production, and produce versions of the tables containing table and field names determined not to be exempt based on the principles set forth in this Court's ruling.

As counsel for both parties explained to the Court in two subsequent status conferences, ICE rejected plaintiffs' proposals for two reasons. First, ICE contends that because the database tables listing table and field names are referred to as a "data dictionary," and the Court's opinion refers to "data 'dictionaries'" as part of the database schema, Mem. Op. 13, the Court's direction that ICE need not conduct a segregability review of the database schemas excuses ICE from reviewing and redacting tables containing table and field names—even though, as the Court found, ICE's own witness conceded the feasibility of such redaction. Second, ICE contends that contents of the databases, including records listing tables and fields in the databases as well as code lookup tables, are outside the scope of this litigation because they are not listed in the agency's Vaughn indexes—even though Mr. Smith testified that those records are part of the databases, are responsive to plaintiff's requests, and have been withheld by the agency. Day 1 Tr. 52.

For its part, ICE has offered no alternative way forward. Instead, it has now, for the first time in this litigation, taken the position that because segregation review of all potentially responsive materials on its Vaughn indexes would be time-consuming, it should be excused altogether from conducting any segregability review—despite this Court's ruling, based largely on the testimony of ICE's own witness, that ICE has not shown that there is no reasonably segregable, non-exempt information among the records withheld.

In light of ICE's position, plaintiffs suggested that the parties brief the two legal issues central to ICE's objections to plaintiffs' proposal: whether the Court's

order precludes segregability review of database tables setting forth table and field names, and whether contents of the databases are outside the scope of this litigation. ICE proposed instead that the parties brief whether it should be excused altogether from *any* segregation review. This Court ordered each party to file an opening brief on the issues it asked the Court to decide, with responsive briefs to follow.

ARGUMENT

The government's view that this Court's order excuses it from segregability review of records in the EID and IIDS that list the tables and fields that make up the databases—the so-called data dictionary—is mistaken. The Court's opinion makes clear that such records contain non-exempt, readily segregable information. The Court's ruling that database schemas need not be reviewed for segregability was self-evidently based on the definition of schemas in the relevant request—records that "set[] forth how the database tables are interlinked"—and it was to this feature of schemas that the Court pointed in explaining why schemas need not be reviewed for segregability. Whether or not tables setting forth table and field names and descriptions are in some sense part of the database schemas, they lack this key feature on which the Court relied to excuse ICE from conducting further segregability review of the schemas. Moreover, there is no justification under FOIA for excluding data dictionary tables from segregability review given the Court's findings that they may contain non-exempt information and that exempt information they may contain can be redacted. The Court should clarify that its statement that ICE need not conduct further segregability review of database schema does not apply to EID and

IIDS records that set forth the names of tables and fields in the databases and other information comparable to that in Plaintiffs' Exhibit AA.

ICE's claim that tables in the databases that contain nonexempt, responsive information are outside the scope of this litigation, and therefore not addressed by the Court's ruling requiring segregation of non-exempt information withheld in response to plaintiffs' requests, is equally groundless. ICE contends that its Vaughn indexes, which do not include database tables, define the complete universe of records at issue in this case. But throughout this litigation, plaintiffs have challenged ICE's failure to identify records from the databases in their response to the requests, which on their face refer specifically to tables within the databases. At the evidentiary hearing, ICE's witness, Mr. Smith, conceded that the databases contain responsive records and that ICE has withheld those records from plaintiffs. Moreover, the limited set of records at issue—data dictionary tables and code lookup tables—are readily identifiable, easily redactable if necessary, and contain the core materials responsive to plaintiffs' request. Contrary to ICE's assertion at the latest status conference, requiring ICE to review these EID and IIDS records for segregability will neither require a burdensome new search for records *outside* the databases that have been generated since the Vaughn indexes were prepared, nor threaten to double ICE's estimated 66-year segregation timetable. Rather, requiring ICE to identify, segregate, and produce these materials offers the best hope for a shortcut to ultimate resolution of this long-running case.

Finally, ICE's proposal that it be permitted to avoid segregation entirely is both untimely and unfounded. It is untimely because ICE has never before argued in this litigation that segregating nonexempt information about tables, fields, and codes would be unduly burdensome, even after the possibility of segregability and redaction became a specific focus of testimony at the evidentiary hearing. It is unfounded because the volume of nonexempt information an agency has withheld cannot itself constitute an excuse for permitting it to avoid completely its obligations to produce such information. Moreover, ICE's premise—that the task is unduly burdensome and time-consuming—assumes the conclusion that plaintiffs' proposals for a speedy way to review and produce the critical information at issue have already been foreclosed by this Court. Absent that premise, ICE's argument collapses.

1. This Court's ruling does not excuse ICE from segregating nonexempt information from tables containing names and descriptions of tables and fields in the EID and IIDS.

The legal principle that underlies this Court's order requiring segregation of nonexempt material—and that the Court's order must be understood to embody—is unambiguous and long-established by statute and precedent: "[A]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). "'[N]on-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.'" *Evans v. Fed. Bur. of Prisons*, 951 F.3d 578, 583 (D.C. Cir. 2020) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). Moreover, in FOIA cases, as in others governed by the Federal Rules of Civil Procedure, genuine issues of fact as to whether

portions of records are exempt and segregable require "a trial in which the court would have to find facts as to the applicability of the exemptions." *Id*. at 587. In such a case, a court's findings of fact based on the evidence received necessarily control whether the agency must perform a segregability review. *See id*. at 588. If a court finds after an evidentiary hearing that a record may contain nonexempt information and that the agency has failed to carry its burden of establishing that such information is inextricably intertwined with exempt material, it follows that the court must order the agency to segregate and produce any nonexempt information.

Here, the Court's findings are utterly inconsistent with the conclusion that the agency need not review and redact tables containing listings and descriptions of database tables and fields such as those contained in Exhibit AA. As the Court's decision explains, the testimony of ICE's own witness established that such tables contain nonexempt information that is *not* inextricably intertwined with exempt material, which can readily be redacted if present. The Court's ruling that database schemas need not be reviewed for segregability, by contrast, referred to a more limited set of records: those that, by definition, reveal interconnections among different parts of the database. That ruling cannot reasonably, or permissibly, be understood as excusing segregability review of records in which exempt and nonexempt information is not inextricably intertwined—even if those records may in some broader sense be referred to as part of the database schemas.

The Court's decision rests on its findings that (1) ICE carried its burden of showing some risk of harm from disclosure of records that would provide

"comprehensive knowledge of the organization of the databases," Mem. Op. 21, comparable to what would be provided by a "thieves' map," *id.* at 19, but (2) ICE failed to carry that burden with respect to listings and descriptions of table and field names and the codes and code translations contained in code lookup tables, *see id.* at 25. Indeed, as the Court's order explained, ICE identified no threat from release of codes or code translations, *see id.* at 22–23, and ICE acknowledged that any other information in code lookup tables that might pose a risk could be "easily redacted," *id.* at 23. Likewise, as to table and field names, the Court pointed to ICE's testimony that disclosure "will not always create an independent threat to the security of the databases," *id.*, and that "sensitive" field names are limited to those that show "how the databases are connected to one another," *id.* As to the latter, the Court found that ICE's witness had conceded that, assuming field names "that show linkages between multiple database tables" were exempt, "the agency could redact those field names" from a spreadsheet of table and field names and descriptions "while still producing others." *Id.* The Court thus concluded that "only metadata that 'describes the organization of [ICE"s] data and the structure of [its] databases,' presents any risk." *Id.* at 25. Accordingly, the Court required ICE to conduct a segregability analysis with respect to records listing "field and table names, codes, code translations, and code lookup tables," which "do not appear to uniformly pose such a risk." *Id.*

Given these findings, the Court's ruling that "ICE need not conduct an additional segregability analysis as to the database schemas," *id.* at 27, is grounded in its earlier statement that database schemas "by definition, describe the structure

of ICE's databases," the information whose revelation the Court found would "present … a material risk." *Id.* at 25. That statement, in turn, refers to the definition of "database schema" in the requests at issue: "a specific class of records … that sets forth how the database tables are interlinked." *Id.* at 4 (quoting FOIA Request I at 1). The Court's reasoning thus excuses segregability review of records in which any nonexempt information is inextricably intertwined with, and cannot reasonably be extracted from, information about linkages among database tables. That reasoning does not, however, provide a justification for forgoing segregability review of tables containing the kind of information shown in Exhibit AA, which does not contain linkage information and from which any information that might be exempt can be redacted.

ICE's contrary position, as explained during the meet-and-confer sessions and status conferences following this Court's June 2 ruling, rests on the point that tables setting forth the names and descriptions of tables and fields within the databases—referred to as data dictionaries—can also be described in broad terms as part of the database schema. For example, Mr. Smith identified Exhibit AA as part of the data dictionary of either the IIDS or EID, *see* Day 1 Tr. 52–53, and earlier described the database schemas as including data dictionaries, *see id.* at 23. Similarly, plaintiff Susan Long explained that sheet 4 of the Excel spreadsheet making up Exhibit AA was a data dictionary for the EARM module of the EID produced by ICE in response to an earlier request, *see id.* at 145–48, and she, too, characterized the data dictionary as part of the database schema, *id.* at 144. This Court's Memorandum Opinion

likewise states that a database schema "contains tables often referred to as data 'dictionaries'—database tables that set forth the names of tables and fields within those databases," and cites Exhibit AA as an example. Mem. Op. 14.[1]

Critically, however, the data dictionaries for the EID and IIDS, by themselves, lack the defining feature that this Court ascribed to database schemas and relied on in finding that schemas fall within Exemption 7(E) and need not be reviewed for segregability: The data dictionaries do not themselves "describe the structure of ICE's databases," Mem. Op. 25, by revealing linkages among tables, unlike a graphical or other representation of the schema that shows how different tables relate to one another, *see id.* at 14. ICE's own witness repeatedly conceded this point: Mr. Smith acknowledged that the data dictionaries do not themselves show linkages among tables, and at most may in some cases allow linkages to be inferred from the names of linkage fields. *See* Day 1 Tr. 43, 56, 92–93, 95–98. And he conceded that if a linkage field name did create a risk sufficient to justify withholding it as exempt, it could be redacted from a spreadsheet that otherwise provided the table and field names and the descriptions making up a data dictionary table. *See id.* at 71, 93.

In concluding that records listing names of tables and fields may contain nonexempt information that may be segregated and produced, this Court relied on

[1] Notably, neither the evidentiary hearing record nor this Court's opinion suggests that code lookup tables in the databases are part of the database schemas. Thus, the Court's order that ICE need not conduct further segregability analysis of the schemas does not even arguably excuse ICE from conducting a segregability review of code lookup tables. Indeed, the order explicitly requires segregability review of code lookup tables. Mem. Op. 27.

Mr. Smith's testimony "that if ICE were to produce to Plaintiffs an Excel spreadsheet that contained those field names that show linkages between multiple database tables, the agency could redact those field names while still producing others." Mem. Op. 23 (citing Day 1 Tr. 71). The example the Court cited to illustrate ICE's ability to redact potentially exempt information from a table containing table and field names and descriptions exactly corresponds to the data dictionary displayed in Exhibit AA. *See* Mem. Op. 13, 14; Day 1 Tr. 53–54, 145.

Reading the Court's ordering language to permit ICE to avoid segregability review of data dictionaries providing the type of information set forth in Exhibit AA would thus make the Court's ruling self-contradictory. The Memorandum Opinion explains at length exactly why tables providing database table names and descriptions are likely to contain segregable nonexempt information, and why the kind of information the Court found to make the database schemas exempt—information revealing database linkages—is *not* inextricably intertwined with the listings of tables and fields that data dictionary tables provide.

Having made those findings, the Court would commit legal error if it were to excuse ICE from its obligation under FOIA to segregate nonexempt information in such tables for the purely semantic reason they can be referred to as part of the database schema. The Court's opinion can only properly be understood to exclude segregability review of schemas as more narrowly defined in the FOIA requests at issue and the Memorandum Opinion's legal analysis: materials that reveal interlinkages within the databases. This Court should clarify that its order does not

exclude data dictionary tables—that is, tables identifying and describing tables and fields within the EID and IIDS, as exemplified by Exhibits AA (and also Exhibits V and W)—from segregability review.

2. Data dictionary and code lookup tables within the databases do not fall outside the scope of this litigation.

ICE's second justification for objecting to plaintiffs' proposal that it segregate and produce nonexempt information from records in the EID and IIDS listing and describing the databases' tables and fields—and its *only* justification for not conducting such a review of code lookup tables in the databases—is its assertion that records in the databases are outside the scope of this Court's order. According to ICE, the only records subject to the Court's orders are those listed in the agency's Vaughn indexes, which were compiled in 2014 and 2015 and do not include the contents of the databases themselves. Thus, ICE declares off-limits the materials most directly responsive to plaintiffs' requests, most likely to contain nonexempt information, most readily identifiable, and most easily redacted. That position makes no sense as a legal or practical matter.

The requests at issue directly seek information contained in the databases, not merely documents outside the databases that refer to or describe them. Plaintiffs' requests concerning table and field names seek "a copy of the records identifying each and every database table in the EID [and IIDS] and describing all fields of information that are stored in each of these tables." Mem. Op. 4. Those records, as Mr. Smith acknowledged, are set forth in tables that are themselves part of the databases. Day 1 Tr. 52. Likewise, plaintiffs' request for code lookup tables explicitly

describes the requested records as "auxiliary tables … within the database itself." Mem. Op. 4. And again, Mr. Smith acknowledged that the code lookup tables sought are found within the databases themselves. *See* Day 1 Tr. 52, 64; *see also id*. at 149 (testimony of Ms. Long explaining that Exhibit AA identified 234 code lookup tables within the EID). Mr. Smith further admitted that ICE had withheld EID and IIDS records listing field and table names, as well as code lookup tables, in response to the FOIA requests in this case, *id.* at 52, and that those records could be redacted to eliminate the kinds of information that he identified as posing unacceptable security threats, id. at 66–67, 71.

The search ICE conducted to generate its Vaughn indexes, however, did not include the databases themselves, but was limited to a repository of documents containing records *associated* with the databases. *See* Wilson Dec., Doc. 17-1, at 5. Thus, the Vaughn indexes do not include the database tables that constitute the core materials responsive to plaintiffs' requests for records identifying database table and field names and code lookup tables from the databases. Given ICE's acknowledgment at trial that those records exist in the EID and IIDS, are responsive, have been withheld, and can be redacted to remove any exempt records, ICE should not be excused from reviewing them for segregability and production to plaintiffs in accordance with this Court's decision.

In its first summary judgment ruling, this Court held that ICE was not required to search the EID and IIDS themselves because, in its view, plaintiffs' summary judgment submissions had "not offered any reason to believe that

responsive records—other than the database schema and codes themselves, which Defendants are not required to produce at this juncture—would be found within the databases." Doc. 29, at 31. "Absent such a showing," the Court held that it was satisfied that a search excluding records from the EID and IIDS databases was proper. *Id*.

That ruling, however, does not control the issue currently before the Court for two reasons. First, it was premised on what the Court had concluded ICE was not required to produce *at that juncture*, when issues about ICE's obligation to produce metadata including table and field names and code definitions, as well as the schemas, remained unresolved. Second, the Court's ruling reflected what the record at that time showed about whether there was reason to believe that responsive records would be found within the databases themselves.

Both those circumstances have now changed. First. the Court has now found that records listing table and field names and descriptions, as well as code lookup tables, may contain extensive nonexempt information that can be segregated from any exempt information. Mem. Op. 25, 27. Thus, the Court has determined that it "cannot conclude that ICE has released all reasonably segregable material." *Id*. at 25. At the *current* juncture, therefore, ICE *is* required to review such records for production. Second, there is now much more than "reason to believe" that such information can be found within the databases: ICE's own witness has admitted that data dictionary and code lookup tables providing the exact information sought in the relevant FOIA requests are part of the databases and have been withheld by ICE.

Day 1 Tr. 52. Given the uncontradicted evidentiary record that now exists, ICE is no longer in a position to resist going to the source of the records at issue when it conducts the required segregability analysis.

Contrary to ICE's assertions at the most recent status conference, identifying the responsive records in the EID and IIDS will not involve a highly burdensome search. Plaintiffs do not ask the Court to require ICE to update its search of its document repository to identify the thousands of additional records that have likely been generated over the past five years that refer to the EID and IIDS but are not part of the databases themselves. Rather, plaintiffs seek to require ICE only to identify two categories of responsive records within the EID and IIDS that it did not previously search for: the data dictionary tables listing and describing tables and fields within each database, and all code lookup tables. As to the first, Mr. Smith's testimony makes clear that ICE knows exactly what a data dictionary is and how to locate it in the databases. *See* Day 1 Tr. 23, 52. As to the second, code lookup tables are readily identifiable because the data dictionary itself lists them as part of its comprehensive listing of the tables that make up the database. *See id*. at 149.

Moreover, segregability review of these tables will not, as ICE has suggested, multiply ICE's projected 66-year segregability review by a factor of two or more. Rather, as the testimony at the hearing showed, any exempt materials in the tables can be readily redacted. Day 1 Tr. 70–71. And plaintiffs have offered to streamline the process further by suggesting, as a first cut at segregability review of the data dictionary tables, redaction of *all* table and field names and production of the

"comments" field that provides a plain-English description of the tables and fields—information that ICE has never contended poses a risk sufficient to justify exemption. *See id*. at 62. Similarly, the second step of plaintiffs' proposed course—production of code lookup tables—would require an uncomplicated segregability review given ICE's concession that the core information in those tables (codes and their definitions) does not create any threat, *see id*. at 65–67, and that any additional information in code lookup tables that might be exempt could be easily redacted, *see id*. 70–71; Mem. Op. 22–23. Finally, plaintiffs' third proposed step—a segregability review of the table and field names in the data dictionary tables—would necessarily be more time consuming insofar as it would involve review of each name. That is the nature of the review this Court ordered, and plaintiffs' proposal would focus that review on the records that are the direct source of the information plaintiffs have requested. Completion of that review, in turn, might well obviate the need for further review of the mass of material from outside the databases that is the basis of ICE's 66-year estimate.

3. The Court should not excuse ICE completely from conducting any segregability review.

ICE not only seeks to avoid review of the records most likely to contain responsive information and most readily segregable, but also to avoid any segregability review at all, notwithstanding the Court's conclusion that ICE has not produced all reasonably segregable, non-exempt information concerning table and field names and code lookup tables. ICE's submission appears to be that because the volume of materials listed in its Vaughn index is so large, and ICE's projection of the

time needed for a complete review of that information is so great, the agency should be excused from any segregability review.

To begin with, ICE's argument "come[s] too late." *Long v. U.S. Dep't of Justice*, 479 F. Supp. 2d 23 (D.D.C. 2007). Plaintiffs raised ICE's failure to demonstrate that it had produced all reasonably segregable information concerning metadata in their first summary judgment brief in 2014, Doc. 18, at 23, and, more recently, plaintiffs' counsel extensively questioned ICE's witness at the evidentiary hearing about the feasibility of redacting exempt information from records identifying tables, fields, and codes. But until now ICE has never argued that the burden of segregability review of such records is so great that it should be excused from segregating and producing nonexempt information from any responsive records.

In any event, the burden on an agency seeking to avoid completely its statutory obligation to produce segregable nonexempt information is high: It must show specifically how *any* further segregation of documents would be unduly burdensome. *See Danik v. U.S. Dep't of Justice*, __ F. Supp. 3d. __, 2020 WL 2838584, at *4 (D.D.C. 2020). That the agency has withheld a large amount of nonexempt information, moreover, cannot itself supply such a justification, or an agency would be rewarded for the extensiveness of its failure to comply with the statute's disclosure obligations. Here, ICE cannot plausibly demonstrate that *none* of the records it has withheld can reasonably be reviewed for segregability without undue burden. That the process might eventually produce diminishing marginal returns does not excuse the agency

from, at a minimum, attempting to identify those files most likely to contain nonexempt information and beginning its review there.

ICE, moreover, has failed to focus on "the readily-available records most likely to reveal the information requested," *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 8 (D.D.C. 2003)—the EID and IIDS tables that list and describe tables and fields, and the databases' code lookup tables. Its segregability analysis thus does not even address the feasibility of segregability review of those materials. As explained above, those records could be reviewed and produced with a fraction of the time and effort ICE projects for its review of the entirety of the responsive materials on its Vaughn index, and the results of such review might well moot the question whether the segregability review outlined in ICE's analysis is unduly burdensome. Even leaving aside the directly responsive materials in the EID and IIDS, ICE has so far made no effort to identify any parts of the universe of responsive materials on its Vaughn index that are more likely to contain nonexempt information and analyze the effort required for a more focused segregability review. The Court must accordingly reject ICE's request that it be excused from even attempting to produce responsive, segregable, nonexempt records.

CONCLUSION

The Court should clarify that its orders do not foreclose segregability review of responsive records in the EID and IIDS—specifically, tables listing and describing the tables and fields in the databases, and code lookup tables—and should order ICE to commence such a review promptly.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
DC Bar No. 413548
Michael T. Kirkpatrick
DC Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiffs

September 9, 2020