

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

1:10-cv-3488

Plaintiffs.

[Rel. 10-CV-2705]

v.

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

Defendants.

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**DECLARATION IN SUPPORT OF
PLAINTIFFS' MOTION FOR DISCOVERY
PURSUANT TO RULE 56(d)**

I, SUNITA PATEL, declare, pursuant to Fed. R. Civ. P. 56(d) and subject to the penalties of perjury, that the following is true and correct:

1. I am a licensed attorney at the Center for Constitutional Rights, one of the co-Plaintiffs in the above-captioned matter.
2. I submit this declaration in support of Plaintiffs' Motion for Discovery dated September 12, 2011.
3. The Court ordered disclosure of several documents or categories of documents on July 11, 2011, but withheld judgment on whether versions of an Immigration and

Customs Enforcement (ICE) memorandum dated October 2, 2010 and titled “Secure Communities – Mandatory in 2013” (collectively, the “Oct. 2 Memo”) is protected by attorney-client privilege and whether the memorandum must be disclosed under the working law doctrine. (July 11 Order at 63.)

4. The Court ordered Defendants to “provide more information as to the role [the Oct. 2 Memo] played in the deliberative process, and to establish that the confidentiality of the document has been maintained.” (July 11 Order at 60-63.)
5. Thereafter, ICE submitted supplemental *Vaughns* and the declaration of Deputy FOIA Officer of the ICE FOIA Office, Ryan Law, dated August 11, 2011 (“Law Declaration”).
6. Plaintiffs contested the adequacy of the supplemental *Vaughns* and the Law Declaration. The Court agreed it failed to explain the purpose of the memo or how it was used and failed to establish that the confidentiality of the contested documents had been maintained. (8/11/2011 Tr. at 23-24.)
7. After argument, the Court permitted Defendants another opportunity to submit a supplemental declaration. (8/11/2011 Tr. at 27-30.)
8. Defendants submitted a supplemental declaration by Ryan Law on August 23, 2011 (“Supplemental Law Declaration”).
9. Plaintiffs further contested the adequacy of the Supplemental Law Declaration and the *Vaughns*. (8/24/2011 Tr. at 25-27, 34-35.) The Plaintiffs argued that the declaration failed to answer several key questions important to determining whether Defendants maintained confidentiality of the Oct. 2 Memo and the Court inquired further into the sharing of the Oct. 2 Memo. (*E.g.*, 8/24/2011 Tr. at 28-29) (“[Law]

- talks about the sender and the recipient, he interviewed senders and recipients. . . but there may be other custodians, not a sender, not a recipient, but a custodian. That custodian could be in one of these peripheral agencies like FEMA. . . that person releases it to other people, and suddenly there isn't any confidentiality maintained."").
10. If the Court is not yet satisfied that Plaintiffs' cross-motion should be granted, Plaintiffs seek discovery or an evidentiary hearing to obtain facts related to Defendants' claimed FOIA Exemption (b)(5) for the Oct. 2 Memo. The factual information Plaintiffs seek through discovery or an evidentiary hearing is (a) whether the October 2 Memo was disclosed to any individual within ICE who did not have authority to speak on behalf of ICE; (b) whether the Oct. 2 memo was disclosed to any third party; (c) whether the analysis contained in the Oct. 2 Memo (as opposed to the memo itself) had been disclosed to any individuals outside the zone of purported privilege; (d) how the Oct. 2 Memo was used by the agency and (e) whether and when the agency adopted any content of the Oct. 2 Memo.
 11. If the Court does not order disclosure of the Oct. 2 Memo, the factual information enumerated below is reasonably expected to provide the Plaintiffs and the Court with information necessary to resolve any lingering issues of material fact regarding the applicability of the attorney-client privilege and the working law doctrine to the Oct. 2 Memo.
 12. Plaintiffs seek to obtain the below referenced factual information through depositions or in court testimony of an ICE FOIA officer and an ICE official(s) with knowledge of the purpose, use, and dissemination of the Oct. 2 Memo and the analysis contained therein.

Confidentiality

13. If the Court is not yet satisfied that the Oct. 2 Memo should be disclosed, Plaintiffs seek further factual information relevant to whether attorney-client privilege was maintained.
14. Specifically, Plaintiffs seek factual information related to:
 - a. which individuals were provided hard copies of the Oct. 2 Memo;
 - b. which individuals received the Oct. 2 Memo via email;
 - c. which individuals were provided with an explanation of the analysis contained within the Oct. 2 Memo, regardless of whether or not they received the memorandum itself;
 - d. whether all individuals who received the Oct. 2 Memo, or an explanation of the analysis contained therein, were within the zone of privilege and authorized to speak on behalf of ICE with regard to the issues discussed in the memorandum;

Adoption

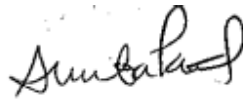
15. If the Court is not satisfied that the Oct. 2 Memo should be disclosed under the working law doctrine, Plaintiffs seek further factual information relevant to whether ICE adopted any contents of the Oct. 2 Memo as agency positions or working law.
16. Specifically, Plaintiffs seek factual information related to:
 - a. the process for creating the Oct. 2 Memo;
 - b. the function and significance of the Oct. 2 Memo in the agency's decision making process;

- c. whether, when, and with whom the Oct. 2 Memo, or the legal analysis contained in the Oct. 2 Memo, was discussed by ICE or other officials;
- d. whether any contents of the Oct. 2 Memo served as a basis for agency policies related to Secure Communities, including the policy that Secure Communities is mandatory for all States and localities; and
- e. what other documents, if any, served as a legal basis for agency policies related to Secure Communities, including the policy that Secure Communities is mandatory for all States and localities.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: New York, New York

September 12, 2011



SUNITA PATEL