

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 04-0907 (RBW)
)	
UNITED STATES DEPARTMENT)	
OF HOMELAND SECURITY,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., (“Judicial Watch”) by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby moves for partial summary judgment on its Freedom of Information Act claim against Defendant U.S. Department of Homeland Security (“DHS”). As grounds therefor, Judicial Watch states as follows:

MEMORANDUM OF LAW

I. Introduction.

This case began as Judicial Watch’s attempt to obtain information about a “Temporary Guest Worker” program originally proposed in a speech by President George W. Bush and the subsequent survey conducted by U.S. Border Patrol agents regarding the effect, if any, the President’s speech had on illegal immigration numbers. What this case has become is an example of a government agency’s lack of respect for FOIA.

Judicial Watch is entitled to partial summary judgment because DHS has failed to comply with its obligations under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As shown in its first motion for partial summary judgment and below, DHS not only failed to satisfy its

procedural requirements under FOIA, but also failed to conduct adequate searches for responsive records and release all responsive records to Judicial Watch. Consequently, partial summary judgment should be granted in Judicial Watch's favor.

II. Factual Background.

In January 2004, Judicial Watch began investigating the so-called "Temporary Guest Worker" program. In furtherance of its investigation, on February 27, 2004, Judicial Watch sent DHS, by facsimile and certified U.S. mail, return receipt requested, a FOIA request seeking access to any and all records concerning or relating to the survey conducted by U.S. Border Patrol agents to discover if the President's speech had any effect on the decision of illegal aliens to cross the U.S. - Mexican border. *See* Plaintiff's Statement of Material Facts in Support of Motion for Partial Summary Judgment ("Plaintiff's Statement") at ¶ 2.

On or about March 2, 2004, Judicial Watch received a letter from Ave M. Sloane of the U.S. Citizenship and Immigration Services, Freedom of Information and Privacy Acts Office, acknowledging DHS's receipt of the February 27, 2004 FOIA request. Plaintiff's Statement at ¶ 3. Pursuant to the statutorily-mandated, 20-day deadline, DHS's response to the request was due on March 29, 2004. *Id.* at ¶ 4; 5 U.S.C. § 552(a)(6)(A)(i). However, no responsive records were produced on or before that deadline, nor was Judicial Watch notified that responsive records were being withheld under any claim of exemption. Plaintiff's Statement at ¶ 4. Because it had not received any responsive documents or other substantive response to its February 27, 2004 FOIA request, Judicial Watch sent a letter to Ms. Sloane on May 10, 2004 requesting an update on the status of the FOIA request. *Id.* at ¶ 5.

On or about May 13, 2004, Judicial Watch received a letter from Ms. Sloane stating that

Judicial Watch's request was being processed and that it was "currently number 647 on the list of 760 pending cases to be worked." See Plaintiff's Statement at ¶ 6. The letter failed to inform Judicial Watch when it could expect to receive a substantive response to its February 27, 2004 FOIA request. *Id.* at ¶ 6. As of June 2, 2004, DHS had failed to respond to Judicial Watch's FOIA request in any substantive manner. Consequently, Judicial Watch filed this lawsuit on the following day. *Id.* at ¶ 7.

On May 6, 2005, DHS finally produced 965 pages of records to Judicial Watch pursuant to the February 27, 2004 FOIA request, including 882 questionnaires labeled with the designation: "Priority Intelligence Report" ("PIR"). Plaintiff's Statement at ¶¶ 8-9. Also included in this production was a January 29, 2004 e-mail referring to 1,711 as the "total number of questionnaires." *Id.* at ¶ 10. Within these 965 pages of responsive documents, Judicial Watch discovered many troubling inconsistencies as well as missing information. On August 26, 2005, DHS produced additional records including a Microsoft Access spreadsheet containing the results of 2,934 questionnaires. *Id.* at ¶ 11. This additional information did not, however, clarify the inconsistencies, or fill the gaps of missing information.

On November 1, 2005, Judicial Watch filed a motion for partial summary judgment arguing that DHS failed to perform an adequate search. Plaintiff's Statement at ¶ 12 (Docket No. 10). On December 22, 2005, DHS cross-moved. *Id.* (Docket No. 12). In its opposition and reply brief, Judicial Watch made clear that DHS had not conducted an adequate search. *Id.* at ¶ 13 (Docket No. 16). As examples, Judicial Watch highlighted the fact that DHS failed to search specific places likely to have responsive documents, gave inconsistent information about the number of questionnaires at issue, failed to adequately explain missing documents, and otherwise

demonstrated a lack of good faith. For relief, Judicial Watch asked the Court to order DHS to conduct a new, appropriate search. *Id.*

In early February 2006, counsel for DHS began discussing the possibility of a 90-day stay in order to allow DHS to conduct a new search. Plaintiff's Statement at ¶ 14. Judicial Watch drafted a stipulation that would have stayed this matter for 90 days to allow DHS to conduct a new, court-ordered search, but DHS rejected any stipulation that did not describe the new search as voluntary. *Id.* Having been forced to litigate as a result of DHS' failure to live up to its FOIA obligations in general and to conduct an adequate search in particular, Judicial Watch objected to any stay that was not based upon a new, court-ordered search. *Id.*

On February 9, 2006, the Court granted the 90-day stay and ordered DHS to conduct a new search by May 10, 2006. Plaintiff's Statement at ¶ 15 (Docket No. 21). The Court also made note of Judicial Watch's "lack of confidence" in DHS and put DHS on notice that unreasonable delays or evidence of bad faith would compel the Court to take "appropriate actions."¹ *Id.* Pursuant to the Court's subsequent May 22, 2006 order, DHS produced an additional 125 pages of responsive documents to Judicial Watch, a supplemental *Vaughn* index describing the redactions of the newly produced records, and the declarations of Shari Suzuki, John H. Block, Daniel Hiebert and Cynthia Atwood. *Id.* at ¶ 16 (Docket No. 28). The declarations purport to describe the second search performed by DHS and its findings. *Id.* Judicial Watch now respectfully requests that the Court grant partial summary judgment in its

¹ Judicial Watch respectfully refers to its opposition to DHS' motion for enlargement of time (Docket No. 26) as further evidence of bad faith. Although the Court granted the enlargement of time, it also informed DHS that it would grant no more extensions. *See* May 22, 2006 Order (Walton, J.).

favor.

III. Argument.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Where the non-moving party has the burden of proof on an issue, the moving party is entitled to summary judgment if it shows the absence of evidence to support the non-moving party's claim or defense on which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326-327 (1986). In addition:

[I]n cases in which the nonmoving party will bear the burden of proof at trial, the movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him.

10A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice And Procedure* § 2727, n.41 (3rd ed. 2001).

In a FOIA case, the government has the burden of proving compliance by showing that it produced responsive records on time, that the records do not exist, or that an exemption from disclosure applies to the facts. 5 U.S.C. § 552(a)(4)(B); *Kronberg v. United States Dep't of Justice*, 875 F. Supp. 861, 865 (D.D.C. 1995). Thus, the Court should grant summary judgment in favor of a FOIA requestor unless an agency proves that it produced all responsive records in a timely manner or demonstrated facts showing that the responsive records at issue were exempt from disclosure.

The only FOIA issue in this case is whether DHS conducted reasonable searches. The law of this Circuit regarding the reasonableness of agency FOIA searches is clear. In responding

to a FOIA request, an agency is required to show that it made “a good faith effort to conduct a search for the requested records, using methods that can be reasonably expected to produce the information requested.” *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. United States Dept. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). An agency is not required to search every record system, but it “cannot limit its search to only one record system if there are others likely to turn up the information requested.” *Campbell v. United States Dept. of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998); *Oglesby*, 920 F.2d at 68.

The burden of persuasion as to the reasonableness of a search falls on the agency. *McGhee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). Any affidavit(s) submitted by the agency describing its search for documents must be “relatively detailed and non-conclusory, and . . . submitted in good faith.” *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)). At the very least, the affidavit must denote which files the agency searched, and must explain in a systematic way how the agency’s documents were located in order to enable the Plaintiff to challenge the procedures utilized during the search. *Oglesby*, 920 F.2d at 68. The agency also must explain why conducting a more thorough investigation would have been unduly burdensome. *McGhee*, 697 F.2d at 1102. Additionally, if the reasonableness of the search is challenged, as it is in this case, the agency must “demonstrate ‘beyond a material doubt’ that the search was reasonable.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (quoting *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

Here, the facts clearly show that DHS did not comply with *any* of its FOIA obligations. First, there is no genuine dispute that DHS was required to produce all responsive documents

and/or assert claims of withholding within the statutorily mandated, 20-day time period, but failed to do so. In addition, despite the second search, statements and actions made by DHS, including admissions in the new declarations, render it highly likely that additional documents responsive to Judicial Watch's request have not yet been produced. As such, DHS' second search cannot be said to be reasonable and DHS cannot, as a matter of law, provide sufficient evidence to that effect.

A. Inconsistent Numbers Demonstrate That DHS' Second Search Was Unreasonable.

In its first motion for partial summary judgment and subsequent pleadings, Judicial Watch demonstrated that DHS used three very different numbers when referring to the number of questionnaire. First, DHS produced 882 completed questionnaires to Judicial Watch as part of its first document production on May 6, 2005. However, one of the other records produced by DHS in its first production was an email dated January 29, 2004, which stated that the "total number of questionnaires" was 1,711. Then, on August 26, 2005, DHS sent Judicial Watch a CD-ROM consisting of a Microsoft Access spreadsheet produced by DHS purporting to be the complete questionnaire results. The spreadsheet contained data collected from 2,934 questionnaires. All of these numbers were acknowledged by DHS, though it attempted to distract the Court from this glaring contradiction by claiming that the January 29, 2004 email was "cryptic" and that the number stated in the email (1,711) was unverified. Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion For Partial Summary Judgment at 8 (Docket No. 12).

The documents produced by DHS' second search not only substantiate Judicial Watch's

previous arguments, they also highlight DHS' continued inconsistency regarding the number of questionnaires. First, DHS' second production includes a record which clearly states that 1,711 represents the total number of questionnaires from the Southwest Border. *See Vaughn Index Document ("Document") No. 46, attached as Exhibit 1.* Document 46 confirms the fact that the January 29, 2004 email was not cryptic or unverified. In fact, DHS possessed this information and, rather than produce it in the first search, or explain it in its opposition brief, DHS denied the fact and continued its circumvention of FOIA.

Second, DHS produced Document 47 in its second search, which demonstrates the fact that inconsistencies still abound. In Document 47, DHS states that the total number of questionnaires for all borders is 2,881. *See Document 47, attached as Exhibit 2.* This is a brand new number. The previously released CD-ROM contained survey results from 2,934 completed questionnaires. DHS offers no explanation, but, once again, the numbers simply do not add up.²

B. DHS Has Not Produced All Responsive Records.

DHS claims that its second search has produced an additional 125 pages, some with partial redactions, but that no documents were withheld in their entirety. Declaration of Shari Suzuki ("Suzuki Decl.") at ¶ 29. However, after a careful reading of DHS' declarations, it is clear that certain responsive documents, identified by DHS, were not accounted for and not produced to Judicial Watch.

² Also of note are 12 records entitled "Daily Report" which purport to be from the Border Patrol Field Intelligence Center ("BORFIC"). *See Documents 48-59, attached as Exhibit 3.* Each record contains data on the number of "amnesty questionnaire" reports BORFIC received on a particular date. For example, Document 53 states that "BORFIC received 173 reports from the field with 74 positive responses on January 17 through 20, 2004." According to the reports released by DHS, BORFIC received 851 reports. DHS does not account for, or explain the inconsistent numbers.

For example, in his declaration John H. Block, Assistant Chief at the Border Patrol Field Intelligence Center (“BORFIC”) states that he received the February 14, 2006 email from Cynthia Atwood charging all Border Patrol Sectors and field offices to conduct a new search for records pertaining to Judicial Watch’s FOIA request. Declaration of John H. Block (“Block Decl.”) at ¶ 3. Mr. Block then states that the responsive documents found were boxed and shipped to BP Headquarters in Washington, D.C. *Id.* at ¶ 7. Mr. Block goes on to state that, although he did not personally inspect the boxes before they were shipped to Washington, D.C., he was informed that the box contained approximately 900 pages of records, as well as a copy of the previously released CD-ROM. *Id.* Mr. Block concludes his discussion about the newly discovered records by stating that “the release of any documents not previously provided will be addressed in a separate declaration and *Vaughn* index.” *Id.*³ The Block declaration contains no further reference to the 900 pages of records, but it is clear that Judicial Watch only received an additional 125 pages of records from DHS.

In his declaration, Daniel Hiebert’s states that, as Acting Senior Chief over the Intelligence Division at Headquarters, he has “oversight responsibilities over BORFIC.” Declaration of Daniel Hiebert (“Hiebert Decl.”) at ¶ 1. Mr. Hiebert goes on to confirm that the

³ The Block declaration does not identify the declaration to which Judicial Watch or the Court should look for this information. Unfortunately, this is not the only DHS declaration to do this. The Suzuki declaration states that “actions taken by the Office of Border Patrol will be addressed in a separate Declaration,” and fails to identify which one. Suzuki Decl. at ¶ 8. Only Cynthia Atwood’s declaration makes mention of the fact that John Block’s declaration details the BORFIC search. Declaration of Cynthia Atwood (“Atwood Decl.”) at ¶ 9. FOIA law clearly prohibits this type of back-and-forth referencing. *See Founding Church of Scientology v. Bell*, 603 F.2d 945, 948-49 (D.C. Cir. 1979); *King V. U.S. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987). At the very least, DHS should have specifically indicated where Judicial Watch and the Court should look to find the information.

Form G-392 Intelligence Reports are archived at BORFIC and “were searched for responsive records requested in this matter.” *Id.* at ¶ 4. However, Mr. Hiebert does not account for the approximately 900 pages sent to Headquarters from Mr. Block’s BORFIC office. In fact, no one accounts for what happened to these 900 pages.⁴

Another example of unproduced documents can be seen by examining Document 60. *See* Document 60, attached as Exhibit 4. According to the supplemental *Vaughn* index, Document 60 is a fax cover sheet from the Yuma Sector to BORFIC which “transmits results from the informal survey to BORFIC.” *See Vaughn* index at 17, *see also* Exhibit 4. Those results, however, are not attached. Document 60 states that 26 pages, including the cover sheet, were transmitted to BORFIC from the Yuma Sector; however, the remaining 25 pages are unaccounted for. The pages not produced by DHS are clearly responsive, as they have been described by DHS itself as the results of the survey.

Lastly, DHS has produced several new documents which are beyond the scope of Judicial Watch’s FOIA request insofar as they are out-dated. Documents 4 - 14 are described by DHS as being “inspection summary reports for Otay Mesa Port.” DHS admits that some of the information contained in the reports, namely, the number of apprehensions in San Diego County, is responsive to Judicial Watch’s FOIA request. *See Vaughn* index at 3. However, the reports are dated January 2005 - January 2006, clearly outside the time period requested in Judicial

⁴ The Suzuki declaration makes note of 27 pages identified by the Office of Border Patrol and describes them as including “statistics, questionnaires and daily reports.” Suzuki Decl. at ¶ 8. The “daily reports” referred to by Ms. Suzuki do appear to be from BORFIC, but the reports only consist of 38 pages. *See* Exhibit 3. This still leaves more than 850 unaccounted for pages.

Watch's FOIA.⁵ DHS did not produce, in either production, this responsive information for the time period requested in the FOIA.

Similarly, Documents 17 - 33 present the same problem. DHS described Documents 17 - 33 as "Southwest Border Statistics (weekly reports)." *See Vaughn* index at 4. Again, DHS acknowledges the potentiality that these documents are responsive, yet it produced records outside the requested time period. Documents 17 - 33 are reports from September 5, 2005 to February 12, 2006. DHS *never* produced this information for the requested time period of January 7, 2004 to February 27, 2004.

C. Inadequate DHS Declarations Cast Doubt on the Adequacy of the Second Search.

The declarations submitted by DHS in support of its second search are inadequate and replete with inconsistencies which casts doubt on the overall adequacy of DHS' second search. First, as demonstrated above, certain types of responsive records that have been identified by DHS in its declarations appear to be missing. *See supra* § III.B.

Second, there are several inconsistencies within the declarations. For example, in her declaration, Cynthia Atwood describes the search results for each sector. She states unequivocally that the Yuma Sector "did not participate in the survey." Atwood Decl. at ¶ 10(t). However, as mentioned earlier, Document 60 is clearly a fax cover sheet from the Yuma Sector transmitting the survey results to BORFIC. *See Exhibit 4*. Additionally, several records produced from DHS' first search and described as completed surveys include, as the last question

⁵ DHS admits Documents 17 - 33 are outside Judicial Watch's FOIA time period, but claims it is producing them "out of an abundance of caution." *See Vaughn* Index at 3. However, DHS does admit that some of the data is responsive. Therefore, DHS should have produced these Inspection Summary Reports for the time period Judicial Watch requested.

asked, “why did you choose this area (Yuma) as a place to enter?” *See* Exhibit 5. In fact, some of these Yuma-specific questionnaires have “Yuma Station:” printed at the top of each page. *See* Exhibit 5, pages 1-3. It is clear that the Yuma Sector did participate in the survey, and, therefore, the Atwood declaration cannot be correct.

Another example is the El Centro Sector. The Atwood declaration states that the El Centro Sector “did not take part in the survey.” Atwood Decl. at ¶ 10(e). However, several previously produced questionnaires contain the following line: “station reporting: El Centro.” *See* Exhibit 6. It appears from these records that the El Centro Station did participate, which, in turn, leads to the conclusion that the Atwood declaration is incorrect.⁶

These examples, which are by no means meant to be exhaustive, demonstrate that DHS’ declarations leave too many questions and inconsistencies to be considered adequate. While government agencies are accorded a presumption of good faith, that presumption can be overcome by evidence to the contrary. DHS’ declarations are sworn statements from individuals who purport to be knowledgeable about Judicial Watch’s FOIA request and the search(es) for responsive documents. It is plain, however, that these declarations contain incorrect statements and cannot be said to provide DHS with sufficient evidence to demonstrate an adequate second search.

D. DHS’ First Search Was Clearly Inadequate.

DHS’ first search was clearly inadequate and the Court should issue a declaratory

⁶ Atwood’s declaration states that the Havre Station did not participate in the survey. Atwood Decl. at ¶ 10(h). DHS produced at least one completed questionnaire labeled “HVR.” *See* Exhibit 7. Many of the completed questionnaires contain a similar coding reference which appears to be the identity of the sector and/or station. Logically, therefore, at least this one record is from the Havre Station.

judgment to that effect. While it is true that agencies are not required to “search every record system,” it is also true that they “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Oglesby*, 920 F. 2d at 68. Similarly, when “further searches are available and within the agency’s ability to utilize without expending a whit more than reasonable effort,” such searches are required. *Founding Church of Scientology*, 610 F.2d at 834. In other words, DHS should have made a reasonable effort to search in the places where it is likely responsive records would be located. It is clear from its own actions and admissions that DHS’ first search was unreasonable.

First, in the midst of arguing for summary judgment in the case, DHS suddenly requested a 90 day stay to conduct a new search – the precise relief Judicial Watch sought in its first motion for partial summary judgment. This alone strongly suggests that even DHS did not think its first search was adequate.

Second, the Department of Justice issued a memorandum requiring each office within the Customs and Border Patrol to conduct a new search. This memorandum includes very specific instructions as to how the search was to be conducted and what types of information each office was to provide upon completion of the new search. *See Suzuki Decl.* at ¶ 6; Exhibit 1 to *Suzuki Decl.* DHS produced no similar memorandum from the first search. The absence of a similar memorandum for the first search and the specificity with which the memorandum for the second search is described suggest that DHS did not believe its first search was adequate.

Third, one of the primary points Judicial Watch made in its opposition and reply brief was that certain locations that were likely to possess responsive documents, particularly the BORFIC office, were not searched in the first search. Plaintiff’s Reply in Support of Its Motion

For Partial Summary Judgment and in Opposition to Defendant's Cross-Motion For Summary Judgment at 4-6 (Docket No.16). DHS' declarations regarding the second search were sure to include information, however incomplete, a search of the BORFIC office. *See* Block Decl. Importantly, the Block declaration, which is the only one dealing specifically with the BORFIC search, never states that BORFIC was searched during the first search. The only conclusion to be drawn is that Judicial Watch was correct in stating that BORFIC, despite being the reporting office, was never searched during the first search. The failure to search BORFIC renders the first search inadequate.

In sum, DHS' second search moved closer to being adequate, but it is clear that DHS has not produced all documents responsive to Judicial Watch's February 27, 2004 FOIA request and has not accounted for substantial inconsistencies regarding the second search. The information DHS has provided continues to be inconsistent and contradictory, and leaves Judicial Watch and the Court unable to determine whether DHS' second search was fully adequate.

IV. Conclusion.

For the foregoing reasons, partial summary judgment should be entered in Judicial Watch's favor. The Court should issue a declaratory judgment stating that DHS' first search was inadequate and the Court should order DHS to immediately release all already identified and responsive documents to Judicial Watch accompanied by a *Vaughn* index accounting for any properly applied exemptions, and to account for the reasonableness of its second search.

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Meredith L. Di Liberto

D.C. Bar No. 487733

Paul J. Orfanedes

D.C. Bar No. 429716

Suite 500

501 School Street, S.W.

Washington, DC 20024

(202) 646-5172

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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v.)	Civil Action No. 04-0907 (RBW)
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UNITED STATES DEPARTMENT)	
OF HOMELAND SECURITY,)	
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**PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., (“Judicial Watch”) by counsel and pursuant to Local Civil Rule 56.1, respectfully submits the following statement of material facts in support of its motion for partial summary judgment:

1. Judicial Watch is a non-profit organization headquartered in Washington, D.C. See Plaintiff’s Motion For Partial Summary Judgment, Exhibit 1, Affidavit of Christopher J. Farrell (“Farrell Affidavit”), at ¶ 2 (Docket No. 10).

2. On February 27, 2004, Judicial Watch, Inc. sent a FOIA request to Defendant Department of Homeland Security (“DHS”), by facsimile and certified U.S. mail, return receipt requested, seeking access to any and all records concerning or relating to the following subjects:

- (1) Any and all records that refer and/or relate to a survey, developed by Border Patrol officials in Washington, of illegal aliens detained at the US-Mexican border, that had sought to establish whether “rumors of amnesty” had influenced their decision to cross into the United States.
- (2) Any and all records that refer and/or relate to the number(s) of illegal immigrants entering the United States as a result of the amnesty and/or guest worker program and/or immigration reforms proposed by President George W. Bush on January 7, 2004.

- (3) Any and all records that refer and/or relate to the decision to discontinue the survey on or about January 27, 2004.
- (4) Any and all records that refer and/or relate to the results of any survey of illegal immigrants entering the United States as a result of the amnesty and/or guest worker program and/or immigration reforms proposed by President George W. Bush on January 7, 2004.
- (5) Any and all records that refer and/or relate to the number of illegal immigrants apprehended in San Diego county from January 7, 2004 to the present.
- (6) Any and all records that refer and/or relate to the reported 13 questions contained on said questionnaire(s).
- (7) Any and all records that refer and/or relate to the decision to instruct border patrol agents “not to talk about amnesty, an increase in apprehensions, or give comparisons of past immigration reform proposals” when talking with the media.
- (8) The “talking points” distributed nationwide in which border agents are “not to talk about amnesty an increase in apprehensions, or give comparisons of past immigration reform proposals.”

Farrell Affidavit at ¶5.

3. On or about March 2, 2004, Judicial Watch, Inc. received a letter from Ave M. Sloane of the U.S. Citizenship and Immigration Services, Freedom of Information and Privacy Acts Office acknowledging DHS’s receipt of Judicial Watch, Inc.’s February 27, 2004 FOIA request. *Id.* at ¶6.

4. Pursuant to the statutorily-mandated, 20-day deadline, DHS’s response to the request was due by March 29, 2004. 5 U.S.C. § 552(a)(6)(A)(i). However, no responsive records were produced on or before that deadline, nor was Judicial Watch, Inc. notified that responsive records were being withheld under any claim of exemption. *Id.* at ¶7.

5. Because it had not received a single document or other substantive response to its

February 27, 2004 FOIA request, Judicial Watch, Inc. sent a letter to Ms. Sloane on May 10, 2004 in which it requested an update on the status of the FOIA request. *Id.* at ¶8.

6. On or about May 13, 2004, Judicial Watch, Inc. received a response from Ms. Sloane on behalf of DHS. In its May 13, 2004 letter, DHS stated that Judicial Watch, Inc.'s request was being processed and that it was "currently number 647 on the list of 760 pending cases to be worked." The letter failed to inform Judicial Watch, Inc. when it could expect to receive a substantive response to its February 27, 2004 FOIA request. *Id.* at ¶9.

7. As of June 2, 2004, DHS had failed to respond to Judicial Watch, Inc.'s February 27, 2004 FOIA request in any substantive manner. Consequently, Judicial Watch, Inc. filed this lawsuit the following day, June 3, 2004. *Id.* at ¶10.

8. On May 6, 2005, DHS produced 965 pages of records to Judicial Watch, Inc. pursuant to the February 27, 2004 FOIA request. According to these documents, on January 7, 2004, the Office of Border Patrol Intelligence tasked Border Patrol Intelligence Agents in sectors along the U.S.-Mexican border to begin conducting a survey, on a random basis, of aliens of all countries encountered by USBS agents. *Id.* at ¶11.

9. Also included among the documents produced to Judicial Watch, Inc. on May 6, 2005 were copies of PIR survey questionnaires purportedly completed by USBP agents for 882 apprehended aliens who responded to the survey. *Id.* at ¶13.

10. Also included among the documents produced to Judicial Watch, Inc. on May 6, 2005 is an e-mail dated Thursday, January 29, 2004, identifying 1,711 PIR survey questionnaires, while responses for only 882 persons were provided to Judicial Watch, Inc. *Id.* at ¶14.

11. On August 26, 2005, DHS produced a Microsoft Access spreadsheet to Judicial

Watch, Inc. containing data from what appears to be the results of 2,934 PIR survey questionnaires. *Id.* at ¶16.

12. On November 1, 2005, Judicial Watch filed a motion for partial summary judgment arguing that DHS failed to perform an adequate search. (Docket No. 10). DHS cross-moved on December 22, 2005. (Docket No. 12).

13. In its opposition and reply brief, Judicial Watch made clear that DHS had not conducted an adequate search. (Docket No. 16). As examples, Judicial Watch highlighted the fact that DHS failed to search specific places likely to have responsive documents, gave inconsistent information about the number of questionnaires at issue, failed to adequately explain missing documents, and otherwise demonstrated a lack of good faith. For relief, Judicial Watch asked the Court to order DHS to conduct a new, appropriate search.

14. In early February 2006, counsel for DHS began discussing the possibility of a 90 day stay in order to allow DHS to conduct a new search. Judicial Watch drafted a stipulation that would have stayed this matter for 90 days to allow DHS to conduct a new, court-ordered search, but DHS rejected any stipulation that did not describe the new search as voluntary. Having been forced to litigate as a result of DHS' failure to live up to its FOIA obligations in general and to conduct an adequate search in particular, Judicial Watch objected to any stay that is not based upon a new, court-ordered search. (Docket No. 20).

15. On February 9, 2006, the Court granted the 90 day stay and ordered DHS to conduct a new search by May 10, 2006. (Docket No. 21). The Court also made note of Judicial Watch's "lack of confidence" in DHS and put DHS on notice that unreasonable delays or evidence of bad faith would compel the Court to take "appropriate actions."

16. Pursuant to the Court's subsequent May 22, 2006 order, DHS produced an additional 125 pages of responsive documents to Judicial Watch, a supplemental *Vaughn* index describing the redactions of the newly produced records, and the declarations of Shari Suzuki, John H. Block, Daniel Hiebert and Cynthia Atwood. (Docket No. 28). The declarations purport to describe the second search performed by DHS and its findings.

17. The Declaration of John H. Block states that the Border Patrol Field Intelligence Center ("BORFIC") found approximately 900 responsive paged of records. Block Decl. at ¶ 7. Mr. Block states that the 900 pages were boxed up and shipped to Border Patrol Headquarters in Washington, D.C. *Id.* Those 900 pages are presently unaccounted for by DHS.

18. The Declaration of Cynthia Atwood states that several sectors, including the Yuma Sector and the El Centro Sector, did not participate in the survey. Atwood Decl. at ¶¶ 10(t), 10(e). However, documents released in both productions demonstrate the participation of both sectors in the survey. *See* Plaintiff's Motion For Partial Summary Judgment, Exhibits 4, 5 and 6.

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Meredith L. Di Liberto

D.C. Bar No. 487733

Paul J. Orfanedes

D.C. Bar No. 429716

Suite 500

501 School Street, S.W.

Washington, DC 20024

(202) 646-5172

Attorneys for Plaintiff