UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, FEDERAL BUREAU OF INVESTIGATION, and OFFICE OF LEGAL COUNSEL

Defendants.

---X

ECF CASE

10 CV 3488 (SAS)(KNF)

[Rel. 10 CV 2705]

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION COMPELLING DEFENDANTS TO PRODUCE LIMITED "OPT-OUT" RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUEST

BRIDGET P. KESSLER
PETER L. MARKOWITZ
JAMES HORTON*
PHILLIP STARKWEATHER*
HANNAH WEINSTEIN*
Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
**Law student intern*

Attorneys for Immigration Justice Clinic and National Day Laborer Organizing Network

SUNITA PATEL
DARIUS CHARNEY
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

Attorneys for Center for Constitutional Rights and National Day Laborer Organizing Network

PAULA A. TUFFIN
ANTHONY J. DIANA
NORMAN R. CERULLO
Mayer Brown LLP
1675 Broadway
New York, New York 10019

Attorneys for National Day Laborer Organizing Network

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS OF OBTAINING THE NARROW CATEGORY OF OPT-OUT RECORDS THROUGH FOIA 2

II. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF IRREPARABLE HARM THAT WILL CONTINUE TO RESULT WITHOUT IMMEDIATE PRODUCTION OF THE OPT-OUT RECORDS 5

III. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING THAT THE STRONG PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS THE NEGLIGIBLE BURDEN ON DEFENDANTS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. Dep't of Defense,
339 F. Supp. 2d 501 (S.D.N.Y. 2004)..6

ACLU v. Dep't of Defense,
357 F.Supp. 2d 708 (S.D.N.Y. 2005)..9

ACLU v. Dep't of Justice,
321 F. Supp. 2d 24 (D.D.C. 2004)..7

Burka v. U.S. Dep't of Health & Human Servs.,
142 F.3d 1286 (D.C. Cir. 1998)..6

Carabello v. Beard,
468 F.Supp.2d 720 (E.D. Pa. 2006)..6

Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence,
542 F. Supp. 2d 1181 (N.D. Cal. 2008)..6, 7

Elec. Private Info. Ctr. v. Dep't of Justice,
416 F. Supp. 2d 30 (D.D.C. 2006)..7, 10

Hemenway v. Hughes,
601 F. Supp. 1002 (D.D.C. 1985)..4

Judicial Watch, Inc. v. Export-Import Bank,
108 F. Supp. 2d 19 (D.D.C. 2000)..3, 4

Leadership Conf. on Civil Rights v. Gonzales,
404 F. Supp. 2d 246 (D.D.C. 2005)..7

Ruotolo v. Dep't of Justice.
53 F.3d 4 (2d Cir. 1995)..4

Summers v. Earth Island Inst.,
129 S. Ct. 1142 (2009)..6

Sussman v. Crawford,
488 F.3d 136 (2d Cir. 2007)..3

Three Forks Ranch Corp. v. Bureau of Land Mgm't,
358 F. Supp. 2d 1 (D.D.C. 2005)..6

Tunick v. Safir,
209 F.3d 67 (2d Cir. 2000)..3

Winter v. Natural Resource Defense Council, Inc.,
129 S. Ct. 365 (2008) 9

Yeager v. DEA,
678 F.2d 315 (D.C. Cir. 1982) 4

OTHER AUTHORITIES

6 C.F.R. § 5.3 4

Fed. R. Evid. 408(a) 4

Fed. R. Evid. 408(b) 4

Catalina Jaramillo, Feet in 2 Worlds, *More Confusion Over Secure Communities: Did NY Make a Special Deal with Washington?* (quoting Governor Patterson's statement in an interview with Telemundo47), http://news.feetintwoworlds.org/2010/10/22/more-confusion-over-secure-communities-did-ny-make-a-special-deal-with-washington/ 8

Domestic Violence Survivor Confronts Secure Communities Director, Deportation Nation (Nov. 18, 2010), http://www.deportationnation.org/2010/11/domestic-violence-survivor-confronts-secure-communities-director/?utm_source=twitterfeed&utm_medium=twitter 8

U.S. Immigration and Customs Enforcement, *3 Missouri counties to benefit from ICE strategy to use biometrics to identify and remove aliens convicted of a crime* (Nov. 16, 2010), http://www.ice.gov/news/releases/1011/101116kansascity.htm 9

All West Virginia Counties to Benefit from ICE Strategy to Use Biometrics to Identify and Remove Aliens Convicted of a Crime, ICE.gov (Oct. 26, 2010), http://www.ice.gov/news/releases/1010/101026charleston.htm 9

U.S. Immigration and Customs Enforcement, FOIA Reading Room, http://www.ice.gov/foia/readingroom.htm 9

PRELIMINARY STATEMENT

This motion for a preliminary injunction ("Motion") seeks Opt-Out Records[1]—a limited subset of records initially sought in Plaintiffs' February 2010 FOIA Request. Plaintiffs have repeatedly asked Defendants to produce Opt-Out Records and, after extensive good faith negotiations, Defendants agreed to do so by July 30, 2010. However, all of the responsive records have not yet been produced. Plaintiffs filed this Motion after it became clear that Defendants' sustained failure to produce this narrow category of records is impeding the ability of states and localities to make informed decisions about whether to participate in Secure Communities and obscuring their understanding of how to de-activate their participation in the program. The Defendants' failure to produce the records is also inhibiting the public's ability to engage in an informed debate on the issue. The harm suffered by Plaintiffs and the public is compounded by the daily deployment of the program in successive states and localities across the country without informed discourse.

Plaintiffs have established a likelihood of success on the merits with respect to disclosure of Opt-Out Records under FOIA. (Pl. Br. at 1-2.) Production of these records is neither unduly burdensome nor implicates exempted materials. In fact, Defendants do not claim that they have failed to produce the Opt-Out Records on exemption grounds and have no reasonable basis for arguing burden, especially in light of Defendants' prior agreement to produce the records. Instead, Defendants attempt to distract from Plaintiffs' entitlement to prompt production of Opt-

---

[1] The definitions in this memorandum and accompanying Reply Declaration of Bridget P. Kessler ("Kessler Reply Decl."), dated Nov. 19, 2010, are the same as the opening Memorandum of Law In Support Of Plaintiffs' Motion for a Preliminary Injunction Compelling Defendants to Produce Limited "Opt-Out" Records Responsive to Plaintiffs' FOIA Requests, dated Oct. 28, 2010 ("Pl. Br."), and its accompanying Declaration of Bridget P. Kessler, dated Oct. 28, 2010 ("Kessler Decl.").

Out Records by raising arguments related to Plaintiffs' likelihood of success regarding the entire FOIA Request, such as fee waivers and adequacy of search terms, which subjects of on-going negotiations and not yet ripe for review.

Moreover, Defendants ignore the irreparable injury that has and will continue to occur until the timely production of the Opt-Out Records. To date, information regarding the ability to opt-out of Secure Communities has come primarily in the form of inconsistent public statements, press releases and correspondence from DHS, ICE and DOJ. The confusion created by these inconsistent statements has perplexed states and localities as they are in the midst of time-sensitive negotiations with ICE. If the Court does not order the timely production of the Opt-Out Records, a multitude of states and localities will remain at a distinct disadvantage during their negotiations with ICE. Without the relevant facts that the Opt-Out Records will provide, states and localities will continue to be forced into making uninformed decisions and Plaintiffs will continue to be hampered in their ability to effectively advocate for those affected by the program. This harm is irreparable.

Finally, Defendants discount the significant public interest in the timely disclosure of the Opt-Out Records *before* the nationwide roll-out of Secure Communities proceeds further.

Therefore, Plaintiffs' Motion should be granted.

ARGUMENT

I. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF A LIKELIHOOD OF SUCCESS ON THE MERITS OF OBTAINING THE NARROW CATEGORY OF OPT-OUT RECORDS THROUGH FOIA

Plaintiffs have established a likelihood of success on the merits of their claim for Opt-Out Records under FOIA, a narrow argument Defendants have failed to even address, much less

rebut.[2] (*See* Pl. Br. at 12-15.) Unable to argue that Plaintiffs are not entitled to *the Opt-Out Records* under FOIA, Defendants instead erect straw men arguments regarding Plaintiffs' likelihood of success on the merits with respect to Plaintiffs' overall *FOIA Request*. (*See* Def. Br. at 15-21.) These arguments are irrelevant and without merit.

Defendants argue that Plaintiffs are unlikely to succeed on the merits because the FOIA Request is overbroad and does not, therefore, "reasonably describe" all of the records requested.[3] *See id.* at 17 ("Plaintiffs have not demonstrated a likelihood of success on the merits of their FOIA action . . . ."); *id* ("their 21- page Request"); *id.* ("given the sheer scope of their Request"); *id.* ("their overbroad, 21-page FOIA Request"); *id.* at 19 ("The FOIA Request in the instant case is even broader than the request in *Judicial Watch*."); *id.* ("Plaintiffs' Request includes thirteen single-spaced pages . . . ."); *id.* at 20 ("This sweeping request clearly fails to comply with . . . FOIA."). While the Request does "reasonably describe" the requested records, whether Plaintiffs have "reasonably described" *every record* sought in the Request is irrelevant for purposes of this Motion.

---

2 Defendants' argument for the application of a "rigorous," "clear," or "substantial" likelihood of success on the merits heightened standard of review, is misplaced. *See* Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction, dated Nov. 12, 2010 ("Def. Br.") at 16-17. The heightened standard applies only when a moving party seeks to compel the government from acting contrary to a legal mandate or national security interests. *See Sussman v. Crawford*, 488 F.3d 136, 141 (2d Cir. 2007) (seeking to compel admission of 1,000 protestors onto a military installation during a visit by the Vice President, thus implicating "legitimate security concerns"); *see also Tunick v. Safir*, 209 F.3d 67, 69 (2d Cir. 2000) (seeking to exercise First Amendment rights in direct violation of New York State law prohibiting public nudity). Here, national security is not an issue, and Plaintiffs simply request the Court to compel Defendants to *comply* with a legal mandate—FOIA.

3 Defendants also argue that Plaintiffs are unlikely to succeed on the merits because Plaintiffs are not entitled to a fee waiver. However, Plaintiffs' entitlement to a fee waiver for the entire Request is irrelevant to the issue of Plaintiffs' likelihood of success on the merits of their claim seeking Opt-Out Records.

What is relevant is that Plaintiffs reasonably described the Opt-Out Records. "A description of the requested documents is adequate if it enables a professional agency employee familiar with the subject area to locate the record with a reasonable amount of effort." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000); *see also Yeager v. DEA*, 678 F.2d 315, 318, 326 (D.C. Cir. 1982) (holding that the core of the inquiry into whether a request "reasonably describes" the records requested is not the number of records requested, but "whether the agency is able to determine 'precisely what records (are) being requested'").

Plaintiffs requested and reasonably described Opt-Out Records in the initial February 2010 FOIA Request. (*See* Kessler Reply Decl. ¶ 2; Kessler Decl. Ex. A (the Request)). Plaintiffs subsequently provided Defendants with guidance and clarification regarding the definition of Opt-Out Records,[4] stressing the urgent need for these records throughout *six months* of negotiations:[5]

- On June 9, 2010, at Plaintiffs' first meeting with Defendants' counsel, Plaintiffs stated that Opt-Out Records were a top priority and provided Defendants with guidance as to the meaning of "opt-out". (Kessler Reply Decl. ¶ 3.)
- On June 25, 210, Plaintiffs provided Defendants with Plaintiffs' Rapid Production List ("RPL"), which described Opt-Out Records. (Kessler Reply Decl. ¶ 5; Kessler Decl. Ex. I (RPL); Connolly Decl. Ex. F (RPL).)

---

4 *See Ruotolo v. Dep't of Justice.* 53 F.3d 4, 10 (2d Cir. 1995) ([a]gencies cannot "resist disclosure because the request fails 'reasonably [to] describe' records unless it has first made a good faith attempt to assist the requester in satisfying that requirement.") (citation omitted). In *Ruotolo*, the court required the agency to clarify the scope of the request with the requester in part because it was required by DOJ's regulations. *Id.* at 10. DHS regulations contain a parallel requirement. 6 C.F.R. § 5.3; *see also Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (an agency "must be careful not to read [a FOIA] request so strictly that the requester is denied information that the agency well knows exists in its files, albeit in a different form from that anticipated by the requester").

5 Plaintiffs include correspondence and statements at Kessler Reply Decl. ¶¶ 2-13 and Exhibits A-E, redacted pursuant to Fed. R. Evid. 408(b), which permits the use of statements made during negotiations if they are offered for a purpose not prohibited by Fed. R. Evid. 408(a).

- On July 7, 2010, Defendants agreed to produce "the bulk of" the categories of records identified in the RPL by July 30, 2010, including the narrow subset of Opt-Out Records ("RPL Agreement") (Kessler Decl. Ex. 10 (Letter from Christopher Connolly, Assistant United States Attorney, to Bridget Kessler, Clinical Teaching Fellow, Jul. 9, 2010); Kessler Reply Decl. ¶¶ 4-5.)

- While awaiting Defendants' good faith compliance with the RPL Agreement, Plaintiffs repeatedly provided guidance about the potential location of Opt-Out Records and reiterated the Plaintiffs' and the public's need for that particular category of records. (*See, e.g.*, Kessler Decl. ¶ 6 (Jul. 27, 2010), ¶ 7 (Aug. 31, 2010), ¶ 9 (Sept. 1, 2010), ¶ 10 (Oct. 1, 2010), ¶ 11 (Oct. 11, 2010)).

As further evidence that Plaintiffs reasonably described the Opt-Out Records, certain of the Defendants have used those descriptions to search for and identify responsive Opt-Out Records. (*See* Hardy Decl. ¶¶ 32-33; Palmer Decl. ¶ 19; Kessler Reply Decl. Ex. P.)[6]

II. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF IRREPARABLE HARM THAT WILL CONTINUE TO RESULT WITHOUT IMMEDIATE PRODUCTION OF THE OPT-OUT RECORDS

Plaintiffs demonstrate that irreparable harm has and will continue to result—to Plaintiffs themselves, to local and state elected officials, and to the public—unless the Court grants the Motion ordering Defendants to produce the Opt-Out Records to which Plaintiffs (and the public) are entitled without further undue delay. (Pl. Br. at 15-21.) Defendants erroneously argue (a) Plaintiffs' Motion should be denied because Plaintiffs must suffer a direct harm, and (b) even if Plaintiffs have standing, there has been no showing of irreparable harm. (Def. Br. at 10-13.)

[6] ICE conflates search guidance (Pavlik-Keenan Decl. ¶¶ 39-41), and search terms (Pavlik-Keenan Decl. ¶¶ 48-49)—provided in the course of negotiations to assist in Defendants' location of responsive records—with Plaintiffs' definition of records related to opt-out. ICE further claims that Plaintiffs' definition of Opt-Out Records has shifted. (Def. Br. at 8.) The definition in Plaintiffs' opening brief is simply a restatement of the logical meaning of opt-out—"the existence or inexistence of a procedure for states and localities to decline or limit participation in Secure Communities and the technological capacity of ICE and the FBI . . . 'to ensur[e] that fingerprints are not transmitted from the FBI to ICE.'" (Pl. Br. at 1-2.)

First, Defendants misstate the law—there is no requirement in FOIA litigation that plaintiffs must suffer a direct harm in order to satisfy their burden.[7] Indeed, such a requirement would eviscerate the very purpose of FOIA litigation. *See Burka v. U.S. Dep't of Health & Human Servs.*, 142 F.3d 1286, 1290-91 (D.C. Cir. 1998) (recognizing that anyone may submit a FOIA request, irrespective of personal stake in the documents requested, and has standing to later challenge the agency's response to that request in a court action).[8] In other words, any party that initiated a FOIA request has standing to bring a FOIA action. *See, e.g., Three Forks Ranch Corp. v. Bureau of Land Mgm't*, 358 F. Supp. 2d 1, 2 (D.D.C. 2005) ("[a]ny person who submitted a request for existing documents that the petitioned agency denied has standing to bring a FOIA challenge"). And once granted standing to bring suit, proper FOIA plaintiffs are not foreclosed from seeking preliminary injunctions in those actions, as Defendants' argument suggests. *See ACLU v. Dep't of Defense,* 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (considering harm to non-plaintiffs in the FOIA injunction context).[9] Consequently, FOIA

---

7 Defendants' standing argument ignores the fact that Plaintiffs themselves face irreparable harm to their ability to participate in advocacy, education and organizing related to the public debate about opting-out of Secure Communities. (Def. Br. at 14-16.) The harm to Plaintiffs is linked to the public harm because if Plaintiffs are deprived of the Opt-Out Records, so are: the public; advocates; and state, local and federal elected officials. (Pl. Br. at 15-21.) Plaintiffs' ability to fully participate in the public debate regarding Secure Communities has been harmed over the past six months because of the lack of transparency relating to opt-out and will continue during the Secure Communities roll-out until the Opt-Out Records are released.

8 To support the argument that Plaintiffs lack standing to pursue a preliminary injunction, Defendants rely primarily on precedent outside of the FOIA context in which the public interest is scarcely implicated and the relief sought is far from essential. (*See, e.g.,* Def. Br. at 12) (citing *Carabello v. Beard*, 468 F. Supp. 2d 720 (E.D. Pa. 2006) (denying motion seeking injunction filed by a plaintiff, an inmate in a correctional facility, who sought the return of a fellow inmate to the general prison population for assistance in drafting legal documents)). Indeed, Defendants cite *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009), in which the Court explicitly limited its ruling to "the typical [*i.e.*, non-FOIA] case."

9 *See also Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence,* 542 F. Supp. 2d 1181 (N.D. Cal. 2008) (finding that irreparable harm exists in FOIA actions when it involves

plaintiffs may cite harm to the public generally, not necessarily harm distinct or direct to themselves, to satisfy the irreparable harm standard for preliminary injunctions. *See, e.g., Elec. Frontier Found.*, 542 F. Supp. 2d at 1186 (finding that irreparable harm exists in FOIA when it involves ongoing public debates about issues of vital national importance).

Second, further delay in the production of Opt-Out Records will irreparably harm Plaintiffs, the public, and their elected representatives, by preventing the public and the public's agents from making informed and critical public policy decisions before impending Secure Communities implementation dates. (Pl. Br. at 15-21.) Given the five month delay in satisfying the parties' RPL Agreement, Defendants' refusal to agree to a date certain for production, and repeated missed deadlines (*see* Kessler Decl. ¶¶ 12-16 & Ex. H; Kessler Reply Decl. ¶ 7 & Ex. A), a denial of Plaintiffs' Motion would likely result in Opt-Out Records remaining secret while ICE implements the remainder of its nationwide roll-out of Secure Communities (Pl. Br. at 8-11; Kessler Reply Decl. Ex. R), depriving the public the ability to engage in meaningful debate and negotiations with federal authorities, that enjoy an inherent advantage in power and access to information.

The lack of transparency continues to cause confusion. Since Plaintiffs filed the Motion, ICE left local elected officials with the new message that localities cannot opt-out of Secure

---

cont.

ongoing public debates about issues of vital national importance); *Elec. Private Info. Ctr. v. Dep't of Justice,* 416 F. Supp. 2d 30 (D.D.C. 2006) (same); *Leadership Conf. on Civil Rights v. Gonzales,* 404 F. Supp. 2d 246 (D.D.C. 2005) (same); *ACLU v. Dep't of Justice,* 321 F. Supp. 2d 24 (D.D.C. 2004) (same).

Communities at closed meetings in Santa Clara, San Francisco and Arlington.[10] Public officials in New York, on the other hand, still believe that localities there will be able to opt-out. (Kessler Reply Decl. Ex. S (Fernandez Decl. ¶¶ 9-16); (Pl. Br. at 19.))[11] ICE's and DHS's contradictions about opt-out demonstrate that the irreparable harm caused by the agencies' lack of transparency will continue until the public has access to the Opt-Out Records. It will be impossible to "restart or wind back" the debate that is raging across the country regarding the ability of localities to opt-out of Secure Communities, once the program is activated nationwide. (*See* Pl. Br. at 18-21); (Kessler Reply Decl. ¶ 20 & Ex. L (NDLON Petition, *Allow Counties & States to Opt-Out of the "Secure Communities" Program Immediately*, noting that the petition already has over 4,440 signatures from forty-eight (48) States, the District of Columbia and Puerto Rico)).[12]

---

[10] (*See, e.g.*, Kessler Reply Decl. Ex. J (Press Release, Santa Clara County); Kessler Reply Decl. Ex. K (Memorandum from Barbara M. Donnellan, County Manager, Arlington, Virginia, to County Board Members, Re: Secure Communities Meeting with ICE, Nov. 5, 2010); Kessler Reply Decl. Ex. Q (listing articles))

[11] "This program that the Federal Government asked us to be a part of, in which municipalities have a choice of whether or not they can opt in or not — which is what New York State was able to receive as opposed to other states." Catalina Jaramillo, Feet in 2 Worlds, *More Confusion Over Secure Communities: Did NY Make a Special Deal with Washington?* (quoting Governor Patterson's statement in an interview with Telemundo47), http://news.feetintwoworlds.org/2010/10/22/more-confusion-over-secure-communities-did-ny-make-a-special-deal-with-washington/.

[12] Defendants expend much effort to argue that irreparable harm cannot be based solely on events that have already taken place and claim that the Opt-Out Records will not be stale if Defendants' delay further in search and production. (Def. Br. at 13, 14.) The opt-out meetings that localities attended in early November, however, are only examples of the conversations about opt-out and Secure Communities across the country. *See, e.g.*, Kessler Reply Decl. Ex. S (Fernandez Decl. ¶¶ 17-19); *Domestic Violence Survivor Confronts Secure Communities Director*, Deportation Nation (Nov. 18, 2010), http://www.deportationnation.org/2010/11/domestic-violence-survivor-confronts-secure-communities-director/?utm_source=twitterfeed&utm_medium=twitter (quoting David Venturella stating "this [domestic violence and Secure Communities] is a tough topic" . . . "it elicits a lot of emotion")). Notably, Defendants do not dispute that the occurrence of the early November

ICE is rushing forward with the nationwide roll-out of Secure Communities at an alarming rate, with forty-two additional jurisdictions activated in the Secure Communities program following the filing of Plaintiffs' Motion, the total number of jurisdictions activated subsequent to Plaintiffs' Request now stands at six hundred seventy-two.[13] With jurisdictions being activated on an almost daily-basis, and only eighteen States remaining with unsigned MOAs,[14] the need for the Opt-Out Records could not be more dire.

III. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING THAT THE STRONG PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS THE NEGLIGIBLE BURDEN ON DEFENDANTS

Both the balance of equities and the public interest weigh in favor of granting this Motion. Relying principally on the standard articulated in *Winter v. Natural Resource Defense Council, Inc.*, 129 S. Ct. 365 (2008), Defendants offer vague assertions of hardship the Government will suffer if required to produce the Opt-Out Records it agreed to produce months ago. (Def. Br. at 22-24.) In doing so, Defendants again ignore that FOIA serves the public interest through the *prompt* disclosure of government records relating to issues of vital public importance. (*See* Pl. Br. at 21) (citing *ACLU v. Dep't of Defense*, 357 F. Supp. 2d 708, 712 (S.D.N.Y. 2005)). Allowing Defendants' purported burdens to further delay the disclosure of the

---

cont.

meetings with ICE without the Opt-Out Records irreparably harmed Plaintiffs, the public and the elected representatives involved. (Def. Br. at 13.)

[13] *See* U.S. Immigration and Customs Enforcement, *3 Missouri counties to benefit from ICE strategy to use biometrics to identify and remove aliens convicted of a crime* (Nov. 16, 2010), http://www.ice.gov/news/releases/1011/101116kansascity.htm (last visited Nov. 19, 2010); *All West Virginia Counties to Benefit from ICE Strategy to Use Biometrics to Identify and Remove Aliens Convicted of a Crime, ICE.gov* (Oct. 26, 2010), http://www.ice.gov/news/releases/1010/101026charleston.htm (last visited Nov. 19, 2010).

[14] *See* U.S. Immigration and Customs Enforcement, FOIA Reading Room, http://www.ice.gov/foia/readingroom.htm.

Opt-Out Records would undermine the fundamental principles that FOIA seeks to preserve. *See, e.g., Elec. Private Info. Ctr.*, 416 F. Supp. 2d at 42 (vague suggestions that inadvertent release of exempted documents might occur are insufficient to outweigh benefits of FOIA). Balancing the equities, the need for a robust and well-informed public discourse outweighs the Defendants' vague argument regarding their purported burden of processing and producing the Opt-Out Records that they agreed to produce months ago. While Defendants claim to serve the public interest by guarding against the release of potentially exempt records, Defendants undermine the public interest by inhibiting an informed debate about the voluntary or mandatory nature of Secure Communities *before* nationwide implementation.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a Preliminary Injunction.

Dated: November 19, 2010
New York, New York

Respectfully submitted,

/s/

BRIDGET P. KESSLER (BK-1333)
PETER L. MARKOWITZ (PM-9052)
JAMES HORTON
PHILLIP STARKWEATHER
HANNAH WEINSTEIN
Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
Tel: 212-790-0213
Fax: 212-790-0256
bkessle1@yu.edu
pmarkowi@yu.edu

Attorneys for IJC and NDLON

/s/

SUNITA PATEL (SP-1443)
DARIUS CHARNEY (DC-1619)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
Tel: 212-614-6439
Fax: 212-614-6499
SPatel@ccrjustice.org
DCharney@ccrjustice.org

Attorneys for CCR and NDLON

/s/

PAULA A. TUFFIN
ANTHONY J. DIANA
NORMAN R. CERULLO
Mayer Brown LLP
1675 Broadway
New York, New York 10019
ptuffin@mayerbrown.com
adiana@mayerbrown.com
ncerullo@mayerbrown.com

Attorneys for NDLON