UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IMMIGRANT DEFENSE PROJECT, HISPANIC INTEREST COALITION OF ALABAMA, and the CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

ECF CASE

No. 14 Civ. 6117 (JPO)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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CONTENTS

AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Plaintiffs Immigrant Defense Project, Hispanic Interest Coalition of Alabama, and the Center for Constitutional Rights challenge the adequacy of the searches conducted by defendants United States Immigration and Customs Enforcement ("ICE") and United States Department of Homeland Security ("DHS") (together, the "government") in response to a request (the "Request") made under the Freedom of Information Act. Generally, the request seeks information on what plaintiffs term "home enforcement operations." *See* Request, Dkt. No. 1-1 at 3. The Request spans seven single-spaced pages of bullet points and includes requests for twenty-eight enumerated types of "Records" on at least thirteen identifiable topics (one of which has fifteen separate subtopics, and others of which have as many as nine subtopics) and demands both policy information and data or statistical information. In response, DHS and ICE together have now produced approximately 8500 pages of documents.

The Request is extraordinarily broad. Furthermore, there is no specific unit or office of DHS or ICE charged with enforcement operations that occur at a home. ICE is a law enforcement agency whose mission includes both criminal and immigration-related enforcement actions. Just like a police department, ICE must sometimes apprehend specific individuals, and those individuals are often found at a home (whether their own, or someone else's). The government has produced documents on many specific policies—for example, materials related to the training it provides to officers on the Fourth Amendment, which are important for officers who seek an individual at a residence. But the government cannot seek documents on a particular responsive program, because no such program exists.

Responsive information is not organized in a specific way within the government's file systems. Furthermore, the specific search terms that plaintiffs propose in order to find documents

on "home enforcement operations" are so broad and generic that it would not be reasonable for every office and component to use them. The government has already expended significant efforts in its search, and it has met its obligations under FOIA. The government therefore Court should therefore enter partial summary judgment for the government on adequacy of search, and the plaintiffs' partial motion should be denied.

BACKGROUND

On October 17, 2013, plaintiffs sent a FOIA request to various federal agencies. *See* Compl. Ex. 1, ECF No. 1-1, at 2-13. The Request, sent in the form of a twelve-page letter, included approximately one page of definitions, and approximately seven pages of requests for information, broken down into numerous subcategories, each of which contained a disjunctive list of many different types of information. *See id*. at 3-10. The Request specifically defined the "Record(s)" being sought to include "all Records or communications preserved in electronic or written form," including a list of 28 enumerated types and a residual category for any other type of record. *See id*. at 4. Plaintiffs sought a fee waiver and expedited treatment. *See id*. at 13-14.

ICE received plaintiffs' Request on October 25, 2013. Pineiro Decl. ¶ 6. By letter dated October 29, 2013, ICE's FOIA Office acknowledged that it had received the Requests. *See id.* ¶ 7 (citing *id*. Ex. 2). By separate letters dated December 13, 2013, ICE granted the fee waiver request and denied the request for expedited processing, *see id.* ¶ 11 (citing *id.* Ex. 11). The requesters appealed the denial of expedited processing, *see id*. ¶ 12 (citing *id*. Ex. 7), and ICE's Office of Principal Legal Advisor ("OPLA") affirmed this decision, *see id*. ¶ 13 (citing *id*. Ex. 8).

DHS received the Request at its Privacy Office on October 21, 2013. *See* Tyrrell Decl. ¶ 8. On November 1, 2013, DHS Privacy tasked several DHS components to search for responsive records. *See id*. ¶ 9. Weeks later, one of these components— the Federal Law

Enforcement Training Center ("FLETC")—made a production of 26 responsive pages directly to the requesters. *Id*. ¶ 14.

By letter dated December 10, 2013, DHS acknowledged receipt of the Requests. *See* ECF No. 1-2 at 18-19. The same letter denied expedited processing and held the fee waiver request in abeyance pending determination of the quantity of responsive records. *See* Tyrrell Decl. ¶ 16. By a subsequent letter, DHS Privacy informed plaintiffs that the 26 released pages were the only records located, and noted that ICE had not yet responded. *Id.* ¶ 17. Plaintiffs apparently did not receive that letter due to an incorrect email address, *id*. ¶ 23, but after being provided the letter, plaintiffs appealed the adequacy of the search, *id.* ¶¶ 23-24. An ALJ remanded the matter for clarification about the scope of searches. *Id*. ¶ 27. Following additional searching, *id.* ¶ 28, the ALJ ultimately upheld the searches delegated by DHS Privacy, *id*. ¶ 30.

Plaintiffs were unsatisfied by defendants' responses and filed this suit on August 5, 2014. After defendants answered, the Court entered an order directing defendants to produce documents on a specified schedule. *See* November 19, 2014 Order, Dkt. No. 15. In rolling productions between December of 2014 and August of 2015, DHS produced 1785 pages; ICE produced 6717 pages. Following the government's communication that it had completed its searches and productions, the Court, at plaintiffs' request, held a conference on August 4, 2015 and ordered the government to provide declarations describing its searches by September 30, 2015. *See* Unnumbered Docket Entry (August 4, 2015). The government ultimately provided declarations from each of the following four government employees: Paula Harrington, Unit Chief of the Information Disclosure Unit within Enforcement and Removal Operations ("ERO") at ICE; Reba McGinnis, Unit Chief of the Records and Disclosure Unit within Homeland Security Investigations ("HSI") at ICE; Fernando Pineiro, Deputy FOIA Officer of the ICE

FOIA Office; and Kevin L. Tyrrell, Associate Director of FOIA Appeals and Litigation at DHS's Privacy Office. These declarations are available on the docket as exhibits to a letter filed by plaintiffs on October 31, 2015, *see* Dkt. Nos. 21-1, 21-2, 21-3, 21-4,[1] and as exhibits to plaintiffs' summary judgment papers, *see* Dtk. Nos. 32-2, 32-3, 32-4, 32-5.

After the parties engaged in discussions in an attempt to narrow the issues in dispute, plaintiffs moved for partial summary judgment as to adequacy of search. With the Court's permission, *see* Dkt. No. 29, the government now provides supplemental declarations that give some additional detail about how searches for documents were conducted. Each of the four original declarants has submitted a supplemental declaration. No office or component performed new searches (although in a few limited cases, agencies re-ran a search in order to ensure that all documents had been uncovered); instead, the declarations explain matters that may have been unclear in the original declarations.

ARGUMENT

I. Standard of Review

FOIA disputes (including, as here, the issue of the adequacy of an agency's search for documents) are generally resolved by summary judgment. *See, e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search . . . are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted).[2]

[1] This same letter was filed in corrected form on November 2, 2015, with identical exhibits, as Dkt. No. 22 and accompanying exhibits.

[2] Neither plaintiffs nor the government have submitted a Local Rule 56.1 statement. "The general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of

II. The Law of Adequate Search

The government does not have a heavy burden in defending the searches it performed; each agency need only show "'that its search was adequate.'" *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812). A search is judged by the efforts the agency undertook, not by its results: the agency must demonstrate that its search was "reasonably calculated to discover the requested documents," not that the search "actually uncovered every document extant." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). The search "need not be perfect, but rather need only be reasonable," *Grand Cent. P'ship*, 166 F.3d at 489, because "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000). Provided it is properly designed, an agency's search may be reasonable even if it does not return every responsive document. *See Adamowicz v. I.R.S.*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008).

Once the government submits declarations describing a reasonable search,[3] those declarations are accorded a presumption of good faith, and the Court may award summary judgment on the declarations alone. *Carney*, 19 F.3d at 812; *see also Grand Cent. P'ship*, 166 F.3d at 489. Such declarations may be made by the individuals supervising each agency's search, rather than by each individual who participated. *Carney*, 19 F.3d at 814. Where an agency's declaration demonstrates that it has conducted a reasonable search, "the FOIA requester can

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summary judgment," and Local Civil Rule 56.1 statements are not required." *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (internal quotation marks and alterations omitted).

[3] To describe a reasonable search, a declaration should explain "the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials . . . were searched." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (citation and internal quotation marks omitted). The declaration need not "set forth with meticulous documentation the details of an epic search." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812. "[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to overcome the good faith presumption. *Carney*, 19 F.3d at 813.

III. The Government Conducted Adequate Searches

In spite of the difficulty inherent in searching for documents on a broad set of topics that are not organized under any specific program or office, the government undertook significant efforts to locate responsive documents.

As described in DHS's initial declaration, in November of 2013, DHS's Privacy Office tasked several components—the Federal Law Enforcement Training Center ("FLETC"), the United States Citizenship and Immigration Services ("USCIS"), the DHS Office of Civil Rights and Civil Liberties ("CRCL")—with searches. *See* Tyrrell Decl. ¶ 9. In August of 2014, after this case was filed, DHS Privacy decided—"[o]ut of an abundance of caution"—to conduct a more expansive search and also requested "a manual review instead of a simple key word review." *Id.* ¶ 32. DHS Privacy tasked the same components as before, but also tasked DHS Office of Public Affairs ("OPA"), the DHS Office of Policy "Immigration Division," and the DHS Office of the General Counsel ("OGC"). *Id.*; *see also id.* ¶¶ 33-35 (describing responsibilities of components). DHS Privacy also tasked the Office of Intelligence & Analysis ("I&A") with searches in November of 2014. *See id.* ¶ 41.

As described in ICE's three initial declarations, ICE's search began in November of 2013, when the ICE FOIA Office reviewed the Request and tasked three offices—Enforcement and Removal Operations ("ERO"), the ICE Office of Homeland Security Investigations ("HSI"), and the ICE Office of the Principal Legal Advisor ("OPLA")—with searches. *See* Pineiro Decl. ¶ 26. Later, ICE FOIA tasked an additional six offices with searches. *See id.* ¶ 27. Together,

"these offices and their searches were reasonably likely to uncover all relevant records responsive to a reasonable interpretation of Plaintiff's vague FOIA request." Supp. Pineiro Decl. ¶ 9. At each office, a FOIA point of contact (or "POC") reviewed the Request and determined how best to search. *See* Pineiro Decl. ¶ 21 (describing how each office within ICE has a FOIA POC who has "detailed knowledge about the operations of their particular program office" and communicates with ICE FOIA); *see, e.g.*, ¶ 37 (describing how ICE's Office of Professional Responsibility ("OPR") POC determined how to search for responsive records); *id*. ¶¶ 37, 40, 41, 43, 44, 45 (describing how other ICE FOIA POCs searched each office tasked). In December of 2014, ICE FOIA began processing the material received from each of the eight offices tasked with searches, which required reviewing documents for FOIA exemptions and responsiveness, *see id*. ¶ 46, and made rolling productions through March of 2015, *see id*. ¶¶ 47-52. ICE FOIA also made supplemental productions in May and August of 2015. *See id*. ¶¶ 53-54. In addition, in September of 2015, ICE FOIA processed a number of documents originating with DHS. *See id*. ¶ 55. In total, ICE produced 6717 pages.

In addition, ICE has also provided declarations specific to ICE Enforcement and Removal Operations and Homeland Security Investigations. As described in the Harrington Declaration, ERO itself has suboffices, and ERO determined that three offices at the headquarters level within ERO, as well as three field offices in different areas of the country, might have responsive records. *See* Harrington Decl. ¶¶ 3.a-c, 10. Similarly, HSI determined that two headquarters-level HSI offices might have responsive records, *see* McGinnis Decl ¶¶ 12-13, and additionally tasked three local offices ("Special Agent in Charge" or "SAC" offices) with searches based on the geographic limits specified in the Request, *see id*. ¶ 14.

As a general matter, the ICE declarations describe the reason ICE personnel picked particular offices as potentially having responsive documents. For example, the McGinnis Declaration says that HSI's Policy Unit was tasked "because the request sought in part, 'policies, procedures and objectives of home enforcement operations,'" and Policy maintains that type of record. McGinnis Decl. ¶ 12 (quoting Request).

The precise manner in which each DHS and ICE office searched varied from office to office, based on, for example, the differing responsibilities of offices and the ways in which each office organizes its files. *See, e.g.*, Harrington Decl. ¶ 12 (citing "staffing allocations, subject matter expertise" and "geographic priorities" as bases for differences within ERO offices' searches). The declarations provide details of each office's responsibilities and searches; additionally, details of these searches are discussed further in the portions of this briefing addressing plaintiffs' specific arguments.

The government's searches were time-consuming and required the cooperation of more than fifteen individual offices or components within ICE or DHS. Months of searches yielded more than 8500 pages of responsive documents. The government's declarations demonstrate a reasonable, adequate search, and for the reasons given in the declarations and in the rest of the government's papers, the government's motion for partial summary judgment should be granted.

IV. Plaintiffs' Arguments Rely On a Misconception of the Legal Standard

Plaintiffs attack both the description of the government's searches and the substance of those searches. But a number of Plaintiffs' arguments rest on a misconception of the government's duty in conducting a FOIA search. The government's search need only be reasonable. The adequacy of the search is measured against the breadth of the request and the burden of response.

A. FOIA Requires Only a Reasonable Search

Plaintiffs' Request was extraordinarily broad. Even in the era of electronic records, FOIA demands only a reasonable search. Plaintiffs' numerous arguments about the specific electronic search terms that agency personnel used and the ways those terms were arranged misapprehend the government's burden.

The starting point for assessing the government's search is the request itself; here, the request was vague and broad. FOIA requires a request to "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). A reasonable description must "enable[] a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 10 (2d Cir. 1995) (internal quotation marks omitted). Thus, the reasonableness of a request is directly tied to the government's ability to respond.

Here, the Request defines "home enforcement operations" to include not only operations "in, at, or around homes or residences," but also "any enforcement operation that involves entry into a place of residence, and may include…street arrests, entry into a workplace, or enforcement at other locations." *See* ECF 1-1 at 3. And the Request demands—to take just one example—"any and all Records related to how targets of home enforcement operations are identified." *Id.* During the financial years from 2009 to 2014, ICE conducted 2,274,038 removals.[4] Although plaintiffs do not define "enforcement," removals presumably qualify. It appears that—taking just one small subpart of the Request on its face—plaintiffs seek *every record* maintained at DHS and ICE that is "related to" a governmental decision to engage in enforcement of federal immigration laws with respect to any individual subject to "enforcement" in any operation that happened to involve a residence.

[4] *See* FY 2015 ICE Immigration Removals, available at https://www.ice.gov/removal-statistics.

In the context of such a broad request, it is within an agency's discretion to structure a search that is likely to uncover responsive documents without resulting in an unduly burdensome search. This is so both because the agency itself is in the best position to understand the structure of its files, and because "'an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search.'" *Hainey v. U.S. Dep't of the Interior*, 925 F. Supp. 2d 34, 44 (D.D.C. 2013) (quoting *Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990)); *see also Bigwood v. United States Dep't of Def.*, No. 11-CV-0602 (KBJ), 2015 WL 5675769, at *9 (D.D.C. Sept. 25, 2015) ("In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request. Rather, a federal agency has discretion in crafting a list of search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request.") (internal quotation marks and citations omitted). For example, in *Anderson v. U.S. Dep't of State*, the plaintiff sought a specific presentation (and related communications) that formed the basis for a speech on Iraq given by the Secretary of State to the United Nations in 2003. 661 F. Supp. 2d 6, 7-8 (D.D.C. 2009). The agency searched but found no responsive records, and then moved for summary judgment. *See id.* The court held that the agency's search was reasonable even though it had used only some of the plaintiff's suggested electronic keywords, while omitting others—such as "Iraq"—that, in its judgment, would have returned many unresponsive documents. *See id.* at 11-13. In deciding the issue, the court noted that "'[g]enerally, an agency need not honor a FOIA request that requires it to conduct an unduly burdensome search.'" *Id.* at 12 n.3 (quoting *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)).[5]

[5] Indeed, in determining how to structure its search, there is no requirement that an agency use electronic search terms at all—a manual search conducted by a person with knowledge is sufficient (and in many instances, superior). As one court in this district noted, "[a]lthough [the requester] continues to object to the individualized searches conducted by OGC [and the absence

Plaintiffs' position on an agency's search duty is far broader than the recognized standard. Plaintiffs argue, for example, that "Reasonable searches would have used more flexible search terms, including using Boolean operators and connectors (words within or next to other words) and at least a handful of key word synonyms (such as home, house, residence, apartment)." Pl. Br. at 13. But not all agency systems and databases allow for such advanced searching. Further, agencies rely on their employees' knowledge of the subject matter and agency systems to tailor electronic searches in a way that is targeted at locating potentially responsive documents, without generating large sets of unresponsive documents. *See, e.g.*, Supp. Harrington Decl. ¶ 8; Supp. Pineiro Decl. ¶ 13. Moreover, searching emails or other records for synonyms of common terms such as "house" or "home," or searching a law enforcement agency's records for documents containing the word "warrant" or "gang," would be an immense undertaking in no way reasonably tailored to plaintiffs' Requests. *See, e.g.*, Supp. Pineiro Decl. ¶¶ 10-11.

Plaintiffs' view of the law—that in response to a multi-part, wide-ranging request for documents, the court should police the precise arrangement of electronic search terms and connectors, including (for example) by requiring use of specific Boolean or contextual operators and synonyms—appears to be founded in two cases from this district that do not represent the law of this Circuit and are factually dissimilar to this one. *See* Pl. Br. at 5 (citing *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87 (S.D.N.Y. 2012) (*"NDLON"*) and *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 331 (S.D.N.Y. 2011)). In *Families for Freedom*, the court held that an agency's

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of centralized searches using electronic search terms], FOIA does not require an office to use electronic search terms, nor has [the requester] pointed to any case law imposing such a duty on an agency." *Fox News Network, LLC*, 739 F. Supp. 2d at 534 (citing *Grand Cent. P'ship,* 166 F.3d at 489). All that is required is reasonable detail in description, and search terms that are reasonably calculated to uncover relevant documents. *See Anderson*, 661 F. Supp. 2d at 10.

searches were inadequate only after the agency itself admitted that its previous representations about its searches—including how its searches were conducted and the contents of its files—were materially incorrect. *See* 837 F. Supp. 2d at 336-37. That is certainly not the case here, where the government is entitled to a presumption of good faith. *See Carney*, 19 F.3d at 812. And in *NDLON*, the court, citing both *Families for Freedom* and various sources on the topic of electronic discovery, held that various agencies' descriptions of FOIA searches were inadequate in large part because they failed to describe the precise terms and connectors used in electronic searching. *See* 877 F. Supp. 2d at 107-12.

But the court's decision in *NDLON* to scrutinize the arrangement of specific terms and connectors (and the similar holding in *Families for Freedom*) is a legal outlier that exceeds FOIA's requirement of reasonable search described with reasonable detail. Thus, in *Bigwood*, 2015 WL 5675769, at *10-11, the District Court for the District of Columbia specifically rejected the approach taken in *NDLON*, saying that it did not accord with the "reasonableness" standard articulated by the D.C. Circuit—which is the same standard applied by the Second Circuit. *Compare Mobley v. C.I.A.*, 806 F.3d 568, 580 (D.C. Cir. 2015) ("This court applies a reasonableness standard to determine whether an agency performed an adequate search . . . .") *with Grand Cent. Partnership, Inc.*, 166 F.3d at 489 ("[W]e have made clear that an agency's search need not be perfect, but rather need only be reasonable.") (citing *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)). Other cases have also rejected the argument that a FOIA requester may specify the precise terms of an agency's electronic search. *See, e.g.*, *Citizens for Responsibility and Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F.

Supp. 2d 40, 50 (D.D.C. 2006) (rejecting argument that agency had not demonstrated adequacy of search by failing to describe Boolean operators or connectors employed in search).[6]

In any event, the touchstone is the reasonableness of the agency's overall search in the context of the specific FOIA request. In this case, the government was presented with a broad FOIA request for documents that lack an obvious description or search string in either agency's own files. The long-established rule is that "an agency is not required to reorganize (its) files in response to (a plaintiff's) request in the form in which it was made, and that if an agency has not previously segregated the requested class of records production may be required only where the agency (can) identify that material with reasonable effort." *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 353 (D.C. Cir. 1978) (internal quotation marks and footnoted citations omitted). In the era of electronic searches, the principle is no different: as the Second Circuit has held,

> When the request demands all agency records on a given subject then the agency is obliged to pursue any "clear and certain" lead it cannot in good faith ignore. But, an agency need not conduct a search that plainly is unduly burdensome.

Halpern v. F.B.I., 181 F.3d 279, 288 (2d Cir. 1999).

[6] Apart from *NDLON* and *Families for Freedom*, other decisions cited by plaintiffs in support of their partial motion are not to the contrary: they demonstrate minimal intervention to correct specific, limited inadequacies in electronic search terms. First, *Fox News Network, LLC v. Dep't of the Treasury*, 678 F. Supp. 2d 162 (S.D.N.Y. 2009) (cited in Pl. Br. at 11) did require an agency to conduct additional searches with one additional electronic search term. But that decision is far narrower than *NDLON* or *Families for Freedom*. In *Fox News*, the agency had failed to use "BONY" in a search for documents related to "Bank of New York," and the court required additional searches for "BONY." The court did not inquire into the specific means (for example, which terms and connectors were used) by which the electronic search was done. Similarly, *Hasbrouck v. U.S. Customs & Border Prot.*, No. C 10-3793 RS, 2012 WL 177563, at *1-4 (N.D. Cal. Jan. 23, 2012) (cited in Pl. Br. at 12) required an agency to perform searches using variations on the spelling of the plaintiff's name, but did not demand searches based on specific terms of connectors. Finally, in *Amnesty International USA v. C.I.A.*, (cited in Pl. Br. at 11) the court stated in dicta that "a search that is designed to return documents containing the phrase 'CIA detainees' but not 'CIA detainee' or 'detainee of the CIA' is not reasonably calculated to uncover all relevant documents." No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at *15 (S.D.N.Y. June 19, 2008). But the court held that the agency's search was adequate, because the majority of its searching had been done by hand, and therefore not subject to the electronic search limitation described. *Id.*

B. An Agency Need Only Give Reasonable Detail About Its Organization And File Structure

To show that it has performed an adequate search, an agency must provide enough detail about its search to explain why "any further search [would be] unlikely to disclose additional relevant information." *Katzman v. C.I.A.*, 903 F. Supp. 434, 438 (E.D.N.Y. 1995) (citing *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987)).

Plaintiffs argue that some of the searches are inadequate because the declarations do not give sufficient detail about the types of files searched or provide enough detail about the agency's file systems. *See, e.g.*, Pl. Br. at 5-6 (citing *Katzman*, 903 F. Supp. at 438). In this case, however, Plaintiff's FOIA requests were lengthy, vague, and broad, and did not refer to a specific governmental program or office; thus, the government's first step in responding was to determine which offices or components were likely to contain responsive information. *See, e.g.*, Harrington Decl. ¶ 7 (describing process ERO uses to determine which offices are reasonably likely to have responsive records); *id*. ¶ 8 (describing application to this case). The declarations describe the responsibilities of the offices that were searched, and the reasons each office might reasonably have been expected to have relevant documents. *See, e.g.*, Pineiro Decl. ¶¶ 25-27 (describing how ICE determined which offices would be tasked with searches, and enumerating those offices); *id*. ¶¶ 28-36 (describing the responsibilities of each office tasked); *see also* Tyrrell Decl. ¶¶ 9-13 (same for DHS). This level of description meets the agency's burden. *See, e.g.*, *Amnesty International USA*, 728 F. Supp. 2d at 497-98 (holding a search was adequate when agency described why it had searched in one office, but not in others); *Int'l Counsel Bureau v. U.S. Dep't of Def.*, 657 F. Supp. 2d 33, 41 (D.D.C. 2009) (holding that agency's obligation to describe its filing system was satisfied by declaration explaining why only three specific components were likely to have responsive documents).

Plaintiffs also argue that searches were inadequate because of alleged inconsistencies between different components' or offices' searches. But "there is no requirement that an agency use identical search terms in all of its offices." *Fox News Network, LLC v. U.S. Dep't of The Treasury*, 739 F. Supp. 2d 515, 534 (S.D.N.Y. 2010). As explained above, different components were identified in part because they were likely to hold different information, and different components might store the same information in different ways. Thus, there is no reason that each should have the same search terms.

C. The Agency Need Only Make a Reasonable Judgment About Where to Search

In a similar vein, an agency need only search the files of offices that are likely to possess responsive documents and, within the relevant sections of the agency, need only search the files of individual employees who are likely to possess responsive documents. *See, e.g.*, *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010); *Defs. of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 10-14 (D.D.C. 2004). In addition, individuals are permitted to reasonably exercise their discretion in making decisions about how best to locate records within their own files. *See Am. Fed'n of Gov't Employees, Local 812 v. Broad. Bd. of Governors*, 711 F. Supp. 2d 139, 151 n.11 (D.D.C. 2010).

V. Plaintiffs' Arguments About Search Descriptions Are Without Merit

Plaintiffs mistakenly claim that the government has failed in various ways to adequately describe the searches it conducted.

A. ICE's Declarations

Plaintiffs argue first that the declarations given by the various components of ICE were deficient. *See* Pl. Br. at 6-9. These arguments are addressed in turn below.

Enforcement and Removal Operations. Plaintiffs make a number of specific arguments (*see* Pl. Br. at 7) about ERO's descriptions of its searches:

- Plaintiffs argue that ERO's searches were deficient because they did not conduct electronic keyword searches at headquarters, but as noted above, there is no requirement that an agency do keyword searches at all. *See Fox News*, 739 F. Supp. 2d at 534. Moreover, ERO's Policy office did conduct an electronic search in order to verify that its previous search was complete, and determined that all responsive documents had already been provided. *See* Supp. Harrington Decl. ¶ 10.

- Plaintiffs also take issue with the fact that the Law Enforcement Systems and Analysis ("LESA") unit did not conduct any searches at all. As described in the Harrington Declaration, LESA was tasked with determining whether it held any responsive records, but LESA responded that it does not maintain any records that track, and does not code in any database for, whether an enforcement operation occurs at a home, business, or elsewhere. *See* Harrington Decl. ¶ 9.a; *id.* ¶ 14 (noting that any information on the location where an officer made contact is primarily maintained in narrative form, and LESA is unable to extract it for statistical reporting); *see also* Supp. Harrington Decl. ¶ 8 ("LESA does not know—and does not track—whether [an] address is a business, a residence, a street, or some other type of location."). Thus, any search would have been futile, and its decision not to conduct a search was reasonable.

- Plaintiffs argue that the search conducted by the office of Secure Communities and Enforcement ("Enforcement") was inadequate because it was a manual search that took approximately three hours. But there is no requirement for keyword searching (and plaintiffs offer no reason to believe that three hours was an insufficient effort to locate responsive documents).

Plaintiffs also argue that the Harrington Declaration is insufficient because it fails to identify the custodians whose emails were searched and does not discuss the structure of various files. *See* Pl. Br. at 7. But as argued above, ICE has already described the structure of the agency's files just by describing the roles of various offices and components and explaining why each office might have a specific type of information. In this case, the work of delegating a broad request to specific offices accomplishes some of the description that, in another case, might be done by explaining the differences between different databases of records.

Homeland Security Investigations. Plaintiffs appear not to take issue with the description of searches at HSI headquarters (Pl. Br. at 7-8). However, plaintiffs argue that the descriptions of searches at the local offices—known as Special Agent in Charge, or "SAC," offices—are insufficient. With respect to SAC Buffalo, plaintiffs argue that the description does not provide

detail about the types of files searched or search terms used. Pl. Br. at 8. But the SACs were tasked by the Records and Disclosure Unit ("RDU") of HSI, after examining the FOIA Request, based on RDU's understanding of how HSI is structured. *See* McGinnis Decl. ¶ 14. As to SAC New York and SAC New Orleans, plaintiffs argue that the description of the email search was insufficient because it provides no information about email custodians or the way in which search terms were combined. *See* Pl. Br. at 8. But FOIA does not require this level of description. Additionally, as described in paragraph 10 of the Supplemental McGinnis Declaration, the Special Agent in New York who searched determined that only emails were likely to contain responsive information.

Office of the Principal Legal Advisor. In response to plaintiffs' argument (Pl. Br. 8) that OPLA's search was inadequately described, paragraph 10 of the Supplemental Pineiro Declaration explains that the Deputy Chief of the OPLA District Court Litigation Division conducted a manual, document-by-document search of paper files and shared drives containing information from two previous suits involving ICE that involved similar issues, and did produce a significant number of documents.

Office of Training and Development. In response to plaintiffs' argument (Pl. Br. 9) that OTD's search was inadequately described, paragraph 13 of the Supplemental Pineiro Declaration explains that the "ERO Training Division Chief searched two [] shared drives where all of the training materials for OTD are kept," and that "OTD does not keep training materials in paper format, in outlook accounts, or on individual employee hard drives."

B. DHS's Declaration

Plaintiffs also argue that DHS's declaration, from Kevin Tyrrell, is insufficient in various respects. *See* Pl. Br. at 9-10. These arguments are without merit.

Federal Law Enforcement Training Center. In response to plaintiffs' arguments, the Supplemental Tyrrell Declaration gives additional detail on FLETC's search: an employee of the Training Management Division used a number of terms to search shared drives, as well as student syllabi, texts, and handouts, and also searched criminal investigator training programs. *Id*. ¶ 5.

Office of Civil Rights and Civil Liberties. Plaintiffs claim, *see* Pl. Br. at 10, that the description of CRCL's search is inadequate because it describes both a manual search and electronic search terms, and because it provides little information about methodology, custodians, or file types searched. However, the Supplemental Tyrrell Declaration provides significant additional detail: In October of 2014, an analyst in CRCL's compliance branch conducted a keyword search of CRCL's complaint-tracking database, Entellitrak, using a number of broad terms in a disjunctive search. *See* Supp. Tyrrell Decl. ¶ 6 (describing search using "ICE" and/or "home, house, apartment, shelter, motel, residence, trailer," and a number of specific city names). The analyst manually reviewed the records retrieved by this search, and in addition, manually reviewed CRCL shared drives. *Id*. ¶ 7. Together, these searches yielded a universe of 2528 potentially responsive documents, which were then reviewed for responsiveness. *Id*. Ultimately, CRCL produced 778 responsive pages directly to plaintiffs, and also referred out 1012 additional pages to other agencies for review. *See* Tyrrell Decl. ¶ 48.

Office of Public Affairs, Office of Policy, & Office of Operations Coordination. Plaintiffs group these offices together (Pl. Br. at 10) and argue that, though they provided electronic search terms, these offices failed to provide information about files types searched or custodians. However, the Supplemental Tyrrell Declaration provides additional detail.

- In the supplemental declaration, DHS OPA has corrected a misstatement from the first declaration: OPA personnel did not search a "database," *see* Tyrrell Decl. ¶ 38,

but rather searched in employee email accounts using specific search terms in Microsoft Outlook, *see* Supp. Tyrrell Decl. ¶¶ 8-9 (describing search using terms including "home enforcement, home enforcement operations," and "home arrests"). This is a reasonable level of detail sufficient to meet the agency's burden.

- Also in the supplemental declaration, DHS OPS (which "works to deter, detect, and prevent terrorist acts") clarified that its search was done in a database using the same search terms as OPA, and that no results were found. *See* Supp. Tyrrell Decl. ¶¶ 20-21. OPS also stated that "[a]s a general matter, [it] is not involved with immigration arrests." *Id*. ¶ 21.

- Finally, the supplemental declaration clarifies that DHS Policy searched in shared network drives and email using search terms similar to those used by other DHS components. *See* Supp. Tyrrell Decl. ¶¶ 12-13.

Office of the General Counsel. Finally, plaintiffs argue that OGC failed to provide information about whether records other than email were searched. As described in the Supplemental Tyrrell Declaration, at the time the search was conducted, the Immigration Law Division within OGC contained only three attorneys with differing areas of responsibility. *See* Supp. Tyrrell Decl. ¶¶ 13-14. After all three attorneys reviewed the subject matter of the request, they determined that only one Associate General Counsel would have responsive records, and that attorney conducted an email search. *Id.* ¶ 14.

* * *

In sum, both ICE and DHS have provided enough detail about the searches they conducted so that the plaintiffs and the Court can understand the structure of the agencies' files and how the searches were done. FOIA requires no more.

VI. Plaintiffs' Arguments About the Substance of the Searches Are Without Merit

In addition to attacking the adequacy of the government's descriptions of the searches it conducted, plaintiffs also make a number of specific arguments about the alleged inadequacy of the searches themselves. As described below, these arguments are without merit.

A. The Inadequate Search Arguments About ICE Offices or Components Are Without Merit

1. Offices Where Searches Were Conducted

ERO searches. Plaintiffs attack the adequacy of the searches at three ERO field offices (which carry out immigration enforcement operations). With respect to the Buffalo and New York Field Offices, plaintiffs argue that both excluded certain electronic search terms "crucial to the Request," including "warrant," "consent," "home," or "target." Pl. Br. at 14. But as discussed above, plaintiffs may not dictate specific search terms, especially in the context of a broad request, and these terms would likely have generated an unmanageably large number of unresponsive documents. Additionally, while plaintiffs attack all three offices' decisions about which custodians to search, the Harrington Declaration states that both offices assigned the individuals most likely to have responsive documents, if any. *See* Harrington Decl. ¶¶ 11.a-c, 12.

HSI searches. Plaintiffs also quarrel (Pl. Br. at 14-15) with the search terms of the New York and New Orleans SAC offices (which conduct enforcement operations related to criminal investigations, *see* McGinnis Decl. ¶¶ 7-8); these arguments are without merit for the reasons given above.

ICE Office of Professional Responsibility. Plaintiffs attack OPR's search terms; in addition, plaintiffs argue that, although DHS's Office of Civil Rights and Civil Liberties produced a number of complaints, OPR did not produce "corresponding reports of investigation that would have been generated by OPR." Pl. Br. at 16. Plaintiffs simply speculate that OPR records must exist.[7] CRCL and OPR have different responsibilities, and plaintiffs offer no reason to believe that every DHS CRCL complaint must generate an ICE OPR report of investigation.

[7] Moreover, although an agency does have a duty to follow up on obvious leads, *see, e.g.*, *Halpern*, 181 F.3d at 288 ("the agency is obliged to pursue any 'clear and certain' lead it cannot in good faith ignore"), the "lead" plaintiffs point to is not obvious, but speculative, and originates from another "agency" within the meaning of FOIA. *See* 5 U.S.C. § 551(1) ("'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency"). As demonstrated by the declarations offered in this case, ICE and

2. Offices Where No Searches Were Conducted

Plaintiffs also argue that various offices or components should have conducted searches.

ERO Law Enforcement Systems and Analysis. Plaintiffs claim that LESA did not adequately justify its decision not to search for data on the location of enforcement operations. *See* Pl. Br. at 16. But LESA has explained that it does not track data on the location at which enforcement operations are conducted, so any search would be futile. *See* Harrington Decl. ¶ 8.a (noting that "LESA does not track information on home enforcement operations, including home operations conducted; arrests, book ins, or removals associated with home enforcement operations; landlord participation in home enforcement operations; contraband found during home enforcement operations; misconduct during home enforcement operations; or home enforcement operation supervision information"). In her Supplemental Declaration, Ms. Harrington further explains that

> …while LESA does track operation codes or names, LESA does not specifically track the term "home enforcement operations" or otherwise keep track of whether enforcement operations occur in or at homes, and thus would be unable to utilize that as a search parameter. Further, as LESA is unable to produce a data set that is specifically related to "home enforcement operations" as the data is not tracked in that manner, LESA is unable to specifically track other singular data elements as they relate specifically to "home enforcement operations" even if the singular data points exist in the database.

Id. ¶ 8. The document that plaintiffs attach to their briefing does not call LESA's description into question. As Ms. Harrington describes, the fields plaintiffs identify—"landmark" and "place of apprehension or seizure"—do not distinguish between whether an address is a business, a residence, or something else. At base, plaintiffs speculate that LESA *must* have information based on its mission (and the alleged "prominence of the home enforcement tactic at ICE," Pl.

DHS have totally separate FOIA personnel, and ICE cannot be required to review every document produced by DHS in order to determine whether it *might* point to the existence of potentially responsive documents in ICE's possession. Such cross-review would be unduly burdensome.

Br. at 16, for which plaintiffs offer no factual support). But "a FOIA requester who challenges the reasonableness of a search 'because the agency did not find responsive documents that [the requester] claims must exist' cannot sustain that challenge when he 'provides no proof that these documents exist and [offers only] his own conviction that [an event] was of such importance that records must have been created.'" *Carter, Fullerton & Hayes LLC v. F.T.C.*, 520 F. Supp. 2d 134, 140 (D.D.C. 2007) (quoting *Oglesby*, 920 F.2d at 67 n.13.).[8]

ICE Office of Public Affairs. Plaintiffs assert in conclusory fashion that "ICE routinely issues announcements regarding home raids and enforcement operations, and the numerous articles published about home raids—some of which were included as exhibits to Plaintiffs' Request and administrative appeal, *see* ECF No. 1-1—were likely to have generated communications and discussions of home raid operations." But plaintiffs point to no actual ICE "announcements regarding home raids and enforcement operations," and as ICE Deputy FOIA Officer Pinerio explained in his original declaration, ICE OPA "doesn't have involvement with home enforcement operations matters." *See* Pineiro Decl. ¶ 43. Furthermore, as the Supplemental Pineiro Declaration explains, the Request does not cover press releases. *See id*. ¶ 14. Plaintiffs' arguments about OPA's no records response again represent speculation that documents must exist, which does not defeat summary judgment.

Office of State, Local and Tribal Coordination. While plaintiffs are correct that part of OSLTC's mission is to build "strong partnerships with federal, state, local, tribal, law enforcement and community groups to promote public safety, national security and border

[8] Plaintiffs' citations are not to the contrary. For example, in *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 231, 256 (D. Conn. 2012), the court held that "while . . . the Marine Corps's original reasoning would not have excused its failure to conduct a search, Mr. Kammer's supplemental declaration provides a sufficient reason for why this failure is harmless: as the Marine Corps did not have the requested information, it could not provide it." This seems to be precisely the opposite of the proposition for which plaintiffs cite the case.

integrity," Pl. Br. at 17 (quoting https://www.ice.gov/leadership/osltc), plaintiffs' Request specifically sought information about "'Records reflecting or memorializing ICE protocol for obtaining information or data from any and all agencies that is *used for home enforcement operations*,'" and "'Records reflecting ICE protocol for requesting information or data *used for home enforcement operations*.'" Supp. Pineiro Decl. ¶ 16 (quoting Request ¶ (1)(d)(i)). As explained, OSLTC has no involvement in home enforcement operations. *Id*. An agency is not required to reorganize its files in response to a FOIA request, *see Goland*, 607 F.2d at 353, and thus OSLTC was not required to attempt to determine which information—if any—acquired from local law enforcement or other groups subsequently played some role in an arrest that took place at a residence.

B. The Inadequate Search Arguments About DHS Offices or Components Are Without Merit

Office of General Counsel. As described above, the OGC search involved only a single attorney because, at the time, only three attorneys worked in the Immigration Law Division of OGC, and the subject matter of the Request fell within the purview of a single attorney. *See* Supp. Tyrrell Decl. ¶¶ 13-14. Otherwise, plaintiffs' arguments about the exact search terms used exceed the scope of what is required by FOIA. In particular, plaintiffs' claim that the Assistant General Counsel's search was not reasonable because it failed to include the words "warrant" or "consent" is without merit. Requiring a lawyer for a law enforcement agency to search his or her emails for this sort of generic, widely-used term is not reasonable and not required by FOIA, particularly given the breadth of the Request.

DHS Office of Public Affairs, Office of Policy, and Office of Operations Coordination. Once again, plaintiffs dispute the precise search terms employed by these offices, which exceeds the agency's burden under FOIA. As described above in addressing the description of these

searches, the Supplemental Tyrrell Declaration provides additional detail about how these searches were conducted. *See id*. ¶¶ 8-9, 12-13, 20-21. Given the breadth of the Request, the search terms used were reasonable.

VII. The Specific Supplemental Searches Plaintiffs Demand Are Not Required And Are Not Reasonable

For the reasons given above, both ICE and DHS have conducted adequate searches. Nonetheless, should the Court hold that in any respect the searches were not adequate, the government respectfully requests that it be permitted to provide the Court with brief additional information on the burden that plaintiffs' proposed searches (*see* Pl. Br. at 19-20 & Ex. 8 to Schwarz Decl.) would impose and other reasons that these proposed searches are not proper. The proposed search strings, for example, include single words such as "bedroom" and "residence," which are likely to create highly overbroad, unduly burdensome searches, especially when conducted in the email accounts of many individual government employees. In addition, the supplemental searches that plaintiffs propose are in some respects so broad or vague that it would be difficult to determine how to conduct them.[9]

[9] Furthermore, at least some of the information plaintiffs seek would likely be exempt in total, so that a search for that information would be futile and unduly burdensome. For example, plaintiffs suggest that LESA and DHS's OIS, after conferring with plaintiffs about "the search capabilities and tracking of data in LESA and OIS, and coming to agreement regarding the parameters of the data," would "produce the results of searches for data regarding apprehension and arrests between January 1, 2014 and December 31, 2015 in the jurisdictions identified in Plaintiffs' FOIA Request." Plaintiffs seem to be seeking addresses at which apprehensions and arrests occurred. If so, this information would be exempt under FOIA's Exemption 7(C), *see* 5 U.S.C. § 552(b)(7)(C), which prevents disclosure of information "compiled for law enforcement purposes" where such information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

CONCLUSION

Tor the reasons given above, plaintiffs' motion for partial summary judgment should be denied, and the government's motion for partial summary judgment should be granted.

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Respectfully submitted,

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