

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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AMERICAN IMMIGRATION COUNCIL, et al.,)	No. 3:12-CV-00355 (WWE)
)	
Plaintiffs,)	September 21, 2012
)	
v.)	
)	
DEPARTMENT OF HOMELAND SECURITY ,)	
)	
Defendant.)	
_____)	

DECLARATION OF MICHAEL WISHNIE

I, Michael Wishnie, upon my personal knowledge, information, and belief, and in accordance with 28 U.S.C. § 1746, hereby declare as follows:

1. My name is Michael Wishnie. I am an attorney with the Jerome N. Frank Legal Services Organization (“LSO”), and counsel for Plaintiffs in this litigation.
2. On January 4, 2012, I attempted to contact Seth Grossman, whom I believe is currently Deputy General Counsel, Department of Homeland Security (“DHS”), and at the time of my call was Chief of Staff, DHS Office of the General Counsel. In both of these positions, his portfolio included immigration-related matters. I placed the call in an effort to discuss the scope of the FOIA request at issue in this case, including the possibility of random sampling as a mutually beneficial approach, and in the hope that we might avoid the need for litigation of the request. I left a message on Mr. Grossman’s personal voicemail requesting the opportunity to discuss the FOIA request. I did not receive a response from Mr. Grossman or anyone acting on his behalf.

3. In response to the FOIA request at issue in this case, my office received a letter dated January 27, 2012 from an official, Catrina Pavlik-Keenan. I know from Ms. Pavlik-Keenan's deposition in a prior FOIA case handled by the clinic in the District of Connecticut that she is the head of the ICE FOIA office. Her January 27, 2012 letter asserted that the request was "not . . . perfected" and that requesters must "further refine" the request before the agency would respond. The letter also stated that an affirmation/declaration form attached to the letter must be submitted within 30 days on behalf of all "individual aliens" that may be the subject of a search, or ICE would conclude that the requesters "no longer require[d] the information requested."

4. On March 1, 2012, Jason Glick, a law student intern working under my supervision, called the phone number indicated on ICE's January 27 letter and was transferred to a person identified as Mark Graff. Mr. Glick stated that Plaintiffs do not seek personally identifying information. I understand Mr. Graff expressed the opinion of DHS that any record relating to any person, including any document located by a database search done by individual alien number ("A#"), is protected by the Privacy Act. In my view this is a plain misstatement of law.

5. On March 8, 2012, Cody Wofsy, another law student intern working under my supervision, again called the number listed in the January 27, 2012 ICE letter. I understand Mr. Wofsy was told that Ms. Pavlik-Keenan was out of the office. I understand that Mr. Wofsy left a message stating that Plaintiffs did not waive any part of their request, and reconfirmed that Plaintiffs did not seek any personally identifying information but wished to explore random sampling as a mutually agreeable resolution of the request.

6. On March 20, 2012, my office received a letter from ICE dated March 13, 2012 regarding our administrative appeal of ICE's fee waiver denial.

7. On June 11, 2012, I spoke with opposing counsel regarding this matter. I explained that in our view, Plaintiffs are entitled to a full fee waiver. I also noted that some parts of the request, such as those items in Part I (related to policies and procedures), reasonably ask for all relevant documents. As to portions of the request, such as Part V (related to individual records), I repeated the statement from the original request that requesters would accept a random sample of responsive records so as to dramatically reduce the total volume of records to be searched and produced. I further stated that certain information from DHS could aid both sides in exploring an agreement for a more limited document production, such as the type and approximate number of responsive records that exist; the kinds of communications from ICE field offices to ICE headquarters that might exist, given that in other ICE enforcement programs there are such weekly or monthly reports; and the sort of annual reports or audits done in CAP regarding contacts and arrests associated with the program.

8. On June 21, 2012, I participated in a second telephone conference with counsel for DHS. At that time, counsel for DHS indicated that DHS declined to undertake random sampling of responsive records. At no time did Defendant, ICE, or any representative of either agency agree to engage in any such sampling, or even to identify the universe of records from which Plaintiffs, aided by statistics experts, could calculate the minimum sample necessary to generate a valid result.

9. Defendant has characterized Plaintiffs' FOIA request as unduly burdensome and moved for summary judgment on this basis. See ECF No. 27-1. However, Plaintiffs lack information relating to burdensomeness other than that contained within the Declaration of Jamison Matuszewski, ECF No. 27-2.

10. Exhibit A, attached hereto, is a true and correct copy of an EARM Encounter Summary and accompanying cover letter produced by Immigration and Customs Enforcement, a component of Defendant, in response to a FOIA request. The redactions indicated with “b6,” “b7,” and “k2” were made by ICE prior to disclosing this form in response to the FOIA request. I have redacted additional personally identifying information.

11. Exhibit B, is a true and correct copy of a DHS document entitled “Privacy Impact Assessment Update for the Enforcement Integrated Database (EID), ENFORCE Alien Removal Module (EARM 3.0),” available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_eidupdate\(15b\).pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_eidupdate(15b).pdf) (last visited 9/21/12).

12. Exhibit C, attached hereto, is a true and correct copy of a DHS document containing a statement of ICE director John Morton before the House Subcommittee on Homeland Security, available at <http://appropriations.house.gov/uploadedfiles/hhrg-112-ap15-jmorton-20120308.pdf> (last visited 9/21/12).

13. Exhibit D, attached hereto, is a true and correct copy of a DHS document entitled “U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States,” available at http://www.oig.dhs.gov/assets/Mgmt/OIG_11-26_Jan11.pdf (last visited 9/21/12).

14. Exhibit E, attached hereto, is a true and correct copy of an example Form I-213. This document was previously filed in DACORIM v. DHS, No. 3:06-cv-01992-RNC (D. Conn.), ECF No. 60-3.

