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# Unlocking Secure Communities: The Role of the Freedom of Information Act in the Department of Homeland Security's Secure Communities

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# UNLOCKING SECURE COMMUNITIES: THE ROLE OF THE FREEDOM OF INFORMATION ACT IN THE DEPARTMENT OF HOMELAND SECURITY'S SECURE COMMUNITIES

BY ERICA LYNN TOKAR\*

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## INTRODUCTION

In 1941, members of the Attorney General's Committee on Administrative Procedure agreed unanimously that "an important and far-reaching defect of administrative law has been the simple lack of public information concerning its substance and procedure."<sup>1</sup> The Freedom of Information Act (FOIA)<sup>2</sup> uniquely addresses this concern by providing members of the general public an opportunity to consider and respond to administrative action by viewing actual agency records. FOIA affords broad access to "any person,"<sup>3</sup> and it has become a key tool for both organizations and individuals who not only wish to

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<sup>1</sup> ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, S. DOC. NO. 8-77, at 25 (1st Sess.1941).

<sup>2</sup> Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (2006)).

<sup>3</sup> *Id.* at § 552(a)(3)(ii) (stating that, with a few exceptions "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person").

learn more about the inner workings of the U.S. government, but also seek to participate fully in the democratic process.<sup>4</sup>

For instance, a FOIA request was the primary tool for interested individuals to learn about the Department of Homeland Security's (DHS's) Secure Communities initiative, including why it was created and how it was being implemented. DHS designed Secure Communities to enhance and expand current strategies for identifying removable immigrants in the United States who have violated a criminal law. Under Secure Communities, police check a suspect's fingerprints during an arrest against not only the Federal Bureau of Investigation's (FBI's) fingerprint database, but also against DHS's newly established immigrant biometric database.<sup>5</sup> If the search reveals that the individual is an immigrant who is subject to administrative removal, the database then automatically delivers information on the individual's immigration history to local law enforcement officials so that they may comply with a DHS detainer and transfer that person into the custody of DHS's Immigration and Customs Enforcement (ICE).<sup>6</sup> As of September 2012, Secure Communities is active in 97% of jurisdictions in the United States and is slated to be implemented in all jurisdictions by 2013.<sup>7</sup>

Despite Secure Communities' broad effect, DHS developed and implemented it independent of an explicit statutory mandate and without using rulemaking procedures under the Administrative Procedure Act (APA).<sup>8</sup> In fact, Congress rejected two pieces of legislation that would have provided DHS with a specific statutory mandate to implement programs that were similar to Secure Communities.<sup>9</sup> Rather,

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<sup>4</sup> See *e.g.*, Press Release, Am. Civil Liberties Union, Legislation Introduced to Strengthen Freedom of Information Act (Mar. 18, 2009), available at <http://www.aclu.org/national-security/legislation-introduced-strengthen-freedom-information-act> ("FOIA is not only an invaluable tool for the ACLU, other advocacy organizations and reporters, but for all Americans.").

<sup>5</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES OPERATING STANDARD PROCEDURES § 1 (2009), available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf). *Id.* at § 3 (explaining that the premise behind Secure Communities technology is biometric interoperability between the Department of Justice (DOJ) FBI fingerprint database, and the Department of Homeland Security's (DHS's) fingerprint database whereby "a single query by a participating local law enforcement agency (LEA) checks both systems and confirms the identity and immigration status of a subject being processed during incarceration booking").

<sup>6</sup> See generally *id.* at § 2.2, "Requested Local LEA Cooperative Action" (describing the LEA's responsibility for placing the detainer in the immigrant's file, informing Immigration and Customs Enforcement (ICE) in the event of the immigrant's transfer or release, allowing ICE to access the detainees, and allowing ICE to acquire information on the immigrant).

<sup>7</sup> *Activated Jurisdictions*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Sept. 9, 2012) (dynamic web document that is updated frequently).

<sup>8</sup> See generally 5 U.S.C. § 551–59, 701–06.

<sup>9</sup> These two bills were the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), H.R. 2671, 108th Cong. (2003), and the Homeland Security Enhancement Act of 2003 (HSEA), S. 1906, 108th Cong. (2003). Similar versions of both bills were also reintroduced in 2005. See *infra* notes 71–75 and accompanying text.

DHS created Secure Communities in response to Homeland Security Presidential Directive-24<sup>10</sup> and congressional priorities for criminal alien removal defined in the Fiscal Year 2008 Budget Appropriations Act.<sup>11</sup> DHS has cited its power to implement this program as general provisions of the Immigration and Nationality Act (INA) that pertain to the identification and removal of criminal aliens.<sup>12</sup>

Especially in the early stages of the program's implementation, DHS made little information publicly available about Secure Communities. As a result, Congress, advocates, the public, and state officials had significant questions concerning how the technology worked, the burden that it would place on local law enforcement and, most notably, whether a state's participation was voluntary.<sup>13</sup> In response, the National Day Laborer Organizing Network (NDLON), in conjunction with the Center for Constitutional Rights (CCR) and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, filed a FOIA request to gain access to DHS's records on the program.<sup>14</sup> After months

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<sup>10</sup> See Homeland Security Presidential Directive-24, *Biometrics for Identification and Screening to Enhance National Security* (June 6, 2008) (stating "The ability to positively identify those individuals who may do harm to Americans and the Nation is crucial to protecting the Nation," and therefore directing agencies to streamline technology and develop "a framework to ensure that Federal executive departments and agencies use mutually compatible methods and procedures in the collection, storage, use, analysis, and sharing of biometric and associated biographic and contextual information of individuals in a lawful and appropriate manner . . ."); *infra* note 80 and accompanying text.

<sup>11</sup> See Department of Homeland Security Appropriations Act, H.R. 2764, 110th Cong., Div. E, Tit. II (2008) (instructing DHS to "present[] a strategy for U.S. Immigration and Customs Enforcement to identify every criminal alien, at the prison, jail, or correctional institution in which they are held"); *infra* note 77 and accompanying text.

<sup>12</sup> At one time, DHS utilized a Memorandum of Agreement to formalize a state's participation in Secure Communities, which cited DHS's legal authority for the program as "Immigration and Nationality Act (INA) provisions regarding identification, detention, arrest and removal of aliens (8 USC § 1226(c); 8 USC § 1226(d); 8 USC § 1226(e); 8 USC § 1227(a)(2); and 8 USC § 1228); the INA provision regarding liaison activities with internal security officers and data exchange (8 USC § 1105); and FY 2008 DHS Appropriations Act (Pub. L. No. 110-161, 121 Stat. 1844, 2365 (2007))." For an example of an agreement, see Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement And [State Identification Bureau], U.S. Immigration and Customs Enforcement, *available at* [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf).

<sup>13</sup> See, e.g., Lee Romney, *U.S. to Investigate Secure Communities Deportation Program*, L.A. TIMES (May 18, 2011), <http://articles.latimes.com/2011/may/18/nation/la-na-secure-communities-20110519> (discussing the controversy surrounding the program and quoting one community advocate as saying Secure Communities "has been shrouded in secrecy and we hope that the OIG takes a real and serious look at all aspects of its operation"); Bianca Vazquez Toness, *Confusion in Mass. Gov't Over Secure Communities Immigration Program*, WBUR BOSTON'S NPR NEWS STATION (June 8, 2011), <http://www.wbur.org/2011/06/08/secure-communities-5> ("There's a lot of confusion surrounding a new federal immigration initiative. [Massachusetts Governor Deval Patrick] previously indicated the state would join the program, called Secure Communities. Then on Tuesday, Patrick announced he would not sign on because he was told recently that it's not mandatory. But the federal authorities say it is.").

<sup>14</sup> Freedom of Information Act Request by Bridget Kessler, Clinical Teaching Fellow at the Immigrant Justice Clinic of the Benjamin N. Cardozo School of Law (Feb. 3, 2010), *available at* <http://ccrjustice.org/files/FOIARequest%20-%20ICE%202.3.10%20-FINAL.pdf>.

of litigation, DHS released the materials pursuant to a series of court orders and NDLOM published the records online, making them available to the public.<sup>15</sup> The release of these FOIA documents equipped stakeholders with facts that enabled them to understand, meaningfully evaluate, and provide informed feedback on Secure Communities for the first time.

This Article examines the role of FOIA in Secure Communities. Part I provides background information on the Freedom of Information Act, the role of local enforcement agencies (LEAs) in enforcing immigration law, and the basic structure of Secure Communities. Part II analyzes how FOIA requests facilitated the release of documents and expanded public understanding of Secure Communities, and observes that the agency's reliance on FOIA as the primary method for disseminating information to the public hampered public participation in shaping Secure Communities, undermined public confidence in the agency, and caused untold monetary and other costs. Part III recommends that agencies prioritize proactive disclosures<sup>16</sup> of FOIA records to facilitate public access and review of agency policy prior to implementation to avoid the lack of transparency that characterized Secure Communities.

## I. BACKGROUND

### A. BACKGROUND ON THE FREEDOM OF INFORMATION ACT

Although numerous statutory mechanisms exist to oversee agency power and promote accountability,<sup>17</sup> FOIA is unique because it goes beyond the disclosures initially envisioned by the APA to facilitate broad public access to original agency documents.<sup>18</sup> Grounded in the

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<sup>15</sup> For a listing of the FOIA documents visit <http://uncoverthetruth.org/> and click "FOIA documents."

<sup>16</sup> See *infra* note 33 and accompanying text.

<sup>17</sup> See, e.g., The Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (current version at 5 U.S.C. § 552b (2000)); Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1970) (codified at 5 U.S.C. app § 2 (2000)). Additionally, for a general discussion of statutes less well-known than the APA and FOIA that promote transparency and public participation among agencies, see generally William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009).

<sup>18</sup> Although the APA provides "interested persons" an opportunity "to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation," records were made available only to those "properly and directly concerned." See Administrative Procedure Act, Ch. 324 § 3, 60 Stat. 237, 238 (1946) (repealed 1966). The Attorney General made clear in the 1941 manual interpreting the Act that "3(c) is not intended to open up Government files for general inspection." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, DEP'T OF JUSTICE, 25 (1947), available at <http://www.law.fsu.edu/library/admin/1947ii.html>. FOIA, however, was designed to facilitate much greater transparency by limiting the grounds for nondisclosure, and thereby end the perception that agencies favored nondisclosure merely to "cover up embarrassing mistakes and irregularities" S. REP. NO. 89-813, at 38 (1966). For a straightforward discussion of the "nuts and bolts" of FOIA, see generally, Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387 (2010).

belief that “sunlight is the best disinfectant,”<sup>19</sup> FOIA is designed “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”<sup>20</sup> Congress adopted FOIA in 1966 as an amendment to section 552 of the APA, and has been amended several times, including one expansion in 1996 to include provisions concerning electronic access to records.<sup>21</sup> With a few exceptions, FOIA requires that government entities make government records available to “any person”<sup>22</sup> who “reasonably describe[s]”<sup>23</sup> the records sought and complies with any additional procedural instructions that the agency may provide.<sup>24</sup> Most often records are made available free of charge or for the cost of record duplication.<sup>25</sup>

A few provisions limit the government’s obligation to disclose. For instance, though generally construed broadly, courts have denied “agency record” status to some documents, such as handwritten notes.<sup>26</sup> Additionally, documents that are not in official possession of the agency or could be characterized as personal property of an individual are also not subject to disclosure under FOIA.<sup>27</sup> Further, FOIA provides nine substantive exemptions from an agency’s obligation to disclose.<sup>28</sup> The exemptions pertain to different forms of governmental privilege, individual privacy interests, and commercial privacy interests, such as trade secrets.<sup>29</sup> If a record is subject to an exemption, FOIA does not exempt the entire document from production. Rather, the agency may

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<sup>19</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (Nat’l Home Library Found. ed. 1933)).

<sup>20</sup> *See* *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (discussing the purpose of FOIA in the context of a landmark decision that ordered the disclosure of records surrounding the imprisonment of suspected enemy combatants in Guantanamo Bay, Cuba).

<sup>21</sup> *See FOIA Update 1979-2000*, DEP’T OF JUSTICE, <http://www.justice.gov/oip/foi-upd.htm> (discussing the history of FOIA amendments) (last visited Sept. 10, 2012).

<sup>22</sup> Freedom of Information Act § 552(a)(2)(D).

<sup>23</sup> *Id.* § 552(a)(3)(A).

<sup>24</sup> *See, e.g.*, HOW TO SUBMIT A FREEDOM OF INFORMATION ACT REQUEST (FOIA) OR PRIVACY ACT REQUEST TO THE DEPARTMENT OF HOMELAND SECURITY, DEP’T OF HOMELAND SEC., [http://www.dhs.gov/xfoia/editorial\\_0316.shtm#fees](http://www.dhs.gov/xfoia/editorial_0316.shtm#fees) (last reviewed Mar. 25, 2011) (instructing FOIA requesters to provide contact information, a description of the records requested, and prepare to pay fees, when applicable).

<sup>25</sup> The agency may charge a limited fee if the records are sought for commercial use, including costs for search, duplication, and review. *See* Freedom of Information Act § 552(a)(4)(A)

(i). Requesters who are news media, educational, or scientific requesters may be charged for duplication. *Id.* Other requesters may be charged for search time and duplication. *Id.*

<sup>26</sup> *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155–57 (1980) (suggesting that in some circumstances handwritten notes are not agency records).

<sup>27</sup> *See, e.g.*, *Bureau of Nat’l Affairs v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1496 (2006) (holding that an agency official’s calendars of appointments that were kept for personal use and were not distributed among staff were not agency records).

<sup>28</sup> Freedom of Information Act § 552(b).

<sup>29</sup> In 1974, the Privacy Act was enacted largely to address concerns about privacy under FOIA. *See* Pub. L. No. 93-579, 88 Stat. 1896 (1974) (current version at 5 U.S.C. § 552a(b) (2006)).

redact from the document any information pertaining to the applicable exemption before producing it to the requester.<sup>30</sup> FOIA's provision for judicial review enables requesters to appeal an agency's decision to withhold documents<sup>31</sup> and, particularly because courts have interpreted exemptions narrowly,<sup>32</sup> the threat of litigation provides agencies with an incentive to disclose records that are not clearly exempt.

In addition to the provisions of FOIA that enable individuals to request records, FOIA also contains provisions for "proactive disclosures," which require agencies to release information for general public access. The four categories statutorily subject to proactive disclosures are: "final opinions [and] . . . orders" in the adjudication of administrative cases, "specific agency policy statements," "certain administrative staff manuals," and records that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."<sup>33</sup> The agency must place such records online in "electronic reading rooms,"<sup>34</sup> which are now replacing the in-person reading rooms previously staffed by agencies to comply with the proactive disclosure requirements.

When President Obama took office in January 2009, he announced his commitment to implementing an unprecedented level of openness in government through his Open Government Initiative.<sup>35</sup> The Obama Administration's Open Government Directive, published in December 2009, provides a roadmap for the Initiative, and contains specific instructions and deadlines requiring agencies to promote a government that is transparent, collaborative, and fosters public participation.<sup>36</sup> Document disclosure under FOIA has been one of the Initiative's cornerstones, and Attorney General Eric Holder launched the FOIA innovations by announcing a shift from the legal presumption of non-disclosure observed by the prior administration, to a presumption favoring openness.<sup>37</sup>

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<sup>30</sup> Freedom of Information Act § 552(b) (stating that "any reasonably segregable portion of a record shall be provided [to the requester] after deletion of the portions which are exempt").

<sup>31</sup> Freedom of Information Act § 552(a)(4)(B) ("On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.").

<sup>32</sup> See e.g., *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting that the exemptions "must be narrowly construed").

<sup>33</sup> Freedom of Information Act § 552(a)(2); see *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 756 (D.C. Cir. 1978) (*en banc*) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary").

<sup>34</sup> See Freedom of Information Act § 552(a)(2) (requiring proactively disclosed records created by an agency on or after November 1, 1996 to be made available by "electronic means").

<sup>35</sup> Transparency and Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

<sup>36</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. M-10-06: MEMORANDUM TO THE HEADS OF EXEC. DEP'TS AND AGENCIES (2009).

<sup>37</sup> Office of the Attorney Gen., Freedom of Information Act (FOIA): Memorandum to the Heads of Exec. Dep'ts and Agencies (Mar. 19, 2009).

Under the Open Government Initiative, promoting proactive disclosure of FOIA records electronically has also been a top priority. The Obama Administration has required that agencies “proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA,” and that records should be published “online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used web search applications.”<sup>38</sup> Additionally, Attorney General Holder’s memorandum explicitly encouraged agencies to “systematically” post records online in advance of FOIA requests.<sup>39</sup> The Obama Administration also introduced the website [data.gov](http://data.gov) as another forum for the proactive release of government data,<sup>40</sup> and required agencies to develop open government webpages “to serve as the gateway for agency activities related to the Open Government Directive.”<sup>41</sup>

In response to the Open Government Initiative, DHS, like other agencies, produced an Open Government Plan that affirms its commitment to “institutionalizing” proactive disclosure. DHS’s Open Government Plan states, “The Department has shifted its focus from by request FOIA services to a more proactive approach for sharing information.”<sup>42</sup> In 2008, DHS’s Chief FOIA Officer and Chief Privacy Officer, Mary Ellen Callahan, also released a memorandum requiring the agency to increase proactive disclosures in specific areas,<sup>43</sup> and she invited components to release more information to promote transparency.<sup>44</sup> The Department of Justice (DOJ) concluded that every agency, including DHS, has made

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<sup>38</sup> OFFICE OF MGMT. & BUDGET, *supra* note 36 at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> DEP’T HOMELAND SEC., OPEN GOVERNMENT PLAN 2.0, *available at* <http://www.dhs.gov/xlibrary/assets/dhs-open-government-plan-v2.pdf>.

<sup>43</sup> This memorandum directs DHS to proactively disclose: “(1) Historical daily schedules of the most senior agency officials (notated to reflect that officials may have deviated from the posted schedule and abridged as appropriate for security and privacy concerns); (2) Executed contracts & grants; (3) Management directives and instructions; (4) Congressional correspondence under DHS control; (5) FOIA logs; (6) Any records released pursuant to a FOIA request that have been, or are likely to become, the subject of three or more requests.” Memorandum from Mary Ellen Callahan, Dep’t of Homeland Sec., Proactive Disclosure and Departmental Compliance with Subsection (a) (2) of the Freedom of Information Act (FOIA) (Aug. 26, 2009), *available at* [http://www.dhs.gov/xlibrary/assets/foia/foia\\_proactive\\_disclosure.pdf](http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf).

<sup>44</sup> *Id.* at 2 (“[N]othing in this memorandum is intended to limit components’ ability to proactively post additional records beyond those suggested consistent with FOIA and other disclosure laws. A component may choose to post documents specific to its function in order to further advance transparency.”).

some progress,<sup>45</sup> and DHS's Open Government webpage touts that "[s]ince August 2009, the Department has released/posted approximately 700 documents to its FOIA reading rooms."<sup>46</sup>

### B. LOCAL ENFORCEMENT OF IMMIGRATION LAW AND THE BACKDROP FOR SECURE COMMUNITIES

The history of immigration enforcement in the United States, and particularly the relationship and power-sharing between local and federal governments, is a complex and nuanced area of law that this Article does not attempt to detail fully. The purpose of this Part is to provide a brief background on the federalist structure of immigration enforcement that provides a backdrop for Secure Communities. This allows for greater insight into the constitutional controversy that made the information gleaned through NDLO's FOIA request so important.

Early in American history, states took a more active role in creating and enacting immigration laws, for instance, by establishing their own entry requirements and health restrictions.<sup>47</sup> These laws provide the basis for the "inherent authority" theory of state enforcement, which suggests that states have inherent power as sovereigns to implement and enforce immigration laws.<sup>48</sup> During the latter part of the 19th century, however, the federal government began to assert a plenary power over immigration by passing substantive immigration laws.<sup>49</sup> In 1889, the now-famous *Chinese Exclusion Case* held that the federal

<sup>45</sup> See *Celebrating FOIA's Forty-Fifth Anniversary and Assessing This Past Year's Progress in Implementing Attorney General Holder's FOIA Guidelines*, DEP'T OF JUSTICE, <http://www.foia.gov/2011foiapost26.html> (last visited Sept. 10, 2012) [hereinafter *FOIA's Forty-Fifth Anniversary*] (providing an overview on agencies' progress implementing President Obama's mandate and concluding that "[t]his assessment illustrates that all the Departments have taken multiple, concrete steps in all five of the key areas to implement the FOIA Guidelines.").

<sup>46</sup> Dep't of Homeland Sec, *Transparency at the Department of Homeland Security* (Sept. 29, 2012, 4:50 PM), <http://www.dhs.gov/transparency>.

<sup>47</sup> See Jayesh Rathod, Speech on Local Enforcement of Immigration Law at the American University Washington College of Law Summer Institute on Law and Government (June 28, 2011) (discussing the common misunderstanding that immigration enforcement has always existed exclusively at the federal level); see also Michael J. Wishnie, "State and Local Enforcement of Immigration Laws," *Faculty Scholarship Series*, Paper 928, available at [http://digitalcommons.law.yale.edu/fss\\_papers/928/](http://digitalcommons.law.yale.edu/fss_papers/928/) ("In the early years of the nation, there was little federal regulation of immigration . . .").

<sup>48</sup> For a criticism of this position, see generally Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that the inherent authority position is indefensible because conflicts with the constitutional mandate for uniform enforcement of immigration laws and undermines cohesive foreign policy). See also Greg K. Venbrux, *Devolution or Evolution: The Increasing Role of the State in Immigration Law Enforcement*, 11 U.C.L.A. J. INT'L L. & FOREIGN AFF. 307, 314-21 (2008) (discussing the increasing role of local and state governments in immigration enforcement and the DOJ's inconsistent application of the "inherent authority" theory).

<sup>49</sup> See CONG. BUDGET OFFICE, *IMMIGRATION POLICY IN THE UNITED STATES 1* (2006), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/70xx/doc7051/02-28-immigration.pdf> (discussing the passage of the first substantive immigration law in 1875, which barred immigrants who were considered to be "undesirable," such as prostitutes).

government's ability to exclude foreigners is "an incident of sovereignty" under the U.S. Constitution.<sup>50</sup> The constitutional basis for federal power over immigration law is often cited as the combined authority under the Naturalization Clause,<sup>51</sup> the Foreign Affairs Clauses,<sup>52</sup> and the Commerce Clause.<sup>53</sup> Some argue that these constitutional provisions, particularly when coupled with the Supremacy Clause,<sup>54</sup> enable the federal government to preempt state immigration enforcement altogether.<sup>55</sup> The recent Supreme Court case, *Arizona v. United States*, affirmed that the primacy of federal authority over immigration law is "well-settled" and struck down provisions of an Arizona immigration statute that authorized independent immigration enforcement action by local police.<sup>56</sup> In its decision, the Court discussed at length the legal and policy reasons for the federal government's expansive immigration power.<sup>57</sup>

Although the current landscape of immigration law appears to reject the "inherent authority" theory for states, Congress has delegated certain immigration functions to states by statute.<sup>58</sup> For example, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes states to detain previously removed immigrants.<sup>59</sup> The same year it enacted the AEDPA, Congress also passed the Illegal Immigration

<sup>50</sup> See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

<sup>51</sup> See U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress "to establish an uniform rule of Naturalization . . . throughout the United States").

<sup>52</sup> *Id.* at art. I, § 8, cl. 11 (Congress' power to declare war); *id.* at art. I, § 8, cl. 2 (Senate's power to advise and consent to the appointment of ambassadors); *id.* at art. II, § 2, cl. 2 (President's power to make treaties, with the advice and consent of the senate).

<sup>53</sup> *Id.* at art. I, § 8, cl. 3 (granting Congress the power "to regulate commerce with foreign nations . . .").

<sup>54</sup> *Id.* at art. VI, cl. 2.

<sup>55</sup> See Pham, *supra* note 48, at 987 (examining each of the pertinent constitutional provisions in detail as support against the "inherent authority" position and arguing in favor of exclusive federal control over immigration power for both legal and policy reasons).

<sup>56</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2496 (2012) ("Federal law specifies limited circumstances in which state officers may perform an immigration officer's functions . . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.").

<sup>57</sup> *Id.* at 2498 ("Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.").

<sup>58</sup> *But see* John Ashcroft, Attorney General, Prepared Remarks on the National Security Entry/Exit Registration System (June 6, 2002) (transcript available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>) (providing a rare unpublished government endorsement of the inherent authority position shortly after 9/11, Attorney General Ashcroft noted, "The Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily—arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC—is within the inherent authority of the states.").

<sup>59</sup> Pub. L. No. 104-32, § 439, 110 Stat. 1214 (1996).

Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>60</sup> which provided that, in the circumstance of a “mass influx” of immigrants, local police have the power to make arrests.<sup>61</sup> IIRIRA also established legal mechanisms for the Attorney General to delegate immigration enforcement authority to local police.<sup>62</sup> Codified under section 287(g) of the INA, this provision has formed the basis for one of the broadest initiatives to incorporate local police into immigration enforcement through so-called “287(g) agreements.”<sup>63</sup> These agreements provide LEAs the opportunity to sign a Memorandum of Understanding with DHS wherein local officers are deputized as ICE agents and trained to enforce immigration law.<sup>64</sup> Section 287(g) has facilitated sixty-eight active agreements with DHS in twenty-four states.<sup>65</sup>

Up until and including the implementation of 287(g) agreements, the involvement of LEAs in immigration enforcement was always framed as voluntary.<sup>66</sup> Grounded, in part, in the Tenth Amendment,<sup>67</sup> the doctrine outlined in *Printz v. United States*<sup>68</sup> and *New York v. United States*<sup>69</sup> provides that the federal government may not commandeer

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<sup>60</sup> Pub. L. No. 104-208, § 287 110 Stat. 3009 (1996).

<sup>61</sup> See *id.* at § 372(8) (“In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.”).

<sup>62</sup> See *id.* at § 287(g) (“The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”)

<sup>63</sup> See, e.g., DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(g) AGREEMENTS, OFFICE OF THE INSPECTOR GENERAL (2010), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf); see generally Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Sept. 10, 2012).

<sup>64</sup> Fact Sheet: Updated Facts on ICE’s 287(g) Program, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (last visited Sept. 10, 2012).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., Pham, *supra* note 48, at 976–77 (noting that initiatives that implicate local police in immigration enforcement “must be structured as an invitation to local law enforcement to pass Tenth Amendment muster”).

<sup>67</sup> U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or the people.”).

<sup>68</sup> 521 U.S. 898, 902 (1997) (“The Federal Government may neither issue directives requiring the states to address particular problems, nor command State’s officers or those of political subdivisions, to administer or enforce federal regulatory program.”).

<sup>69</sup> 505 U.S. 144 (1992) (finding that the history of the Constitutional Convention supports the conclusion that “Congress may not commandeer the States’ legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals”).

state machinery to administer federal laws.<sup>70</sup> A few congressional attempts to encroach on this territory in immigration law failed. For example, in 2003, and again in 2005, the House proposed the “Clear Law Enforcement for Criminal Alien Removal Act” (CLEAR Act).<sup>71</sup> This legislation sought to give local law enforcement officers the authority to enforce federal immigration laws through incentivized state and local participation.<sup>72</sup> A Senate proposal called the “Homeland Security Enforcement Act” (HSEA) would have implemented similar measures.<sup>73</sup> These bills pushed constitutional boundaries because they would have imposed rigid appropriation disincentives for non-compliance that many felt overstepped commandeering boundaries.<sup>74</sup> Neither of these pieces of legislation succeeded.<sup>75</sup>

### C. THE STRUCTURE OF SECURE COMMUNITIES

Secure Communities was not explicitly created by an act of Congress, and is not governed by any DHS regulations.<sup>76</sup> DHS has asserted that its legal authority to implement Secure Communities is found in Congress’s broadly worded instruction that DHS target and remove criminal aliens. This direct mandate appeared in 2008 when the Budget Appropriations Committee instructed DHS to prioritize developing strategies to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are

<sup>70</sup> This doctrine applies to the immigration context. See Daniel Booth, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL’Y 1063, 1075 (2006) (“Given the relatively robust anti-commandeering doctrine expressed in *Printz* and *New York*, it does not appear that there could be an ‘emergency exception’ to the general rule. Moreover, even if there were such a rule or exception, local enforcement of immigration law does not rise to the level of an emergency in which such an exception would apply.”).

<sup>71</sup> See Clear Law Enforcement for Criminal Alien Removal Act of 2003, H.R. 2671, 108th Cong. (2003).

<sup>72</sup> *Id.*

<sup>73</sup> Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. (2003).

<sup>74</sup> The 2005 version of the CLEAR Act legislation stated that LEAs “have the inherent authority of a sovereign entity to investigate, identify, apprehend, detain or transfer to Federal custody aliens in the United States” but that any state which “has in effect a statute, policy, or practice that prohibits law enforcement officers . . . from assisting or cooperating with Federal immigration law enforcement . . . shall not receive certain funding.” H.R. 3137, 109th Cong. §§ 2–3(a) (2005). For additional discussion on this legislation, see Booth, *supra* note 70 at 1075–81 (discussing whether funding incentives constitute federal coercion to the point that the commandeering doctrine is implicated).

<sup>75</sup> *Id.*

<sup>76</sup> *National Day Laborer Organizing Network (NDLON) v. US Immigration and Customs Enforcement Agency (ICE)*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://www.ccrjustice.org/secure-communities> (last visited Sept. 13, 2012) (observing that “no regulations have been promulgated”) [hereinafter *NDLON v. ICE Synopsis*].

judged deportable.”<sup>77</sup> Further, in addition to general provisions of the U.S. Code that give DHS the power to identify and detain criminal aliens,<sup>78</sup> the most pertinent provision of DHS’s enabling statute requires it “to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens.”<sup>79</sup>

The explicit mandate for the creation of Secure Communities is rooted in the Bush Administration’s Presidential Directive-24, which instructed DHS to streamline its efforts with numerous other federal agencies to aggregate and share biometric data of “persons who may pose a threat to national security.”<sup>80</sup> The directive required agencies to concretely identify strategies for collecting and comparing biometric information and report back to the President with a cohesive program within one year.<sup>81</sup>

In response to this executive and legislative guidance, DHS developed Secure Communities to be a program that, unlike past legislation, utilizes new technology that merges fingerprint identification into one step and does not require deputizing or providing significant training to local law enforcement.<sup>82</sup> Secure Communities does not authorize local police to enforce immigration laws and, on its face, does not authorize local law enforcement to inquire about a person’s immigration status or take action based on a suspicion that the person does not have lawful a immigration status.<sup>83</sup> Describing the program as a “technology-centric”

<sup>77</sup> H.R. 2764 § 2 (requiring that DHS, as part of that initiative, “present a strategy for U.S. Immigration and Customs Enforcement to identify every criminal alien, at the prison, jail, or correctional institution in which they are held” and that DHS “shall report to the Committees on Appropriations of the Senate and the House of Representatives, at least quarterly, on progress implementing the expenditure plan”). For additional information on the background of Secure Communities, see generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED (2012) and IMMIGRATION AND CUSTOMS ENFORCEMENT, *Secure Communities: A Comprehensive Plan to Identify and Removal Criminal Aliens* (July 21, 2009), available at [http://epic.org/privacy/secure\\_communities/securecommunitiesstrategicplan09.pdf](http://epic.org/privacy/secure_communities/securecommunitiesstrategicplan09.pdf) (a revised version of DHS’s original 2008 strategic plan).

<sup>78</sup> See Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement And [State Identification Bureau], *supra* note 12 (asserting that DHS’s authority to implement Secure Communities is grounded in the following provisions which generally discuss the agency’s power to identify and remove criminal aliens: 8 U.S.C. § 1226(c), 8 U.S.C. § 1226(d), 8 U.S.C. § 1226(e), 8 U.S.C. § 1227(a)(2), 8 U.S.C. § 1228, and 8 U.S.C. § 1105).

<sup>79</sup> 8 U.S.C. § 1226(d)(1)(a).

<sup>80</sup> See Homeland Security Presidential Directive-24, *supra* note 10.

<sup>81</sup> See *id.*

<sup>82</sup> See Immigration and Customs Enforcement, *What Law Enforcement Needs to Know: Secure Communities Briefing #1*, YouTube (June 11, 2011), <http://www.youtube.com/watch?v=jUdeqg5TpHA>.

<sup>83</sup> IMMIGRATION AND CUSTOMS ENFORCEMENT, GET THE FACTS, available at [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Sept. 10, 2012) (“Under Secure Communities, state and local law enforcement officers are not deputized, do not enforce immigration law, and are not tasked with any additional responsibilities.”).

rather than “agent-centric” strategy,<sup>84</sup> ICE responded to congressional concerns about the involvement of agents by stating that the new biometrics technology eliminates the burden and discretion that 287(g) agreements place on officers.<sup>85</sup>

Secure Communities technology is utilized when a law enforcement officer submits a request to the FBI fingerprint database, pursuant to standard arrest protocol.<sup>86</sup> Once the fingerprints are received by the FBI fingerprint database, it automatically searches the individual’s immigration history as well.<sup>87</sup> The database then delivers the result of the inquiry to local law enforcement.<sup>88</sup> If there is a match indicating that the arrested immigrant is removable, ICE investigates the immigrant’s status and determines whether to issue a detainer.<sup>89</sup> ICE is then responsible for taking the immigrant into custody, though local law enforcement often aids ICE by keeping the individual detained and completing appropriate paperwork.<sup>90</sup>

Secure Communities training materials indicate that it prioritizes certain groups of criminal aliens based on the “levels” of threat posed by the offender.<sup>91</sup> For example, “Level 1” includes “individuals who have been convicted of major drug offenses, national security crimes, and violent crimes such as murder, manslaughter, rape, robbery, and kidnapping.”<sup>92</sup> Levels 2 and 3 target lesser offenses.<sup>93</sup> ICE maintains that it uses this grading system as a framework for determining whether to take an immigrant into custody.<sup>94</sup> As of June 30, 2012,

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<sup>84</sup> *Hearings Before a Subcommittee of the Committee on Appropriations*, Subcommittee on Homeland Security 111th Cong., 971 (2009) [hereinafter 2010 Appropriations Hearing] (statement by Michael Aytes, Acting Deputy Director, U.S. Citizenship and Immigration Services (USCIS)).

<sup>85</sup> 2010 Appropriations Hearing, 976 (statement of David Venturella, Executive Director of Secure Communities) (responding to an inquiry about whether the program would involve “relying a lot on the local communities” by saying that, unlike the old model, “the new model does not rely on them making a judgment on the individual’s immigration status”).

<sup>86</sup> This database is called the Federal Bureau of Investigation (FBI) Criminal Justice Information Services Division’s Integrated Automated Fingerprint Identification System (IAFIS). See Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement And [State Identification Bureau], *supra* note 12 at 3. The DHS database is called the United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”) Automated Biometric Identification System (“IDENT”). *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2–3.

<sup>90</sup> *Id.*

<sup>91</sup> Secure Communities Standard Operating Procedures, § 4.0 Appendix A, *available at* [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 8.

Secure Communities has resulted in the removal of 151,000 criminal aliens from the United States.<sup>95</sup>

Like 287(g), Secure Communities engages localities in immigration enforcement, but the Secure Communities technology is arguably distinguishable because it automatically transmits fingerprint data from DHS headquarters, and the local agent only has control over whether to view the response.<sup>96</sup> When questioned by Congress about whether DHS would activate the technology without the state or locality's consent, ICE stated: ". . . the local law enforcement officials, as well as local governments, can opt out of participating in this type of program. So it is not a mandatory program, it is certainly voluntary."<sup>97</sup> This congressional testimony quelled concerns about unconstitutional state commandeering and distinguished the program from more controversial programs, including the 2003 and 2005 legislation that had proposed integrating LEAs with federal enforcement of immigration law.<sup>98</sup>

## II. FOIA IN DHS'S SECURE COMMUNITIES

### A. THE ROLE OF FOIA IN SECURE COMMUNITIES

Shortly after the implementation of Secure Communities, community advocates, state officials, and the public began to inquire about the details of the program. The media highlighted concerns about the burden that Secure Communities would place on local law enforcement and the reality that, although the program purports to target criminal aliens who have been convicted of the most serious crimes, many immigrants arrested for minor crimes have also been detained.<sup>99</sup> Stakeholders also voiced concerns about racial profiling, wherein

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<sup>95</sup> *Secure Communities*, IMMIGRATION & CUSTOMS ENFORCEMENT (last visited Sept. 8, 2012 8:10 PM), [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) ("Through June 30, 2012, more than 151,000 immigrants convicted of crimes, including more than 55,000 convicted of aggravated felony (level 1) offenses like murder, rape and the sexual abuse of children were removed from the United States after identification through Secure Communities.").

<sup>96</sup> 2010 Appropriations Hearing, 977 (statement of David Venturella, Executive Director, Secure Communities) ("Local law enforcement has always had the ability to initiate an immigration query through a telecommunications system. What we are doing now is we are integrating the two databases, and part of the booking process . . . So, they do not have to do a second query, they do not have to initiate a second. It is all part of the booking process.").

<sup>97</sup> *Id.*

<sup>98</sup> See footnotes and surrounding text *supra* notes 71–75.

<sup>99</sup> See IMMIGR. AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, IDENT/IAFIS INTEROPERABILITY, MONTHLY STATISTICS THROUGH APRIL 30, 2011, § 2, available at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-feb28.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf) (reporting that ICE has detained 75,104 non-criminal immigrants since the program began in 2008); see also Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/2011/05/06/us/-06immigration.html> ("Some state officials, led by Governor Quinn, said the program was not accomplishing its stated goal of deporting convicted criminals, but had swept up many immigrants who were here illegally but had not been convicted of any crime.").

officers arrest individuals for alleged crimes knowing that the criminal charges will likely be dismissed, but the person will nonetheless be detained by DHS.<sup>100</sup> By far the most heated public debate concerned questions about whether the program was voluntary and,<sup>101</sup> despite DHS's assurances to Congress, its public messages began to waver from the clear statement that the program is "certainly voluntary."<sup>102</sup> Reports that states could not opt out emerged from sources like "[a] senior ICE official, speaking on the condition of anonymity because he was not authorized to talk about the involuntary nature of the program," who suggested that, because Secure Communities is predicated on information-sharing between federal agencies, the agencies intended to continue collecting data notwithstanding state opposition.<sup>103</sup> A media frenzy ensued when Janet Napolitano reportedly stated in an October 2010 public appearance, "We don't consider Secure Communities an

<sup>100</sup> See Julian Aguilar, *With Clock Ticking, Immigration Bills in Limbo*, THE TEX. TRIB. (May 23, 2011), <http://www.texastribune.org/texas-legislature/82nd-legislative-session/with-clock-ticking-immigration-bills-in-limbo/> (reporting on a debate in the Texas state legislature about whether to pass a bill making Secure Communities mandatory, and quoting a letter from the House Democrats stating, "We have concerns about racially profiling our citizens under the guise of cracking down on so-called 'sanctuary cities.' There is a tremendous risk that such legislation would inadvertently target legal citizens of Texas, solely because they fall within a certain ethnic demographic. As we are all well aware, racial profiling is illegal in Texas."); Burke, *Secure Communities or Racial Profiling?*, COLO. CONNECTION (Feb. 16, 2010), <http://www.coloradoconnection.com/news/story.aspx?id=581473>; Karen Lee Ziner, *R.I. Critics Say Secure Communities Invites Racial Profiling*, PROVIDENCE J. (June 12, 2011), [http://www.projo.com/news/content/SCOMM\\_PROTESTS\\_06-12-11\\_6JOIUON\\_v38.29638ff.html](http://www.projo.com/news/content/SCOMM_PROTESTS_06-12-11_6JOIUON_v38.29638ff.html).

<sup>101</sup> See Afton Branche, *Can Cities Really Opt Out of Secure Communities*, HUFFINGTON POST (Sept. 2, 2010, 11:01 AM), [http://www.huffingtonpost.com/afton-branche/can-cities-really-opt-out\\_b\\_703431.html](http://www.huffingtonpost.com/afton-branche/can-cities-really-opt-out_b_703431.html); Suzanne Gamboa, *"Voluntary" Immigration Program Not So Voluntary*, ASSOCIATED PRESS (Feb. 16, 2011), [http://www.msnbc.msn.com/id/41625585/ns/us\\_news-security/t/voluntary-immigration-program-not-so-voluntary/](http://www.msnbc.msn.com/id/41625585/ns/us_news-security/t/voluntary-immigration-program-not-so-voluntary/) ("A voluntary program to run all criminal suspects' fingerprints through an immigration database was only voluntary until cities refused to participate, recently released documents show."); Ruxandra Guidi, *KPBS RADIO* (June 20, 2011), <http://www.kpbs.org/news/2011/jun/20/secure-communities-program-comes-under-fire/> (interviewing Immigration and Customs Enforcement Director John Morton's on KPCC Public Radio in Los Angeles, where he said, "An individual state can't come to the federal government and say, 'we don't want the Department of Justice and the Department of Homeland Security to share information or seek to prevent that information sharing.' That is between federal departments"); Mallie Jane Kim, *Controversial Immigration Program Spurs Federal-State Spat*, U.S. NEWS & WORLD REP. (June 27, 2011), <http://www.usnews.com/news/articles/2011/06/27/controversial-immigration-program-spurs-federal-state-spat>; Press Release, The Center for Constitutional Rights, *New Document Confirms Secure Communities Program is Voluntary, Rights Groups Say ICE Must Allow Counties to Opt-Out* (Sept. 1, 2010), available at <http://www.commondreams.org/newswire/2010/09/01-8> ("We have known all along that S-Comm is a voluntary program because it is a program, not a federal law.").

<sup>102</sup> See *supra* text surrounding notes 96–97.

<sup>103</sup> Shankar Vendantam, *No Opt-Out for Immigration Enforcement*, WASHINGTON POST (Oct. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html?sid=ST2010122004569>.

opt in/opt out program.”<sup>104</sup> Confusion about the program led several states to resist implementation, and a few to announce that they intended to refuse participation altogether.<sup>105</sup>

As the public searched for information about Secure Communities, DHS’s website remained incomplete, abstract, and even seemed contradictory. For instance, the “Get the Facts” webpage included data about the program’s efficiency and statistics tallying the removals of criminal aliens effectuated through the program, but did not include key “facts” like information on the functionality of the technology.<sup>106</sup> Even as news that states could not opt out trickled to the public, documents suggesting just the opposite remained on DHS’s website, including a sample Memorandum of Understanding suggesting an “agreement” between local police and DHS to operate Secure Communities and a “Setting the Record Straight” document that described the steps for opting out.<sup>107</sup> Further, in a separate area of DHS’s website that is not linked to the Secure Communities page, DHS posted a section of ICE’s proactive disclosures, which included documents like the 2009 Standard Operating Procedures, the 2009 Strategic Plan, the 2009 Appropriation Utilization Plan, and a document containing Secure Communities presentations.<sup>108</sup> These documents, which are still the only content on Secure Communities on ICE’s proactive disclosures webpage, provide general information about the program, but do not resolve the

<sup>104</sup> See, e.g., *Zoe Lofgren: DHS May Have Misled Public On Immigration Program*, HUFFINGTON POST (Apr. 28, 2011, 6:21 PM), [http://www.huffingtonpost.com/2011/04/28/lofgren-calls-for-dhs-investigation\\_n\\_855138.html](http://www.huffingtonpost.com/2011/04/28/lofgren-calls-for-dhs-investigation_n_855138.html).

<sup>105</sup> See, e.g., *Miriam Jordan, States Rebel Over Deportations*, WALL ST. J. DIGITAL NETWORK, (May 14, 2011), <http://online.wsj.com/article/SB10001424052748704681904576321404203166580.html>.

<sup>106</sup> IMMIGRATION AND CUSTOMS ENFORCEMENT, GET THE FACTS, available at [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Sept. 10, 2012).

<sup>107</sup> *FOIA Proactive Disclosures*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/proactive.htm> (last visited Aug. 11, 2012) and click on “Secure Communities- Memorandums of Agreement”; *Elise Foley, Opting Out of Immigration Enforcement*, THE WASHINGTON INDEPENDENT (Sept. 1, 2010), <http://washingtonindependent.com/96472/opting-out-of-immigration-enforcement> (“On a conference call today, advocacy groups criticized the opt-out process delineated in a Aug. 17 [2010] ICE document called ‘Setting the Record Straight.’ The paragraph-long set of instructions for opting out should have been released sooner and more widely, critics of Secure Communities say.); *Elise Foley, Document on Opting Out of Immigration Enforcement Program Mysteriously Disappears*, THE WASHINGTON INDEPENDENT (Oct. 20, 2010), <http://washingtonindependent.com/101243/document-on-opting-out-of-immigration-enforcement-program-mysteriously-disappears> (“An Immigration and Customs Enforcement spokeswoman said not to read too much into it, but the August document listing steps for communities to opt out of the Secure Communities program seems to have disappeared from the ICE website.”). In the wake of the controversy, ICE brushed aside suggestions that the “Setting the Record Straight” document’s disappearance was significant, and media reported that “ICE launched a new website today, and ICE spokeswoman Cori Bassett said it is possible the document was lost in the shuffle and will reappear later.” *Id.* The “Setting the Record Straight” document never reappeared, but was previously available at: [http://www.ice.gov/doclib/secure\\_communities/pdf/sc-setting\\_the\\_record\\_straight.pdf](http://www.ice.gov/doclib/secure_communities/pdf/sc-setting_the_record_straight.pdf).

<sup>108</sup> *FOIA Proactive Disclosures*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/proactive.htm> (last visited Sept. 29, 2012).

main questions posed by the public regarding “opt-out” provisions or racial profiling, nor do they provide current information on up-to-date appropriations.

In an effort to learn more about Secure Communities,<sup>109</sup> on February 3, 2010, NDLO, CCR, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law<sup>110</sup> (together the NDLO Requesters) filed a FOIA request with ICE.<sup>111</sup> The request sought a variety of records, including training materials, public speeches, coordination documents, documents pertaining to potential racial profiling, statistical data, and demographic data on immigrants removed under the program.<sup>112</sup> After receiving no response, on April 27, 2010, the requesters filed a complaint with the U.S. District Court for the Southern District of New York seeking access to internal records on the program.<sup>113</sup> The complaint observed that “[d]espite the immense scale of Secure Communities, ICE has released little information about it to the public. The limited information available is vague and conflicting” and asserted that disclosure was necessary to “facilitate meaningful public discourse and increase government transparency.”<sup>114</sup> The NDLO Requesters further argued that disclosure would “vindicate the public’s right to information about practices and policies relating to the ongoing implementation and expansion of Secure Communities.”<sup>115</sup> On August 2, 2010,<sup>116</sup> DHS began to release documents in response to the complaint but, throughout the litigation, disputes have arisen over the timing, substance, and manner of DHS’s disclosures.

With regard to the timing of disclosures, the plaintiffs claimed that the request required expedited processing because of the “compelling need” for the information under 5 U.S.C. § 552(a)(6)(E)(i)(I). A “compelling need” is established when there is “urgency to inform the public concerning actual or alleged Federal Government activity,” when the requester is a “person primarily engaged in disseminating information,”<sup>117</sup> and also when there is “a matter of widespread and

<sup>109</sup> The request stated, “The purpose of this request is to obtain information for the public about the Secure Communities program and its impact on the relationship between local law enforcement and immigration enforcement in local communities. This information will enable the public to monitor the impact of the program.” Kessler, *supra* note 14 at 1.

<sup>110</sup> The firm Mayer Brown, LLP began to assist the plaintiffs with the project in Fall 2010. See NDLO v. ICE Synopsis, *supra* note 76.

<sup>111</sup> See NDLO v. ICE Synopsis *supra* note 76.

<sup>112</sup> Bridget Kessler, *supra* note 14.

<sup>113</sup> Complaint for Plaintiff, Nat’l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011, available at* [http://ccrjustice.org/files/SC\\_Complaint\\_REAL\\_FINAL.pdf](http://ccrjustice.org/files/SC_Complaint_REAL_FINAL.pdf) (published online by NDLO).

<sup>114</sup> *Id.* at 2–3.

<sup>115</sup> *Id.* at 3.

<sup>116</sup> NDLO v. ICE Synopsis, *supra* note 76.

<sup>117</sup> 28 C.F.R. § 16.5(d)(1)(iv).

exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."<sup>118</sup> The NDLOJ Requesters claimed that the broad scope of the program and significant resources devoted to its implementation justified release of the data.<sup>119</sup> The court agreed and ordered ICE to release a small portion of the most urgent records due to the "compelling need" for release.<sup>120</sup>

With regard to the substance of disclosures, DHS employed several strategies aimed at retaining or limiting the information disclosed, including invoking several FOIA exemptions. For instance, it invoked FOIA Exemption 2, which protects from disclosure information that pertains solely to the internal personnel rules and practices of an agency,<sup>121</sup> and includes documents "used for predominantly internal purposes."<sup>122</sup> DHS also claimed that Exemption 7(E) under FOIA also applied because release of the information would disclose procedures for law enforcement investigations,<sup>123</sup> which includes law enforcement techniques.<sup>124</sup> Additionally, DHS invoked FOIA's Exemption 5, which effectively invokes the deliberative process privilege.<sup>125</sup> This exemption applies to agency memoranda that could not normally be viewed by people outside of the government unless through litigation discovery techniques. Generally, the court permitted ICE to redact a portion of

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<sup>118</sup> 28 C.F.R. § 16.5(d)(1)(ii).

<sup>119</sup> The request read: "[T]here is an urgent need to inform the public of the Secure Communities program. 28 C.F.R. § 16.5(d)(1)(iv). The Fiscal Year 2010 appropriations bill for DHS allocates \$200 billion to Secure Communities. To date, the program has been implemented in over 95 jurisdictions in eleven states. By 2013, ICE intends to operate the program in all 3,100 county and local jails across the country. In spite of this widespread fiscal and community impact, ICE has promulgated no regulations or agency guidelines . . . [it has] not released the memorandums of agreement that it has entered into with local entities or disclosed precisely how Secure Communities will be implemented on a local level [and] the public has an urgent need to understand the scope of the program." Bridget Kessler, *supra* note 14 at 1.

<sup>120</sup> See Stipulation and Order, Nat'l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011*, available at <http://ccrjustice.org/files/Exemptions-Decision.pdf> (published online by NDLOJ).

<sup>121</sup> See Freedom of Information Act § 552(b)(2).

<sup>122</sup> Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc)).

<sup>123</sup> Freedom of Information Act § 552(b)(7)(E) (exempting from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law").

<sup>124</sup> See Smith v. Bureau of Alcohol, Tobacco & Firearms, 977 F. Supp. 496, 501 (D.D.C. 1997).

<sup>125</sup> Freedom of Information Act § 552(b)(5).

the documents, but required it to release the segregable remainder.<sup>126</sup> In its order, the court explicitly noted DHS's inconsistent messaging on Secure Communities and, with regard to whether state participation was voluntary, observed that DHS "appeared to reverse course" during the pendency of the litigation.<sup>127</sup> The court found that DHS's invocation of these exemptions was in many cases unjustified, noting, for instance, that its reliance on Exemption 5's deliberative process privilege was unfounded when documents did "not contain agency deliberations about what Secure Communities policies should be, but rather about what message should be delivered to the public about what Secure Communities policies *are* . . . . [which] are the sorts of discussions that FOIA is intended to *reveal*."<sup>128</sup> The order asserted that an agency's efforts to conceal such information are "anathema to the operation of democratic government."<sup>129</sup>

An additional substantive dispute emerged surrounding the search techniques that DHS used to gather documents, including whose records should be searched and what keywords DHS should employ to perform the electronic searches.<sup>130</sup> In its July 13, 2012 order, the court noted its difficulty in assessing the adequacy of a search, but emphasized the importance of designing precise research strategies, including thoughtfully constructed search terms with appropriate Boolean connectors.<sup>131</sup> The court instructed the parties to work cooperatively to design searches that would most effectively aggregate the data that should be disclosed under FOIA.<sup>132</sup>

Another litigation dispute arose regarding the manner of ICE's document disclosure.<sup>133</sup> Initially, ICE released the first group of records as one large electronic file, which was not searchable and made it unclear

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<sup>126</sup> See July 11, 2011 Opinion and Order, Nat'l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011*, available at <http://ccrjustice.org/files/Exemptions-Decision.pdf> (published online by NDLOJ) (detailing the exemptions claimed by DHS and the court's decision).

<sup>127</sup> *Id.* at 4–6.

<sup>128</sup> *Id.* at 29 (emphasis in original).

<sup>129</sup> *Id.* at 31.

<sup>130</sup> See generally July 13, 2012 Opinion and Order, Nat'l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011*, available <http://ccrjustice.org/files/7-13-12%20AOS%20Opinion.pdf> (published online by the FOIA requesters).

<sup>131</sup> *Id.* at 39–40.

<sup>132</sup> *Id.* at 44–45.

<sup>133</sup> *Mayer Brown Exposes Controversy Surrounding Secure Communities in FOIA Litigation*, MAYER BROWN, LLP (June 13, 2011), <http://www.mayerbrown.com/probono/news/article.asp?id=11130&nid=291> ("When the government first released its records, the documents were produced in one large electronic file, rendering them unsearchable. The records were also devoid of intrinsic electronic information (metadata) critical to identifying, indexing and searching files in an effective manner. . . Mayer Brown obtained an order holding that certain metadata is, indeed, an integral part of an electronic record and "readily reproducible" in the FOIA context.").

when one document ended and another began.<sup>134</sup> ICE also removed all metadata, which made it difficult for the viewer to determine the dates and agency officials responsible for generating it. Based on the FOIA requirement that documents be released in “any form or format requested by the person if the record is readily reproducible by the agency,”<sup>135</sup> the court held that DHS had to reproduce the documents in a manageable format together with metadata.<sup>136</sup>

Despite these withholdings, by the third disclosure in June 2011, DHS had complied with several court orders and had released thousands of pages of records on the program. After NDLOM published the records online, the public was able to access documents that shed light on the controversy surrounding the program. Media, civil society organizations, and the interested public seized upon newfound access and began to meaningfully scrutinize the program for the first time.<sup>137</sup> The documents released included redacted e-mails between Secure Communities staff and members of Congress about the “opt-out” provisions, internal documents that provided detail on the structure and logistics of the program, as well as documents that connected Secure Communities with a larger FBI initiative. Among the most revealing documents were e-mails that chronicled the internal agency inconsistency surrounding the program, including one widely publicized e-mail in which a staffer, whose name was redacted, wrote: “I’m totally confused now. I’ve got so many versions of the opt-out language I don’t know what’s current and what’s not. It seems like we’ve got different language for different purposes, and it’s confusing.”<sup>138</sup> By equipping the public with this information about Secure Communities, including the internal agency inconsistency, the release of the FOIA documents

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<sup>134</sup> *Id.*

<sup>135</sup> Freedom of Information Act, 5 U.S.C. § 552(a)(3)(B).

<sup>136</sup> See *Opinion and Order, Nat’l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency*, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011*, available at <http://ccrjustice.org/files/Exemptions-Decision.pdf> (published online by NDLOM) (detailing the exemptions claimed by DHS and detailed in the court’s decision).

<sup>137</sup> See Alfonso Chardy, *FBI Joins Effort to Identify Undocumented Aliens*, MIAMI HERALD (July 7, 2011), reprinted at <http://www.mcclatchydc.com/2011/07/08/v-print/117232/fbi-joins-effort-to-identify-undocumented.html>; Rina Palta, *A FOIA Brings in Data on Secure Communities*, KALW NEWS (Aug. 10, 2010), <http://informant.kalwnews.org/2010/08/a-foia-brings-in-data-on-secure-communities/>; Marcos Restrepo, *Newly Released Documents Shed Light on FBI’s Role in Secure Communities*, FLA. INDEPENDENT (July 6, 2011), <http://floridaindependent.com/38178/fbi-secure-communities>.

<sup>138</sup> Michele Waslin, *New DHS Documents Highlight Internal Confusion About Secure Communities Program*, IMMIGRATION IMPACT (Feb. 23, 2011), <http://immigrationimpact.com/2011/02/23/new-dhs-documents-highlight-internal-confusion-over-secure-communities-program/>.

caused a sea change in public discourse, participation, and even state and local decision making.<sup>139</sup>

After the FOIA documents became public, DHS also took several affirmative steps to address concerns, including explicitly apologizing for its misleading statements.<sup>140</sup> For instance, DHS's Office for Civil Rights and Civil Liberties (CRCL) created an online system to handle civil rights complaints relating to Secure Communities, such as complaints regarding racial profiling, and also enhanced its oversight through statistical analysis of immigrants detained under Secure Communities.<sup>141</sup> To address the "confusion about how Secure Communities works and who is required to participate that had been created by certain ICE statements," the Secretary of Homeland Security commissioned a task force comprised of individuals from diverse fields that held town hall meetings nationwide.<sup>142</sup> The task force made findings on issues like "Misunderstandings Regarding the Secure Communities and the Role of Local Law Enforcement Agencies" and "Perceived Inconsistencies between Secure Communities' Stated Goals and Outcomes."<sup>143</sup> It recommended that "ICE must improve the transparency of the program," and ICE responded by expanding the information available on its website.<sup>144</sup> For example, the "Get the Facts" section now includes the clear statement: "FACT: State and local jurisdictions cannot opt out of Secure Communities."<sup>145</sup> Further, senior ICE Officers also granted requests to meet with media and advocacy organizations to discuss the program

<sup>139</sup> See, e.g., Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, (May 5, 2011), <http://www.nytimes.com/2011/05/06/us/06immigration.html> ("This year, the National Day Laborer Organizing Network, an immigrant advocate organization, obtained a trove of e-mails and other internal documents concerning Secure Communities from the immigration agency through a Freedom of Information request. After examining those documents, Ms. Lofgren and Senator Robert Menendez of New Jersey, also a Democrat, demanded that the homeland security inspector general open an investigation. Ms. Lofgren said officials had deliberately misled local governments into thinking they could choose to opt out of the program. 'I believe that some false and misleading statements may have been made intentionally, while others were made recklessly,' Mr. Lofgren [the top-ranking Democrat on the House Judiciary Immigration Subcommittee] wrote the inspector general.

In an apologetic response, Mr. Morton, the head of the immigration agency, said the agency 'takes full responsibility for the confusion and inconsistent statements' about participation.'").

<sup>140</sup> *Id.*

<sup>141</sup> Dep't of Homeland Sec., *Secure Communities (June 2011)*, <http://www.dhs.gov/secure-communities> (last visited Oct. 10, 2012).

<sup>142</sup> ICE OFFICE OF THE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 2 (2012).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 4–5 ("ICE . . . has recently updated the ICE.gov Secure Communities webpage at [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) to provide additional transparency and increased information sharing. These updates include information on how Secure Communities works, frequently asked questions, new ICE policies, the Secure Communities complaint protocol, and briefing materials for state and local law enforcement agencies (LEAs).").

<sup>145</sup> IMMIGRATION AND CUSTOMS ENFORCEMENT, GET THE FACTS, *available at* [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Sept. 10, 2012).

in an effort to explain perceived inconsistencies, thus imposing a level of accountability on ICE that had not been previously possible.<sup>146</sup> In its July 13, 2012 ruling in the *NDLON* case, the court observed that “[t]his litigation has influenced much of the public debate over Secure Communities.”<sup>147</sup>

### B. PROBLEMS WITH THE ROLE OF FOIA IN SECURE COMMUNITIES

For Secure Communities, the *NDLON* FOIA litigation was the gateway to public awareness and involvement. Not only did it lead to the release of documents that gave the public previously unavailable insight into the program, but it also acted as a catalyst for the agency to engage the public and release more information. The *NDLON* Court observed that, because the FOIA litigation significantly increased public access to information on Secure Communities, “[t]he Act has therefore served its purpose of engendering a more informed public and a more accountable government.”<sup>148</sup> Though in many ways the *NDLON* case is a FOIA success story, there are many drawbacks to FOIA that are also exemplified by the role of FOIA in Secure Communities.

Most prominently, large agencies rarely respond to FOIA requests promptly and, even in the case of the highly publicized Secure Communities FOIA litigation, many months passed before significant documents were released. The nine FOIA exemptions and evolving case law regarding the manner of record release provided further opportunities for the agency to resist disclosure or cause delay.<sup>149</sup> As months passed and DHS continued to withhold records, journalists and civil society organizations grappled for information on Secure Communities, and speculation lead to heavily sensationalized media

<sup>146</sup> See Daniel Denvir, *Ice Takes Heat for Deportation Plan*, GUARDIAN.CO.UK (June 6, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/06/usimmigration-obama-administration> (reporting that “Ice [sic] says that President Obama’s signature immigration enforcement programme (begun under Bush) is mandatory – after spending three years telling activists, elected officials and law enforcement officials that it was optional” and quoting ICE spokesman Harold Ort as saying “Secure Communities is not voluntary and never has been . . . As we have noted before, unfortunately, this was not communicated as clearly as it should have been to state and local jurisdictions by Ice when the programme began.”); ICE OFFICE OF THE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS, 4 (2012) (“ICE has also expanded outreach efforts with key stakeholders at the national, state and local levels, involving both government offices and community groups. During calendar year 2011, ICE conducted more than 730 in-person or telephonic meetings and presentations regarding Secure Communities with various LEAs, the general public, congressional representatives, immigration advocates, and foreign embassy representatives . . .”).

<sup>147</sup> July 13, 2012 Opinion and Order, *Nat’l Day Laborer Org. v. U.S. Immigration & Customs Enforcement Agency*, 10 CIV. 3488 SAS, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) *withdrawn per order from the court June 17, 2011*, available at <http://ccrjustice.org/files/7-13-12%20AOS%20Opinion.pdf> (published online by *NDLON*).

<sup>148</sup> *Id.* at 3.

<sup>149</sup> See *supra* notes 117–37 and accompanying text.

coverage, including rumors about purposeful cover-up of evidence, and conspiracy.<sup>150</sup> Even though DHS's Inspector General found no evidence of bad faith by DHS,<sup>151</sup> and DHS has sought to improve transparency and public awareness in recent months, some have suggested that the damage to the public's trust is irreparable. One state lawmaker noted, "Whatever faith the community had in this out-of-control agency's ability to police itself is now permanently broken."<sup>152</sup> A California bill intended to limit the effect of Secure Communities is known as the "TRUST Act" — another not-so-subtle indication of the public's continued sense of betrayal.<sup>153</sup> DHS is not unique, however, and many agencies have notoriously long wait times for information, with some requests taking ten or more years to be completed.<sup>154</sup> Commenting on the FOIA delays government-wide, one researcher in a 2007 study quipped "sunlight is the best disinfectant, but this kind of inexcusable delay by federal agencies just keeps us in the dark."<sup>155</sup>

Additionally, even if an agency fulfills a FOIA request in a timely manner, the information will only become available after the agency has implemented the policy. DHS did not disclose substantial records on Secure Communities until it was faced with litigation over a FOIA request, which occurred long after the implementation of Secure Communities was well underway. Further, DHS has continued to move forward with its plan to activate every jurisdiction in the United States by 2013, even though the litigation is still ongoing.<sup>156</sup> Consequently, the public almost played no role in the deliberation, evaluation, or

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<sup>150</sup> See, e.g., *Feds Stall Release of Records for Controversial Immigration Enforcement Program*, DEPORTATION NATION (Feb. 4, 2011), <http://www.deportationnation.org/2011/02/feds-stall-release-of-records-for-controversial-immigration-enforcement-program/>;

*Illinois Activists, Sheriffs Blast Secure Communities Program*, FOX NEWS LATINO (Mar. 29, 2011), <http://latino.foxnews.com/latino/news/2011/03/29/illinois-activists-sheriffs-blast-secure-communities-program/> (quoting Joshua Hoyt, Executive Director of the Illinois Coalition for Immigrants and Refugee Rights as saying, "It sounds like a conspiracy by the Department of Homeland Security just to persecute Mexicans and destroy families."); see also *supra* note 13; Part IIA.

<sup>151</sup> OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HOMELAND SECURITY, *Communication Regarding Participation in Secure Communities*, OIG-12-66 (March 2012), available at [http://webcache.googleusercontent.com/search?q=cache:http://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-66\\_Mar12.pdf](http://webcache.googleusercontent.com/search?q=cache:http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-66_Mar12.pdf).

<sup>152</sup> Elise Foley, *Homeland Security's 'Secure Communities' Didn't Intentionally Deceive, Report Says*, HUFFINGTON POST (Apr. 9, 2012, 10:47 AM), [http://www.huffingtonpost.com/2012/04/06/homeland-security-secure-communities-report\\_n\\_1409105.html](http://www.huffingtonpost.com/2012/04/06/homeland-security-secure-communities-report_n_1409105.html).

<sup>153</sup> Danielle Riendeau, *TRUST Act: California Could Set National Model for Correcting the Damage Done by S-Comm*, ACLU of Northern California (July 23, 2012, 1:27 PM), <http://www.aclu.org/blog/immigrants-rights-racial-justice-national-security/trust-act-california-could-set-national>.

<sup>154</sup> *40 Years of FOIA, 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s*, GEORGE WASHINGTON UNIVERSITY NAT'L SEC. ARCHIVE (2007), available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten\\_oldest\\_report.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf).

<sup>155</sup> *Id.*

<sup>156</sup> *Activated Jurisdictions*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last visited Sept. 9, 2012) (dynamic web document that is updated frequently).

critique of Secure Communities before it became active. This lack of transparency undermined not only the democratic process, but also the agency's commitment to developing well-considered programs that incorporate public feedback.<sup>157</sup>

Another drawback to the way that FOIA functioned in Secure Communities was the monetary cost, both to requesters and taxpayers. Although the FOIA request itself is generally not costly to the requester, the litigation that compels more prompt disclosures or enables FOIA requesters to challenge exemptions can be prohibitively expensive for some individual requesters. The *NDLON* FOIA litigation involved collaboration between students and faculty at Benjamin N. Cardozo School of Law's clinic, activists at *NDLON* and *CCR*, as well as pro bono services by the firm Mayer Brown, LLP.<sup>158</sup> The expense of these legal and research services, as well as the time and effort involved in strategizing the case, are significant. The FOIA request itself is a detailed twenty-one-page document that was necessarily crafted with meticulous detail to ensure the agency would be compelled to release comprehensive records on the program.<sup>159</sup> Throughout the government, the cost to taxpayers to maintain agency instrumentality to respond to FOIA requests, as well as the cost of the DOJ to defend such requests, has far exceeded expectations.<sup>160</sup> In 2010, the government-wide cost for agencies to implement FOIA procedures totaled \$400 million and implicated 4,000 agency staff.<sup>161</sup>

Finally, in addition to the damage to public confidence, the expenditures associated with requesting or executing a FOIA request, and the agency's loss of valuable public feedback, DHS's untimely release of information about Secure Communities through protracted litigation also resulted in incalculable losses to DHS in monetary and other resources that it expended responding to the public backlash. The untold sums that the agency spent clarifying its position in the months and years following the release of the FOIA documents, including costs

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<sup>157</sup> See generally DEP'T HOMELAND SEC., OPEN GOVERNMENT PLAN 2.0, available at <http://www.dhs.gov/xlibrary/assets/dhs-open-government-plan-v2.pdf>; see also Cary Coglianese, Heather Kilmartin & Evan Mendelsen, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927 (2009) ("Not only will transparency and public participation inevitably help to achieve democratic goals, but they also can help produce better, more informed policy decisions.").

<sup>158</sup> See *NDLON v. ICE* Synopsis *supra* note 76.

<sup>159</sup> Bridget Kessler, *supra* note 13; see also Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 399-410 (2010) (describing the importance of drafting precise FOIA requests).

<sup>160</sup> *FOIA's Forty-Fifth Anniversary*, *supra* note 45 (noting that, based on a survey taken ten years after FOIA took effect, FOIA cost approximately \$50 million annually to implement, which was "far higher" than estimated, and in 2010 the overall grew to \$400 million annually, which represents an increase of 700%).

<sup>161</sup> *Id.*

associated with its task force and its report, the efforts undertaken by DHS's Inspector General and CRCL, and myriad press releases and policy documents further illustrate why responding to a FOIA request should not be the an agency's primary vehicle for transparent policy-making, as it was in Secure Communities.<sup>162</sup>

### III. RECOMMENDATIONS

As exemplified by the role of FOIA in Secure Communities, obtaining information about agency action through FOIA requests is time-consuming, expensive, and operates largely as a post hoc mechanism that does not afford the public meaningful opportunities to evaluate proposed policy. Reactive litigation is inadequate when Internet technology has made proactive disclosure of agency records an easily available option. Indeed, DHS could have improved transparency in Secure Communities if it had released more of the records that it ultimately disclosed pursuant to the *NDLON* litigation online as proactive disclosures. Secure Communities is a perfect example of why agencies should comply with the Open Government Initiative's emphasis on proactive disclosures and make disclosable records readily-available online in advance of receiving a FOIA request.<sup>163</sup>

In addition to examining the merits of proactive FOIA disclosures in agency policymaking, this Article also seeks to highlight simple, commonsense ways that agencies could make proactively disclosed FOIA records more accessible. Although it is also not a perfect resource, the website tracking the *NDLON* FOIA litigation—which is located at <http://uncoverthetruth.org/category/foia-documents/> and shared by *NDLON*, *CCR*, and *Cardozo Law School*—catalogues much of the same data that DHS could have posted online as proactive disclosures about Secure Communities. Thus, the “Uncover the Truth” site provides a useful starting point for examining an alternative platform for sharing agency records proactively disclosed under FOIA. Indeed, the website cataloging the disclosed Secure Communities FOIA documents is easily a more comprehensive and user-friendly resource for accessing FOIA records on Secure Communities than the resources available through DHS. If these non-profit organizations are able to create a user-friendly

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<sup>162</sup> See *supra* notes 141–47 and surrounding text.

<sup>163</sup> This suggestion directly comports with the recommendation made by the Task Force on Transparency and Public Participation, which was convened by the organization OMB Watch, stating that: “Agencies should streamline the FOIA request process by publishing electronically not only (i) the records that FOIA requires an agency to release without first receiving a request, but also (ii) any documents that an agency or court has previously determined not to fall within a FOIA exemption.” Coglianese, Kilmartin & Mendelsen, *supra* note 157 at 936–38, 963. This recommendation examines the existing statutory and administrative mandates for electronic proactive disclosure, including those discussed in Section IA of the Article, and finds that even the statutory disclosures required under FOIA “are not always made.” *Id.* at 937.

site for FOIA record disclosures, DHS can reasonably be expected to design a similarly accessible site, especially given its comparatively vast resources and statutory direction to do so.

### A. SUBSTANCE OF DISCLOSURES

As discussed in Part IA of this Article, FOIA's existing statutory proactive disclosure mandate requires the release of certain types of records,<sup>164</sup> the Obama Administration's Open Government Initiative has expanded an agency's obligation to disclose additional materials as a matter of Executive policy, and DHS responded to the Initiative by bolstering its commitment to proactive disclosures.<sup>165</sup> Despite the broad scope of these statutory, administrative, and internal mandates, as of September 2012, DHS's proactive disclosure page still includes only five documents containing general information on Secure Communities. Among these are three outdated documents from 2009, as well as Memorandums of Agreement between DHS and participating states.<sup>166</sup> These limited proactive disclosures were unhelpful in preventing the controversy surrounding Secure Communities, and fail to reach the agency's full disclosure potential under FOIA and the Open Government Initiative.

To the contrary, the Uncover the Truth website containing DHS's disclosures pursuant to the litigation goes far beyond the handful of documents on DHS's website to provide expansive and detailed records on Secure Communities. These records clarify many of the questions that sparked the controversy surrounding Secure Communities. Perhaps most importantly, unlike DHS's disclosures, they concretely evidence that the agency advanced inconsistent policies. For instance, the Uncover the Truth site includes two legal memoranda that evidence DHS's conflicting legal views on whether state participation in Secure Communities must be voluntary to pass constitutional muster.<sup>167</sup> The first memoranda, which is undated, discusses a deployment plan that is slated to run through 2012 and specifically states that "Secure Communities' current internal position is that the decision to allow an LEA to 'opt out' rests with the State."<sup>168</sup> Another memoranda, dated

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<sup>164</sup> Freedom of Information Act § 552(a)(2).

<sup>165</sup> MARY ELLEN CALLAHAN, DEP'T OF HOMELAND SEC., PROACTIVE DISCLOSURE AND DEPARTMENTAL COMPLIANCE WITH SUBSECTION (A)(2) OF THE FREEDOM OF INFORMATION ACT (FOIA) (2009), available at [http://www.dhs.gov/xlibrary/assets/foia/foia\\_proactive\\_disclosure.pdf](http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf).

<sup>166</sup> FOIA Proactive Disclosures, *supra* note 107.

<sup>167</sup> Compare "Opt Out Background," ICE FOIA 10-2674.0002927 available at <http://uncoverthetruth.org/wp-content/uploads/2012/01/Opt-Out-Background.pdf>, with Immigration and Customs Enforcement, ICE FOIA 10-2674.0010797, (Oct. 2, 2010),

available at <http://uncoverthetruth.org/wp-content/uploads/2012/01/Mandatory-in-2013-Memo.pdf>.

<sup>168</sup> "Opt Out Background," ICE FOIA 10-2674.0002927. available at <http://uncoverthetruth.org/wp-content/uploads/2012/01/Opt-Out-Background.pdf>.

October 2, 2010, states that, beginning in 2013, Secure Communities will be mandatory.<sup>169</sup> These records convey exactly the information that the public and local lawmakers needed to be able to make an informed decision about the merits of the Secure Communities initiative: confirmation that DHS was at least considering making participation in Secure Communities mandatory.

To fully implement the Open Government Initiative's mandate that it proactively disclose "useful" information, DHS should proactively disclose records pertaining to important, controversial, programs like Secure Communities online, even if those records may be embarrassing or evidence inconsistency. Indeed, the "utility" of such records can scarcely be questioned. The public should not have gleaned information about the voluntariness of Secure Communities through sources like a media leak by an "ICE official, speaking on the condition of anonymity because he was not authorized to talk about the involuntary nature of the program."<sup>170</sup> Disseminating information in this way only fueled media reports of conspiracy and inspired distrust. Further, DHS's current messaging about the "confusion" that "some" of its public statements caused still seems less than forthcoming,<sup>171</sup> because it rather disingenuously suggests that there was some ambiguity about whether DHS's statements were in conflict. Releasing actual agency records that document important policy inconsistencies or changes would at least have made clear to the public that DHS's policy on the voluntariness of Secure Communities was in flux. Indeed, this type of disclosure is precisely what Congress envisioned when it created FOIA to prevent agencies from concealing information to "cover up embarrassing mistakes and irregularities."<sup>172</sup>

## B. MANNER OF DISCLOSURES

Although not explicitly addressed in the FOIA statute, the Open Government Initiative explicitly implores agencies to post word-searchable records online in a manner that enables them to be retrieved.<sup>173</sup> DHS's current online proactive disclosures are not as accessible as they could be. As mentioned above in Section IA, rather than integrated into the main page of the Secure Communities website,

<sup>169</sup> Immigration and Customs Enforcement, ICE FOIA 10-2674.0010797, (Oct. 2, 2010) available at <http://uncoverthetruth.org/wp-content/uploads/2012/01/Mandatory-in-2013-Memo.pdf>.

<sup>170</sup> See Vendantam, *supra* note 103.

<sup>171</sup> IMMIGRATION AND CUSTOMS ENFORCEMENT, GET THE FACTS, available at [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Sept. 10, 2012) (indicating that "some of ICE's past public statements led to confusion about whether state and local jurisdictions can opt out of the program."). A more appropriate comment would be that ICE released directly contradictory statements.

<sup>172</sup> S. REP. NO. 89-813, at 38 (1966).

<sup>173</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. M-10-06: MEMORANDUM TO THE HEADS OF EXEC. DEPT'S AND AGENCIES 2 (2009).

DHS's proactive disclosures pertaining to Secure Communities are contained on a separate, unlinked page of its website entitled "FOIA Proactive Disclosures."<sup>174</sup> Several of these documents are word-searchable, but to locate them a member of the public would need to have a sufficient understanding of FOIA to know that such a term existed. Additionally, DHS also maintains several other disclosure websites, including its FOIA library, Open Government Webpage, as well as other component-specific electronic reading rooms, none of which is linked to the others.<sup>175</sup> None of these resources appear to have information on Secure Communities. Although data.gov, another Obama Administration tool for disclosure, hosts a home page touting the number of apps and datasets that are affiliated with the webpage to promote transparency, a search for "secure communities" in the search bar yields zero results.<sup>176</sup>

Although not an ideal resource, the Uncover the Truth site's catalogue of FOIA documents makes significant headway toward making them accessible to the public. Each time that they obtained a batch of documents from DHS during the FOIA litigation, the NDLOM Requesters posted them online under headings that describe the subject matter discussed therein. Although some of the headings are subjectively framed to reflect a policy perspective,<sup>177</sup> others offer straightforward labels indicating, for instance, that they contain collections of documents that pertain to Secure Communities' impact on vulnerable groups or ICE detainers.<sup>178</sup> They also posted indexes within groups of records that identify each document contained therein, its date, and a summary of the information included.<sup>179</sup> Smaller documents can be opened as portable document files (PDFs) in the user's Internet browser, and larger document sets can be downloaded as zip files. Within each zip file, documents are named by date and are catalogued in an index. Although it could certainly be improved, the NDLOM Requesters' system for organizing these documents thematically and

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<sup>174</sup> *FOIA Proactive Disclosures*, *supra* note 107.

<sup>175</sup> See Dep't Homeland Sec., *FOIA Library* (last visited Sept. 29, 2012, 3:00 PM), <http://www.dhs.gov/foia-library>; Dep't of Homeland Sec., *Transparency at the Department of Homeland Security* (Sept. 29, 2012, 4:50 PM), <http://www.dhs.gov/transparency>.

<sup>176</sup> Data.gov, *Search ("secure communities")* (last visited Sept. 26, 2012, 2:30 PM), <http://www.data.gov/search/node/%22secure%20communities%22%20>.

<sup>177</sup> See, e.g., "NDLOM v. ICE – Documents Show Projected Growth in Immigration Detention Due to Secure Communities" <http://uncoverthetruth.org/category/foia-documents/>.

<sup>178</sup> For a listing of the FOIA documents visit <http://uncoverthetruth.org/> and click "FOIA documents."

<sup>179</sup> See, e.g., Uncoverthetruth.org, *Secure Communities (S-Comm) Documents, Index of Records Released April 10, 2012, Documents Released by ICE Relating to Vulnerable Groups (Victims, Witnesses, Juveniles, U.S. Citizens)*, available at <http://uncoverthetruth.org/wp-content/uploads/2012/04/ICE-Vulnerable-Groups-Documents-for-Release-Index-Final.pdf>.

by date dramatically increases public access to information beyond the piecemeal document lists on DHS's website.<sup>180</sup>

Agencies should affirmatively strive to make accessing disclosures as user-friendly as possible, and the strategies employed on the Uncover the Truth site are a great way to start. To the extent possible, agencies should utilize PDF files that are easily downloadable and searchable so that readers can locate information quickly.<sup>181</sup> This technology also enables individuals to utilize Adobe software to make notes on the documents once they are saved on the viewer's computer. Also, as on the Uncover the Truth site, cataloguing the records and providing brief summaries of their contents in an index is an excellent way to aid users in locating records, particularly records that are not searchable. Unlike both DHS's website and the Uncover the Truth website, FOIA proactive disclosures should not be labeled as "FOIA Documents," "Proactive Disclosures," or using any other such opaque quasi-legal designation. A stakeholder's ability to access information should not be hampered by a lack of knowledge of the FOIA statute. A straightforward heading like "Electronic Copies of Original Agency Records" would clearly and accurately convey to users what the documents are, and a subheading designating the statutory or administrative mandate that the agency seeks to fulfill with the disclosure would not confuse the viewer. Lastly, like the Uncover the Truth site, records should be consolidated as much as possible for easy access. Agency records are much less accessible to the public when they are isolated in separate sections of agency websites, or even separate sites, but if such separation is necessary then they should at least be linked to the main program page or to each other. To avoid the costly problems that plagued Secure Communities, agencies should prioritize making it as easy as practicable for the public to navigate webpages that contain document disclosures.

## CONCLUSION

Agencies have a unique role in the U.S. government because, unlike the three branches, they are not explicitly provided for in the Constitution. Much of their important work implementing policy is less transparent and accessible to the public than the other branches. Arguably, as society's problems—and accordingly the solutions to those problems—have become increasingly complex, the mechanism

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<sup>180</sup> *FOIA Proactive Disclosures*, *supra* note 107.

<sup>181</sup> This suggestion is also consistent with the Task Force on Transparency and Public Participation's recommendation that: "Agencies should create online FOIA document libraries that allow the public to search and access documents that the agency or a court has determined not to be exempt from FOIA disclosure." Coglianese, Kilmartin & Mendelsen, *supra* note 157 at 943.

that puts internal agency documents into the hands of stakeholders becomes of paramount importance.

The role of FOIA in Secure Communities highlights the need for agencies to proactively disclose records. Between DHS's implementation of Secure Communities in 2008 and DHS's first document disclosure in August 2010, the controversy surrounding Secure Communities steadily intensified.<sup>182</sup> Had DHS released these critical records earlier, the debate on the legal and policy merits of Secure Communities would undoubtedly still have been vigorous, but the speculation and the frustration among the public over the lack of available information would have been significantly curtailed. This would have saved untold monetary costs that DHS expended responding to the backlash against Secure Communities, as well as prevented irreparable damage to public trust. Further, improving the availability of data earlier in the policymaking process would have given the public an opportunity to review and consider the initiative, and thereby enhanced its quality and democratic accountability. Indeed, proactive disclosures support democracy because they support the public's ability to shape policy, rather than simply react to it. Disclosing critical agency records online as early as possible in a manner that facilitates public access would fulfill President Obama's mandate and truly make FOIA a tool for transparency, collaboration, and participation in government because it would enable the public to offer timely feedback on agency policies. Administrative agencies should view the role of FOIA in Secure Communities as a mistake that they cannot afford to repeat, and they should view proactive disclosures as a key tool for preventing similar missteps in the future.

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<sup>182</sup> See *supra* Part II.A and notes 13, 151.