UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SUSAN B. LONG and TRAC REPORTS, INC., Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT and U.S. CUSTOMS AND BORDER PROTECTION, Defendants.	)	No. 5:23-cv-1564 (DNH/TWD)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT U.S. CUSTOMS AND BORDER PROTECTION

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PRELIMINARY STATEMENT

In response to a Freedom of Information Act (FOIA) request submitted by Plaintiffs Susan B. Long and TRAC Reports, Inc., Defendant U.S. Customs and Border Protection (CBP) claims that it has no duty under FOIA to produce records that it creates and stores in the Enforcement Integrated Database (EID) because CBP "does not possess or control" those records. Dkt. 50 at 1. The undisputed facts belie CBP's claim. CBP admits that it "transmit[s] certain data to the EID" and that it can and does "access or change that data" as needed to further its own operational objectives. *Id.* at 3. Although the data is stored in a database that is owned and operated by U.S. Immigration and Customs Enforcement (ICE), CBP's concessions establish that this data falls within CBP's own records for purposes of FOIA.

CBP emphasizes that it "did not create *all* of th[e] data" in the EID, *id.*, and that its access to the EID is "limited" to records that are "relevant to CBP's mission," *id.* at 5. These facts, though, cast no doubt on whether CBP possesses or controls the data that it *does* contribute to the EID, and that it can and frequently does retrieve from the EID and use for its own purposes. Indeed, CBP simply brushes past evidence that the U.S. Department of Homeland Security (DHS), ICE, and CBP itself have all long recognized CBP's ownership of the EID data that CBP creates and uses.

Because the undisputed facts establish that at least some of the records that are responsive to Plaintiffs' FOIA request are CBP records as a matter of law, this Court should grant summary judgment in favor of Plaintiffs and order CBP to produce those records without further delay.

In the alternative, this Court should defer ruling on summary judgment until Plaintiffs have had the opportunity to conduct discovery into CBP's history of claiming and exercising control over its EID records. The present record, at a minimum, casts serious doubt on CBP's efforts to disclaim ownership of the records that CBP contributes to and regularly retrieves from the EID in

the course of carrying out its own operations. Plaintiffs have served targeted discovery demands on CBP to explore the factual basis for its claimed defense, and CBP has refused to provide any responses. CBP admits that this Court has discretion to order it to engage in the discovery process that is ordinarily required of civil litigants, *id.* at 17, and it offers no sound reason why the Court should decline to do so here. To the extent that a more developed evidentiary record is needed to assure the Court that CBP's claimed defense is baseless, the Court should order CBP to respond to Plaintiffs' discovery demands.

ARGUMENT

I. Plaintiffs are entitled to summary judgment against CBP.

Plaintiffs submitted a FOIA request to CBP well over a year ago, and CBP has not yet produced any responsive records. Accordingly, Plaintiffs are entitled to summary judgment on their FOIA claim unless CBP can carry its "burden of 'justify[ing] the withholding'" of the records that Plaintiffs seek. *Seife v. FDA*, 43 F.4th 231, 235 (2d Cir. 2022) (alteration in original; quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). The lone justification that CBP has offered for denying Plaintiffs' FOIA request is that no requested records are CBP records within the meaning of FOIA. Dkt. 50 at 2–16. Because that contention fails as a matter of law, CBP has failed to rebut Plaintiffs' showing that they are entitled to summary judgment against CBP.[1]

A. The parties agree that a FOIA request is properly directed to an agency if that agency has "'either create[d] or obtain[ed]' the requested materials" and is "in control of the requested materials at the time the FOIA request is made." *DOJ v. Tax Analysts*, 492 U.S. 136, 144–45

[1] CBP suggests that if this Court rejects its "agency records" argument, it will seek leave to file an additional summary judgment motion that raises new arguments. Dkt. 50 at 16–17. CBP has not explained why it could not have raised any alternative arguments in its initial motion, and no such arguments are presently before the Court.

(1989) (quoting *Forsham v. Harris*, 445 U.S. 169, 182 (1980)); *see* Dkt. 50 at 2. With respect to data that CBP contributes to the EID, there is no genuine dispute that both conditions are met.

1. As for creation, CBP concedes that it "transmit[s] certain data to the EID through CBP applications" during the course of its enforcement activities. Dkt. 50 at 3. While CBP suggests that compiling this data is not "tantamount to creating records," *id.*, it offers no legal support for that contention. Instead, CBP emphasizes that it "did not create *all* of th[e] data" in the EID that is responsive to Plaintiffs' FOIA request. *Id.* Plaintiffs' operative request, though, was directed to both CBP and ICE, and it sought responsive records from each agency. *See* Dkt. 39-5. The fact that CBP did not create *all* of the records that fall within the scope of Plaintiffs' request does not absolve CBP of its duty to produce the responsive records that it *did* create and *can* retrieve and produce. *See* 5 U.S.C. § 552(a)(8)(A)(ii)(I) (requiring an agency to "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure … is not possible"). And while CBP specifically denies having created one discrete category of records sought—"EID 'code files or look up tables,'" Dkt. 50 at 4; *see* Dkt. 39-6 ¶ 16—Plaintiffs' operative FOIA request also seeks any "other records that translate the specific codes used" in the underlying EID data "into their corresponding meaning." Dkt. 39-5 at 2. CBP has not denied having created or obtained any other records that fit this description. To the extent that CBP has such records, it should produce them.

CBP is wrong to claim that Plaintiffs have engaged in a "mid-briefing re-framing of their [FOIA] request" by stating that they expect CBP to produce only those responsive records that CBP created and controls (with ICE producing the remainder). Dkt. 50 at 14. Plaintiffs continue to seek "'all datapoints' from the EID related to two sets of individuals," and not, as CBP claims, "any EID data, in any form, and [from] any location that CBP may have it." *Id.* at 15. Nor do

Plaintiffs now ask CBP to search its own "systems," rather than the EID, for any "limited snapshots of EID data" that CBP may happen to have handy. *Id.* As CBP admits, it can and does "obtain[] data from the EID" by using its computer applications to "import[]" a copy of that data as it currently exists in the database. *Id.* at 6. Plaintiffs ask CBP to follow that standard process here.

To the extent that CBP suggests that the act of using an application to extract a copy of the data that it has compiled and uploaded into the EID constitutes the creation of a record and so is not required by FOIA, *see id.* at 15–16, CBP is wrong. While "FOIA imposes no duty on [an] agency to *create* records," *Forsham*, 445 U.S. at 186 (emphasis added), Plaintiffs ask CBP, consistent with FOIA's requirements, to utilize the "automated means" that CBP already has at its disposal to search the EID "for the purpose of locating those records which are responsive to a request," 5 U.S.C. § 552(a)(3)(D); *see Ctr. for Investigative Reporting v. DOJ*, 14 F.4th 916, 938 (9th Cir. 2021) (noting that "courts have consistently held that database searches do not involve the creation of new records" and citing cases that "have held that sorting, extracting, and compiling pre-existing information from a database does not amount to the creation of a new record"). Indeed, DHS's own regulations make clear that FOIA requires an agency to produce "specific requested fields or records contained within a well-defined database structure," even when doing so—unlike here—would require the agency to "[c]reat[e] a [new] computer program." 6 C.F.R. § 5.4(i)(2)(ii).

CBP also suggests that because "CBP data, once transmitted to the EID, can be modified by other EID users," the data as it now appears in the EID may not be the data that was initially created by CBP. Dkt. 50 at 3–4. But even if non-CBP users of the EID are technically capable of modifying the data that CBP compiles in connection with its own enforcement activities, CBP has produced no evidence that such users have any reason to do so, let alone that they actually do so in fact. Indeed, if CBP were correct that a record is not an agency record if an outside user could

hypothetically modify it, then none of the records that Plaintiffs seek from CBP belong to *any* agency, given that all of them reside in "a common database repository for several DHS components," where they can be modified both by CBP and by "other users … as well." *Id.* at 3.

2. As for control, CBP admits that it "can access certain EID data" that is "relevant to CBP's mission," Dkt. 50 at 5, and it does not dispute that it regularly does retrieve and utilize the data that it stores in the EID to carry out its regular operations. *See, e.g.*, Dkt. 50-2 at 17 (explaining that CBP uses EID data for various purposes, including "enforcement activities"); Dkt. 46-11 (displaying apprehension data that CBP has collected, stored in the EID, and then disseminated for CBP's own ongoing reporting purposes); Dkt. 46-12 (same). Furthermore, CBP concedes that it has the "ability to make changes to information after it has been transmitted to the EID." Dkt. 50 at 5. While CBP's brief describes this ability as "limited," *id.*, CBP neither identifies any purported limits nor points to any record evidence that does so. The best that CBP can muster is "a document," *id.* at 9, that CBP does not identify and that CBP apparently reads to imply that CBP is limited to "read-only access to EID data," *id.* (quoting Dkt. 50-4). But the paragraph in which the relevant sentence appears says nothing about CBP and, in any event, CBP admits that it *can* modify data within the EID, *id.* at 5, thus establishing that, whatever else CBP's cited sentence might mean, it does *not* mean that CBP's access to the EID is read-only.

As Plaintiffs have explained, Dkt. 46-1 at 8–9, CBP's undisputed ability to retrieve, use, and modify the records that it creates and stores in the EID—and CBP's undisputed practice of in fact exercising this ability—establishes that CBP has control over those records for purposes of FOIA as a matter of law. Specifically, the evidence demonstrates that at least three of the four factors that courts use to assess "control" are present here: CBP's "intent … to retain … control over the records," CBP's "ability … to use and dispose of the record[s] as it sees fit," and the fact

that "[CBP] personnel have read or relied upon the [records]."[2] *Cox v. DOJ*, 111 F.4th 198, 208 (2d Cir. 2024) (quoting *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 218 (D.C. Cir. 2013)). As in its initial brief, CBP suggests that this Court should eschew the prevailing four-factor test, *see* Dkt. 50 at 10; Dkt. 39-1 at 7–8, but also as in its initial brief, CBP does not explain how the Court should otherwise assess "control" or why CBP would prevail under some other, unspecified set of factors. Either way, CBP has not carried its burden of showing that it lacks control over its EID records. *See Doyle v. DHS*, 959 F.3d 72, 76 (2d Cir. 2020) (noting that the agency bears the burden of disproving that the records sought are agency records).

CBP's effort to disclaim control rests on a smattering of irrelevant facts. First, CBP states that it uses "CBP applications or systems" to retrieve and modify the data that it has transmitted to the EID. Dkt. 50 at 4. CBP, however, offers neither reasoning nor precedent to explain why this fact makes a difference. Whether CBP retrieves EID data "directly," *id.*, or by using specialized computer programs, the undisputed fact remains that CBP can and does retrieve, utilize, and manipulate the data that it has created and stored in the EID. Second, CBP again emphasizes that its access is limited to data that is "relevant to [its] mission." *Id.* at 5. Here too, though, the fact that CBP lacks control over the data that *other agencies* store in the EID does not create a dispute over whether CBP has control over the data that *it* stores there. Finally, CBP states that "when CBP obtains data from the EID, it does so through a 'snapshot' of a subset of EID data" that will not be updated if the underlying data is later edited. *Id.* at 6. Any access to a governmental record, however, must occur at a particular point in time, with the possibility that the record could

[2] The fourth factor is "the degree to which the [data] was integrated into [CBP's] record system or files." *Cox*, 111 F.4th at 208 (quoting *Judicial Watch*, 726 F.3d at 218). Plaintiffs accept that the EID itself is owned and operated by ICE, so Plaintiffs do not principally rely on this factor. That said, Plaintiffs note that CBP's regular integration of EID data into CBP documents that it uses to report on its own operations, *see infra* p. 12, might satisfy this factor as well.

subsequently be updated or modified. That reality does not alter the fact that CBP has the authority to retrieve certain data as it exists in the EID at any given point in time, utilize or disseminate that data, and modify that data within the EID as it sees fit. Indeed, the source on which CBP relies to explain how CBP extracts information from the EID refers to CBP's creation of "snapshots *of CBP data* in the … [EID]." Dkt. 50-5 at 2 (emphasis added).

CBP's attempts to analogize this case to *Cause of Action Institute v. OMB*, 10 F.4th 849 (D.C. Cir. 2021), *see* Dkt. 50 at 10–12, are unpersuasive. In *Cause of Action Institute*, the plaintiff sought the browsing histories of certain agency employees. 10 F.4th at 852. The D.C. Circuit concluded that the browsing histories were not agency records subject to FOIA, and it emphasized, among other things, that the agencies had made no "special effort to preserve" their employees' histories, had "restricted official access to an employee's browsing history," and "did not use the … browsing histories for any purpose, much less a purpose connected to agency decisionmaking." *Id.* at 856–57. Here, in contrast, CBP preserves the data that it collects as part of its enforcement activities by storing that data in the EID, has authority to access and modify that data with no identified limitations, and regularly does retrieve, use, and publish that data to further its mission.

CBP's response to these obvious—and legally dispositive—distinctions is to fall back on the same irrelevant facts that it emphasizes elsewhere: that CBP retrieves its EID data by means of "snapshots," that CBP "uses applications" to extract and modify the data, and that CBP stores its data in "an ICE-owned-and-operated database." Dkt. 50 at 11–12. Again, though, data copied out of a dynamic spreadsheet at a particular point in time necessarily takes the form of a static snapshot, the fact that CBP uses applications to access and edit its data does not undermine CBP's level of control over that data, and the fact that CBP's data is housed in an ICE-owned repository does not automatically divest CBP of ownership over that data. *Cf. Kissinger v. Reporters Comm.*

for Freedom of the Press, 445 U.S. 136, 157 (1980) (denying that the "mere physical location of papers and materials" in an agency's offices means that those materials belong to the agency that houses them); *Cause of Action Inst.*, 10 F.4th at 858 (rejecting the notion that an agency "necessarily 'control[s]' every document found in its digital storage"). And although CBP emphasizes that CBP "does not determine when data will be deleted from the EID," Dkt. 50 at 11, this argument is simply a variation on CBP's argument that users from other agencies are theoretically capable of modifying CBP data, and it fails for the same reasons. Specifically, CBP has produced no evidence that it is unable to modify—or delete—the data that it stores in the EID when it wishes to, and CBP has produced no evidence that other users in fact do modify—or delete—the data that it stores in the EID, particularly in circumstances where CBP wants that data to be retained intact, even if those users are technically capable of doing so.

CBP's continued reliance on *Kayll v. DHS*, No. 22-cv-02830, 2024 WL 81231 (D.D.C. Jan. 8, 2024), is similarly misplaced. CBP first suggests that, under *Kayll*, its control over its EID records is irrelevant because it lacks "actual or constructive possession" of those records, Dkt. 50 at 13 (quoting *Kayll*, 2024 WL 81231, at *3), and possession is a "threshold issue that precedes the issue of … control," *id*. But as Plaintiffs have already correctly observed, *see* Dkt. 46-1 at 6 n.2, these inquiries are not distinct, *see Tax Analysts*, 492 U.S. at 145 (equating the issue of whether an agency is "in control of the requested materials at the time [a] FOIA request is made" with the issue of whether "the materials have come into the agency's possession in the legitimate conduct of its official duties"). And CBP offers no explanation as to how an agency could exercise control over certain records—as CBP controls its EID data here—without at the same time having at least "constructive possession" of those records. Certainly, *Kayll* sheds no light on that question, given that the decision does not reach—and so does not analyze—the issue of possession. *See* 2024 WL

81231 at *3. In any event, whatever CBP understands possession or constructive possession to mean in this context, the fact that CBP can and does freely retrieve, modify, and publish the data that it stores in the EID undoubtedly satisfies any such requirement.

CBP also claims that *Kayll* is relevant because it "expressed doubt" about whether CBP had created a CBP record when it filled out a portion of a form that the State Department created and used as part of its process for evaluating visa applications. Dkt. 50 at 14; *see Kayll*, 2024 WL 81231 at *3–5. *Kayll*, though, "assume[d] without deciding that CBP *ha*[*d*] created a record." 2024 WL 81231 at *5 (emphasis added). And any doubt that *Kayll* expressed about the creation of a CBP record was rooted in the facts of that case, in which CBP filled out a State Department form with information that the State Department had requested to assist the State Department in carrying out the State Department's own functions. In this case, in contrast, CBP compiles data in the course of *its own* agency activities and utilizes that data to further *its own* operational objectives, while it simply happens to store that data in an electronic repository that is owned by another agency.

Ultimately, CBP's own concessions about the level of control that it exercises over the records that it creates and stores in the EID establish that those records are CBP records for purposes of FOIA. It necessarily follows, then, that CBP has not carried its burden of *disproving* that the records are CBP records. *See Doyle*, 959 F.3d at 76.

B. What is more, CBP simply brushes aside the record evidence that DHS, ICE, and CBP itself have long recognized CBP's ownership of the data that CBP stores in the EID, dismissing it as a "potpourri of anecdotal 'evidence' and isolated documents." Dkt. 50 at 7. To begin with, CBP's brief entirely ignores cases from as recently as 2023, cited by Plaintiffs, *see* Dkt. 46-1 at 11, in which *the government's own declarations* acknowledge that certain EID records fall within the CBP's purview for purposes of FOIA. *See Buzzfeed, Inc. v. DHS*, No. 19-cv-03062, 2023 WL

5133158, at *1 (D.D.C. Aug. 10, 2023) (describing a DHS declaration that notes DHS's identification of a component of CBP as the appropriate party to respond to a FOIA request for records stored in the EID and that describes CBP's subsequent production of "over 4,423,000 unredacted rows of responsive data"); *ACLU Found. of Ariz. v. DHS*, No. 14-cv-02052, 2017 WL 8895339, at *4 (D. Ariz. Jan. 26, 2017) (quoting a CBP declaration describing a query that CBP conducted in response to a FOIA request after determining that the "EID [was] the only repository or system likely to contain [responsive] records").

Meanwhile, the conduct of DHS, ICE, and CBP in response to Plaintiffs' previous FOIA requests confirms that the government has long taken the view that the EID houses CBP records. For example, Dr. Long's declaration recounts a 2011 phone conversation in which ICE expressly informed her that, "while [ICE] owns the EID for operational purposes, it does not own all of the fields in the EID database." Dkt. 46-7 ¶ 10. The declaration goes on to state that "[o]n many occasions since then, ICE has informed [Dr. Long] that the EID information it provides is limited to ICE activity and that CBP is responsible for responding to requests for EID information that concerns CBP activities, even though both agencies may be involved in the arrest and removal of the same individuals and even though the associated data is all stored together in the EID." *Id.* ¶ 13. CBP dismisses the declaration as a "self-serving" description of Dr. Long's "personal beliefs," Dkt. 50 at 7, but these statements are factual contentions about what ICE has said to Dr. Long, not about what she believes. And the fact that Dr. Long's declaration—like CBP's declarations—could be characterized as "self-serving" does not license this Court to disregard it. *See, e.g.*, *Walsh v. N.Y.C. Hous. Auth.*, 828 F.3d 70, 79–80 (2d Cir. 2016) (holding that the district court abused its discretion by excluding from the summary judgment record plaintiff's "self-serving" testimony about a statement that defendant's agent made); *cf. Danzer v. Norden Sys., Inc.*,

151 F.3d 50, 57 (2d Cir. 1998) ("To hold … that [a party's] allegations of fact are (because 'self-serving') insufficient to fend off summary judgment would be to thrust the courts—at an inappropriate stage—into an adjudication of the merits.").

Documentary evidence, moreover, corroborates Dr. Long's account. An email from the government agency that was coordinating among Dr. Long, ICE, and CBP to resolve the FOIA request that gave rise to the 2011 phone conversation referenced above confirms that the request required ICE to "work[] with CBP" to facilitate production of "data fields that [were] not ICE-owned." Dkt. 46-8 at 1; *see* Dkt. 46-7 ¶¶ 10–11. And a subsequent letter from CBP reports that ICE consequently asked CBP to "conduct a search for responsive records maintained by CBP." Dkt. 46-9 at 1. CBP discounts these documents because they are "devoid of any context" and do not mention the EID by name. Dkt. 50 at 8. But Dr. Long's declaration describes the documents' context and makes clear that they addressed a "FOIA request seeking data from the EID." Dkt. 46-7 ¶ 10. It is only by impermissibly disregarding the declaration that CBP can profess ignorance as to the subject matter of the underlying documents. Meanwhile, CBP cannot plausibly claim a lack of context as to the letter that ICE sent Dr. Long in response to a separate FOIA request, which states that the request sought "information … recorded in … the [EID]" and reports ICE's determination that "the information … is under the purview of [CBP]." Dkt. 46-10 at 1. CBP's answer to this evidence—that nothing in the letter directed CBP to produce the information "directly" from the EID and that the FOIA request *also* sought information from CBP's own "data repositories," Dkt. 50 at 8—is a non sequitur. If, as CBP now argues, ICE has exclusive ownership over all records in the EID, then ICE's referral to CBP of the portion of the request that sought EID records would have been inexplicable and counterproductive.

Indeed, it stands to reason that ICE must sometimes rely on CBP to produce responsive records from the EID because, as Plaintiffs have explained, Dkt. 46-1 at 12–13, CBP is uniquely well situated to identify and produce the EID records that are germane to its own operations. In this case, Plaintiffs seek—among other things—EID records that are "directly or indirectly linked to a person who was apprehended pursuant to a CBP 'encounter' in or after Fiscal Year 2020." Dkt. 39-5 at 2. CBP ignores that ICE has disclaimed any ability to identify the EID records that are associated with these people, *see* Dkt. 46-1 at 13 (citing Dkt. 40-3 ¶ 42), and it does not dispute that CBP not only can—but regularly *does*—compile and publish such records, *see id.* at 11–12 (citing CBP, *Nationwide Encounters* (last updated Dec. 19, 2024), https://tinyurl.com/yfuptrrw). CBP downplays the fact that it regularly disseminates the EID data that it collects in connection with its own enforcement activities, emphasizing that the EID is sometimes listed as an "'unofficial' data source" for these publications. Dkt. 50 at 8. Even accepting CBP's claim that this designation means that the data is not drawn "directly" from the EID but instead is drawn from the EID through CBP's own interfaces, *id.*, however, CBP here too fails to explain why that distinction bears legal significance. And at least with respect to the *Nationwide Encounters* datasets—which the relevant portion of Plaintiffs' FOIA request directly references, *see* Dkt. 39-5 at 2—the EID is listed as a "Data Source," without any "unofficial" designation, *see* CBP, *Nationwide Encounters Data Dictionary* (Sept. 2023), https://tinyurl.com/ypa6p4zj.

Just as CBP has undisputedly done in the past, then, it should "work[] with" ICE, Dkt. 46-8 at 1, to identify and produce the records that are responsive to Plaintiffs' FOIA request in this case. CBP's arguments as to why it should be relieved of that obligation here misconstrue the law and the facts and contravene the government's longstanding past practices.

II. In the alternative, this Court should order CBP to respond to Plaintiffs' discovery demands.

While the existing record establishes Plaintiffs' entitlement to summary judgment against CBP, it bears noting that CBP has refused to produce any discovery whatsoever in response to the discovery demands that Plaintiffs served on CBP with Magistrate Judge Dancks's permission on October 31, 2024. *See* Dkt. 54-2. As an alternative to granting Plaintiffs summary judgment outright, then, this Court has discretion to order CBP to engage in the discovery process so that this Court can revisit the issue of summary judgment on the basis of a more developed record.[3]

CBP admits that this Court has discretion to order discovery, Dkt. 50 at 17, but it emphasizes that the "bare hope of falling upon something that might impugn [agency] affidavits" is insufficient to justify discovery in a FOIA case, *id.* at 18 (quoting *Jarvik v. CIA*, 741 F. Supp. 2d 106, 122 (D.D.C. 2010)). Critically, though, Plaintiffs rely on far more than unsubstantiated speculation that evidence revealed in discovery might belie CBP's claim to lack control over its EID data. As described extensively above, CBP concedes that it can and does retrieve and modify data that it has compiled and stored in the EID, *see supra* p. 5, CBP has produced data from the EID in connection with prior FOIA requests, *see supra* pp. 9–11, ICE and DHS have previously referred FOIA requests for EID data in whole or in part to CBP, *see supra* pp. 9–11, and CBP regularly draws data out of the EID and publishes it as part of its own reporting operations, *see supra* p. 12. This "tangible evidence that a[ ] [defense] claimed by the agency should not apply" is

[3] Plaintiffs have explained why CBP is not entitled to summary judgment, *see* Dkt. 46-1 at 6–13, and CBP's reply arguments in support of its summary judgment motion fail for the same reason that CBP's arguments in opposition to Plaintiffs' cross-motion for summary judgment fail. But if this Court declines to grant summary judgment in Plaintiffs' favor at this time, then it should determine whether Plaintiffs are entitled to discovery responses before ruling on CBP's summary judgment motion. After all, if Plaintiffs are entitled to further develop the record, then the question whether the existing record supports summary judgment for CBP is immaterial.

exactly the sort of showing that the Second Circuit has held can "justify discovery" into an agency's defenses in a FOIA case. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *see also Cox*, 111 F.4th at 213 (observing that while evidence of an agency's bad faith can be sufficient to justify discovery, such a showing is not necessary).

Meanwhile, even a quick skim of the discovery demands that Plaintiffs have served on CBP, *see* Dkt. 46-4; Dkt. 46-5; Dkt. 46-6, reveals that CBP is wrong to claim that the demands represent an "inappropriate[] attempt[] to obtain information through discovery which Plaintiffs would be unable to obtain through FOIA." Dkt. 50 at 18. Not a single one of Plaintiffs' demands seeks the EID records that are the subject of Plaintiffs' FOIA request. Rather, each demand seeks information that will enable Plaintiffs to probe the validity of CBP's claimed defense that it lacks authority and control over its EID records. For example, Plaintiffs have asked CBP about instances in which CBP has produced or declined to produce EID records in response to FOIA requests, including requests that have been referred to CBP by other government agencies. *See* Dkt. 46-4 Nos. 1–3; Dkt. 46-5 Nos. 4–5; Dkt. 46-6 Nos. 4–5. Plaintiffs have asked CBP about its ability to access, delete, and modify EID records, its practices of using and disseminating EID records, and whether CBP has sought permission from ICE before accessing, using, or modifying EID records. *See* Dkt. 46-4 Nos. 4–6, 9–10; Dkt. 46-5 Nos. 2–3, 6–7; Dkt. 46-6 Nos. 1–3. And Plaintiffs have asked CBP about its unique ability to query the EID in ways that are specific to its operational mission and that ICE claims to be unable to accomplish. *See* Dkt. 46-4 Nos. 7–8, 11–12; Dkt. 46-5 Nos. 8–14; Dkt. 46-6 Nos. 6–14. All of these areas of inquiry are plainly and directly relevant to the defense that CBP has asserted, and CBP has not argued otherwise.

CBP also objects to the supposedly "broad-ranging" scope of Plaintiffs' demands, Dkt. 50 at 20, but again, the demands are closely focused on factual issues that CBP itself has put at issue

through its claimed defense. In any event, CBP's objections to the scope of the discovery are premature. As Plaintiffs have explained to Magistrate Judge Dancks, "[b]ecause of the parties' fundamental disagreement over whether … CBP [is] required to produce *any* discovery in this case, the parties have not considered whether they may be able to amicably resolve any of [CBP's] objections … toward specific items within Plaintiffs' discovery demands." Dkt. 52 at 2. Once this Court has resolved the question whether CBP must participate in the discovery process at all, CBP can raise any objections it has to particular discovery requests, and the parties can work to resolve any such discrete disputes consensually or, if necessary, with the assistance of Magistrate Judge Dancks. CBP's generalized complaint about the scope of the discovery demands, in other words, does not justify its refusal to produce any discovery at all.

Finally, CBP suggests that it should be permitted to supply "supplemental submissions" in lieu of discovery. Dkt. 50 at 19. But CBP had every incentive to support its claimed defense with sufficient evidence the first time around, and courts that have taken CBP's proposed course have expressed frustration with the "burden" that this type of "iterative process" places "on the time [and] resources of all involved" and have noted that "it is at odds with [FOIA's] statutory design, which attempts to foster expedition." *Akel v. DOJ*, No. 20-cv-03240, 2024 WL 939974, at *2 (D.D.C. Mar. 4, 2024); *see, e.g.*, *Families for Freedom v. CBP*, 837 F. Supp. 2d 331, 337 (S.D.N.Y. 2011) ("After nearly two years of inadequate searches, six sworn declarations, numerous letters and briefs and in-person conferences, the Court's patience has worn out."). To the extent that this Court is not inclined to grant summary judgment for Plaintiffs on the existing record, the efficient course would be to order the discovery necessary to create a full evidentiary record regarding CBP's claimed defense once and for all, rather than to set up the parties and the Court for recurring and unnecessary cycles of summary judgment briefing and rulings.

CONCLUSION

This Court should grant summary judgment in favor of Plaintiffs and against CBP and order CBP to produce its responsive records from the EID. In the alternative, this Court should order CBP to respond to Plaintiffs' discovery demands and defer ruling on summary judgment until the parties have had the opportunity to supplement the record.

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Respectfully submitted,

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