EXHIBIT G

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor
New York, New York 10007

August 17, 2011

BY E-MAIL
The Honorable Shira A. Scheindlin
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency et al.*, No. 10 Civ. 3488 (SAS)

Dear Judge Scheindlin:

This Office represents defendants in the above-captioned Freedom of Information Act ("FOIA") matter. We write respectfully in response to plaintiffs' letter dated August 11, 2011 regarding the supplemental *Vaughn* indexes submitted to plaintiffs by defendant United States Immigration and Customs Enforcement ("ICE") on August 8, 2011 (the "August 11 Letter").

ICE produced the supplemental *Vaughn* indexes pursuant to the Court's Opinion and Order dated July 11, 2011 (the "July 11 Order"), which directed defendants to provide (1) further support for the FOIA exemptions applied to certain withheld documents, *see* July 11 Order at 79, and (2) *Vaughn* entries for certain documents identified by plaintiffs as missing from ICE's original *Vaughn* index submitted on January 28, 2011, *see id.* at 9 n.23. "Supplemental Vaughn Index I" contains further justifications for certain records ICE continues to withhold. *See* Aug. 11 Ltr. Ex. A.[1] "Supplemental Vaughn Index II" lists those documents

[1] Plaintiffs suggest that some records subject to the July 11 Order do not appear on Supplemental Vaughn Index I and therefore should be released. *See* Aug. 11 Ltr. at 1 n.1. Although they do not cite specific examples of any allegedly missing documents, they do refer to

identified as missing from ICE's original *Vaughn* index. *See id.* Ex. B. ICE also submitted a declaration from Deputy FOIA Officer Ryan Law in further support of its continued withholding of certain documents under the Exemption 5 attorney-client privilege. *See id.* Ex. C.[2]

In the August 11 Letter, plaintiffs ask the Court to order ICE to release three categories of records.[3] First, plaintiffs argue for disclosure of versions of a memorandum dated October 2, 2010 (the "October 2 Memorandum") on the ground that it forms the legal basis for an ICE policy that participation in Secure Communities is mandatory, and therefore cannot be withheld under Exemption 5 pursuant to either the deliberative process or attorney-client privileges. *See*

"the Draft Public Affairs Guidance Memo and certain versions of the October 1, 2010 Memorandum." *Id.* Upon review, ICE has identified one version of the October 1, 2010 memorandum, ICE FOIA 10-2674.0012488-.0012493, that appears to have been mistakenly omitted from the entry on Supplemental Vaughn Index I providing further justification for withholding of the October 1 memorandum. *See* Supp. Vaughn I at 3. ICE respectfully requests that the Court treat Supplemental Vaughn Index I as revised so as to reflect ICE's continued withholding of this document. With respect to the "Draft Public Affairs Guidance Memo" identified by Bates range ICE FOIA 10-2674.0011411-.0011421, ICE confirms that this record was released to plaintiffs on August 15, 2011.

[2] The Law Declaration states that "[p]ursuant to the Court's July 11, 2011, Order in this matter, ICE personnel involved in attorney client communications that ICE withheld from plaintiffs under FOIA Exemption (b)(5) have reviewed all such communications for the purpose of determining whether confidentiality has been maintained. Each of those personnel have responded that confidentiality has in fact been maintained." Law Decl. ¶ 4. ICE respectfully submits that, notwithstanding plaintiffs' argument to the contrary, *see* Aug. 11 Ltr. at 2 n.2, the Law Declaration complies with the Court's direction that, for documents withheld under the attorney-client privilege, defendants "must represent that confidentiality has been maintained." July 11 Order at 37. However, ICE is prepared to submit additional information in support of its invocation of the attorney-client privilege if the Court so requires.

[3] ICE respectfully requests that, to the extent the August 11 Letter fails to raise challenges to certain records listed on Supplemental Vaughn Index I and Supplemental Vaughn Index II, the Court find that plaintiffs have waived their right to challenge ICE's withholding of these records. *See* July 11 Order at 23 (holding that, where plaintiffs failed to challenge certain exemptions claimed in defendants' previous *Vaughn* indexes, "they have waived any argument that the exemptions were improperly asserted").

id. at 2-8.[4] Second, plaintiffs request that the Court order disclosure of certain documents listed on Supplemental Vaughn Index II that are non-responsive to plaintiffs' FOIA request. *See id.* at 9. Finally, plaintiffs purport to raise challenges to ICE's withholdings of additional documents listed in Supplemental Vaughn Index II, and argue that these documents should be ordered disclosed for reasons stated in the July 11 Order. *See id.* at 9-10.

For the reasons that follow, plaintiffs' requests for disclosure should be denied.

A. The October 2 Memorandum Is Properly Withheld Under Exemption 5

In the July 11 Order, the Court denied summary judgment to both parties with respect to several versions of the October 2 Memorandum, which the Court had reviewed *in camera*. *See* July 11 Order at 58-64. The Court directed defendants to "provide more information as to the role that the document played in the deliberative process, and to establish that the confidentiality of the document has been maintained." *Id.* at 63. Consistent with the July 11 Order, in Supplemental Vaughn Index I, ICE describes the October 2 Memorandum as having been "drafted by [the Office of the Principal Legal Advisor] as advice to the client in response to a client request for guidance on the mandatory v. voluntary question of participation in [Secure Communities]." Supp. Vaughn I at 3. ICE further represents that "[c]onfidentiality of the redacted information has been maintained." *Id.* This supplemental description of the October 2 Memorandum is sufficient to establish that it is properly withheld pursuant to Exemption 5.[5]

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[4] Citations to the August 11 Letter are to the double-spaced version submitted on August 12, 2011 at the Court's request.

[5] Plaintiffs mistakenly allege that ICE has withdrawn its claim that the October 2 Memorandum is exempt pursuant to the deliberative process privilege. Aug. 11 Ltr. at 4. Although the entry for the October 2 Memorandum on Supplemental Vaughn Index I erroneously identifies only the attorney-client privilege as a basis for withholding the October 2

Plaintiffs' argument for disclosure of the October 2 Memorandum fails as a matter of law. Indeed, plaintiffs' contention rests merely on speculation; in effect, plaintiffs argue that because defendants have not "identified any other document evidencing the legal basis and rationale for the policy that Secure Communities is a mandatory program for states and localities," the October 2 Memorandum must form the basis for that policy, and therefore constitutes the "working law" of the agency. Aug. 11 Ltr. at 2. That does not comport with the governing law.

A document otherwise protected by Exemption 5 only loses its status where the agency "*expressly* . . . adopt[s] or incorporate[s] [the document] by reference . . . in what would otherwise be a final opinion." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (emphasis added). Moreover, "[m]ere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005); *see also Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (citing cases in support of its finding that the Supreme Court "has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege"). For example, in *La Raza*, the court held that the memorandum in question had been improperly withheld under Exemption 5 because of "repeated references to the [memorandum] made by the Attorney General and his high-ranking advisors" that went beyond mere references to the memorandum's conclusions and instead involved discussions of its contents to justify and explain the agency's policy. *See id.* at 357-58. Likewise, in *Bronx*

Memorandum, the description of the information withheld makes clear ICE's position that the October 2 Memorandum is appropriately exempt pursuant to both the attorney-client and deliberative process privileges. *See* Supp. Vaughn I at 3.

Defenders v. Dep't of Homeland Security, No. 04 CV 8576 (HB), 2005 WL 3462725 (S.D.N.Y. Dec. 19, 2005), the court ordered the memorandum in question disclosed where its analysis and conclusions were repeatedly discussed in subsequent public documents over the course of several years in support of the agency's policy position. *See id.* at *4-*5. *See also Afshar v. Dep't of State*, 702 F.2d 1125, 1140 (D.C. Cir. 1983) (ordering memoranda disclosed where, in subsequent memoranda, the agency "expressly adopted the reasons given for [its] course of action in the portions of the memoranda that are in dispute").

Here, by contrast, plaintiffs do not point to any evidence that the October 2 Memorandum was expressly adopted by ICE, let alone that ICE has adopted the October 2 Memorandum's analysis as the legal basis for a policy position that participation in Secure Communities is mandatory. Indeed, in the July 11 Order, the Court recognized that ICE "has not publicly relied upon the memorandum or adopted it by reference." July 11 Order at 59-60. And the evidence cited by plaintiffs suggests that the October 2 Memorandum was created "to lend support in an intra-agency debate about shifting the policy" rather than to justify an existing policy. July 11 Order at 60. For example, in one document, ICE Assistant Deputy Director Beth Gibson explains that, by means of the October 2 Memorandum and other memoranda, ICE was "drafting revised language to describe the shift from the *current* 'voluntary' formula to the '2013' formula." *See* Aug. 11 Ltr. at 6 n.4 (emphasis added). Likewise, in another e-mail, an ICE employee indicates that ICE is "continu[ing] to refine [its] implementation strategy" and that, as part of this process, ICE's Office of the Principal Legal Advisor was "asked to look into a legal mandate, provision, law, etc." and "weigh in and provide legal references and/or legal interpretation . . . ." *See id.* Such statements are consistent with ICE's description of the October

2 Memorandum in Supplemental Vaughn Index I as "[d]raft language and comments" created as "advice . . . in response to a client request for guidance . . . ." Supp. Vaughn I at 3.

Nor do plaintiffs' citations to public statements by ICE reflecting the mandatory nature of Secure Communities indicate that the October 2 Memorandum constitutes the "working law" underlying that policy. *See* Aug. 11 Ltr. at 6-7 n.5. At best, these statements—one of which pre-dates the October 2 Memorandum by several months, *see id.*—merely support a conclusion that ICE has articulated a policy position that Secure Communities is mandatory. They fail, however, to demonstrate that the October 2 Memorandum forms the legal basis for that policy. *See La Raza*, 411 F.3d at 358 (for a document to lose its protections under Exemption 5, the court must typically find evidence of "reliance on a document's analysis"). Indeed, some of these statements suggest changes to the basis for ICE's policy over time. *See* Aug. 11 Ltr. at 6-7 n.5 (citing an e-mail dated September 21, 2010 where 28 U.S.C. § 534 and certain agency Statement of Records Notices are identified as the basis for the mandatory nature of Secure Communities, and also citing an undated draft letter and a media article dated June 9, 2011 in which the findings of the 9/11 Commission, post-September 11th laws such as the Patriot Act, and unspecified appropriations bills are cited as the basis for the mandatory policy), *id.* at 7-8 (citing a recent letter from ICE Director John Morton indicating that Memoranda of Agreement between ICE and the states are not necessary for the operation of Secure Communities). In sum, the evidence cited by plaintiffs does not support the conclusion that the October 2 Memorandum constitutes the agency's "working law." Instead, this evidence further supports ICE's continued withholding of the October 2 Memorandum under the deliberative process and attorney-client privileges.

B. The Court Should Not Order Disclosure of Non-Responsive Records

Next, plaintiffs ask the Court to order disclosure of eight documents listed on Supplemental Vaughn Index II that ICE identified as non-responsive to plaintiffs' FOIA request. Aug. 11 Ltr. at 9; *id.* Ex. K pt. (b) (listing plaintiffs' "Supplemental Vaughn II 'Out of Date Range' Challenges").[6] These documents were mistakenly included in ICE's processing of its January 17, 2011 production, and were marked non-responsive because they post-date the Court's October 15, 2010 search cut-off date for "opt-out records."

The Court should decline plaintiffs' invitation to exercise discretion in ordering these documents to be produced. Plaintiffs' sole basis for claiming that such discretion exists is an order denying a motion for reconsideration in *Am. Civil Liberties Union v. Dep't of Def.*, Nos. 04 Civ. 4151, 05 Civ. 9620 (AKH), 2008 WL 4755209 (S.D.N.Y. Oct. 29, 2008). *See* Aug. 11 Ltr. at 9. There, the memoranda at issue were also subject to potential disclosure in another FOIA case. *See Am. Civil Liberties Union*, 2008 WL 4755209, at *1. Furthermore, at the same time that it set a search cut-off date, the court in that case had ordered that the memoranda at issue be produced even though they post-dated the search cut-off date. *See id.* No such factual basis exists here for ordering ICE to disclose records that, during the review and processing of a large volume of records on an expedited timeframe, inadvertently were assigned Bates numbers even though they were non-responsive to plaintiffs' FOIA request.

However, if the Court orders these non-responsive documents to be produced, ICE respectfully requests the opportunity, as provided by the *American Civil Liberties Union* court,

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[6] One of the documents listed in Exhibit K part (b), ICE FOIA 10-2674.0011869-72, was not marked as non-responsive, but in fact was withheld in part under Exemption 5 pursuant to the attorney-client privilege. *See* Supp. Vaughn II at 9.

"to submit a *Vaughn* declaration to excuse non-production on the basis of exemption or privilege." *Id.*

C. Plaintiffs Fail to Articulate a Challenge to the Records in Supplemental Vaughn Index II

Finally, plaintiffs indicate that they are challenging 35 documents listed in Supplemental Vaughn Index II, and ask the Court to order disclosure of such documents "for the reasons in the Court's July 11 Order." Aug. 11 Ltr. at 9; *id.* Ex. K pt. (a) (listing plaintiffs' "Supplemental Vaughn II Challenges"). Plaintiffs specifically refer to the July 11 Order's ruling, which it applied to certain documents it reviewed *in camera*, that discussions of how to present the agency's policy to the public are not covered by the deliberative process privilege. *See id.* at 9-10; *see, e.g.*, July 11 Order at 31.

As a threshold matter, the August 11 Letter fails to articulate a basis for the Court to order disclosure of the 35 challenged documents. For example, 11 of the documents listed in Exhibit K to the August 11 Letter were withheld not on the basis of the deliberative process privilege, but instead on the basis of the attorney-client privilege, to which the Court's ruling referenced above does not apply.[7] An additional two documents identified by plaintiffs were withheld in part pursuant to Exemptions 6 and 7(C); again, plaintiffs cite to no ruling in the July 11 Order requiring disclosure of materials withheld pursuant to those exemptions.[8] A further four

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[7] See the entries on Supplemental Vaughn Index II for ICE FOIA 10-2674.9857-58, 9995-97, 10003-05, 10247-48, 10260, 10349, 10354-63, 10400-05, 10406, 10407-12, and 11869-72.

[8] See the entries on Supplemental Vaughn Index II for ICE FOIA 10-2674.5092-95 and 11203.

documents included on plaintiffs' list of challenges were designated as non-responsive.[9] Finally, the *Vaughn* entries for several challenged documents withheld under the deliberative process privilege do not suggest that these documents involve discussions of how to communicate policy.[10]

Moreover, even to the extent certain challenged documents from Supplemental Vaughn Index II involve discussions of how to communicate policy, the Court should not interpret its July 11 Order as ruling that such documents are inherently post-decisional and subject to disclosure. Although the Court ordered some such documents disclosed following *in camera* review, *see* July 11 Order at 49-50, 55-57, 65-66, 68, 70-73, it also recognized that "talking points and public affairs guidance documents, when in draft form, *may* be protected under the deliberative process privilege" and, in at least one instance, denied summary judgment to both parties with respect to such a document, *id.* at 53-54. Thus, to the extent that the Court is inclined to treat plaintiffs' threadbare assertions in the August 11 Letter as sufficient to articulate a challenge to certain records contained in Supplemental Vaughn Index II, then consistent with the July 11 Order, the Court should review such documents *in camera* before making a determination as to the appropriateness of ICE's claimed exemptions.

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[9] See the entries on Supplemental Vaughn Index II for ICE FOIA 10-2674.11599-602, 11630-31, 11692-94, and 11695-96.

[10] See the entries on Supplemental Vaughn Index II for ICE FOIA 10-2674.5363-64, 9917-20, 10234-36, 10380-82, 13582-53, 14055-56.

We thank the Court for its consideration of this letter and respectfully request that it be docketed as part of the record.

Respectfully,

PREET BHARARA
United States Attorney

By: _____

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