# EXHIBIT H

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August 24, 2011

Hon. Shira A. Scheindlin
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *NDLON et al. v. ICE et al.*, No. 10 CV 3488 (SAS)

Dear Judge Scheindlin,

We represent the Plaintiffs in the above-referenced matter. We write, in advance of today's scheduled hearing, to provide the Court with our analysis of the revised Declaration of ICE Deputy FOIA Officer Ryan Law dated August 23, 2004 ("Revised Law Declaration").

As an initial matter, the Defendants have misinterpreted the Court's direction to supplement the Law Declaration as an invitation to relitigate settled law of the case requiring disclosure of the contested October 2, 2010 Memorandum ("October 2 Memo"). Such arguments are both inappropriate and unavailing. *See Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) (explaining the law of the case doctrine). The Court properly ruled in its Opinion and Order dated July 11, 2011 ("July 11 Order") that the October 2 Memo is "not protected by the deliberative process privilege." *Id.* at 62. Moreover, the Court held that the document must be disclosed if the Defendants do not produce a supplemental *Vaughn* index which satisfies their "burden to establish . . . whether [the October 2 Memo] was written to justify an already existing policy or lend support in an intra-agency debate about a shift in policy." *Id.* at 60. In the former



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case, "'the attorney-client privilege may not be invoked to protect [the] document.'" *Id.* at 63 (quoting *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005)); *see also Tax Analysts v. I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) (explaining that statements of an agency's legal policy are not confidential communications subject to privilege); *Falcone v. Internal Revenue Service*, 479 F. Supp. 985, 989–990 (E.D. Mich. 1979) (official statements of policy and interpretation are outside attorney-client privilege); *Lee v. F.D.I.C.*, 923 F. Supp. 451, 457-58 (S.D.N.Y., 1996) (same).

Despite the Court's explicit instructions on this point, the revised *Vaughn* index description of the October 2 Memo, Pls. Aug 11, 2011 Ltr. Ex. A (ICE Revised *Vaughn* Index), "doesn't say anything at all more about whether it was written to justify an already existing policy or to lend support to an ongoing new policy or change of policy." (Tr.[1] at 23). The fact is that the October 2 Memo has nothing to do with legal advice, it is the post-hoc legal justification for the agency's position and thus not covered by any privilege. The fact that the agency previously "went out of its way to mislead the public," July 11 Order at 32, does not make this a change in policy, just a change in agency's appetite for obfuscation. The government chose not to appeal the Court's July 11 Order and chose not to comply with the Court's explicit direction to identify the role the October 2 Memo played in the mandatory in 2013 decision. The Defendants must now live with the consequences of those choices and the October 2 Memo must be disclosed.

In any event, even assuming *arguendo* that the privilege was applicable, the Revised Law Declaration fails to meet the Defendants' burden of establishing the applicability of the attorney-client privilege exemption in at least three ways. (1) The privilege does not protect information

[1] "Tr." refers to the transcript of the August 18, 2011 hearing in the instant proceedings.

flowing *from attorneys*, like the authors of the October 2 Memo, *to a client*, like ICE, unless that communication "rests on confidential information obtained from the client." *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 618 (D.C. Cir. 1997) (internal quotation marks omitted); July 11 Order at 19 ("the agency must show that it supplied information to its lawyers 'with the expectation of secrecy . . .'"). Nothing in the Revised Law Declaration or any *Vaughn* index even asserts that the contested documents "rest[] on confidential information obtained from the client," *Tax Analysts*, 117 F.3d at 618, and thus the claim of privilege fails on this basis alone.[2]

Moreover, as this Court has explained, even if the communication rests on confidential information, the privilege is inapplicable: (2) if the document, *or the "legal analysis" contained therein,* was "shared outside of the agency," July 11 Order at 62 (emphasis added); *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253-54 (D.C. Cir. 1977); or (3) if the document, or legal analysis contained therein, was circulated within the agency beyond "members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communications," *Id.* at 36; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). The Defendants have failed to satisfy their burden as to each of these three requirements of the attorney-client privilege.

Neither the Revised Law Declaration nor any of the *Vaughn* indices can satisfy Defendants burden to establish that the contested privileged information was not shared outside the zone of privilege. First, Law did not take adequate and reasonable steps to identify the custodians of the contested documents, and thus could not even affirm that he has asked all

[2] The Court previously ordered the disclosure of factual information in the October 2 Memo, insofar as such information was not confidentially supplied by the authors' client. July 11 Order at 64. ICE did not appeal this holding and purported to comply with the Order, delivering to Plaintiffs a version of the October 2 Memo with certain factual information unredacted, attached as Ex. A. To the extent any analysis in the memo relies upon this, now admittedly nonconfidential, factual information, it is by definition not covered by attorney-client privilege.

custodians whether they maintained confidentiality. The Revised Law Declaration states that he only sought to query the "sender and recipients" of the contested document "based on the information reflected on the face of the withheld documents." *Id.* at ¶¶ 5, 9. This means individuals who were provided hard copies of the documents, in meetings for example, or people who received the documents via email after the cut-off date for the opt-out production, were simply not queried about confidentiality. Nor did Law's inquiry even ask individuals to provide him with the names of additional persons with whom they shared the purportedly privileged material, such that Law could then query those individuals about confidentiality. *Id.* at ¶7. We do not have to speculate about the sufficiency of Law's inquiry in this regard because the deficiency is apparent on the face of the Declaration. He states: "the senders and recipients of the withheld documents are all ICE employees" but the disclosed documents demonstrate that individuals outside of ICE did in fact have custody of some of the contested documents. Pls. Mem. Ex. B to James Horton Decl., Doc. No. # 1 ICE FOIA 10-2674.0010794 (email to author of October 2 Memo showing memo sent to DHS and conveying complements of DHS official on the quote "excellent" memo). Second, despite Plaintiffs' specific query, Law asked only whether the "senders and recipients," had "disseminated the documents," Rev. Law Decl. at ¶7, and failed to follow the Court's direction to query whether the "legal analysis contained in the document[s] was shared outside of the agency." July 11 Order at 62; *see also id.* at 36 (discussing the "information found in the documents"); Email from Sonia Lin to Christopher Connolly, dated August 19, 2011 (attached as Ex. B) (requesting certain specific information be contained in the Revised Law Declaration).[3] Third, Law misstated the proper zone of privilege in his query to

[3] Contrary to Defendants' claims, Def. Ltr. Accompanying Rev. Law Decl. dated Aug. 23, 2011, at p.2, there are multiple documents which suggest that the analysis contained in, for example the

"senders and recipients," asking whether they had share the documents "with anyone outside the Department of Homeland Security or its component agencies." Rev. Law Decl. at ¶7. Again, Defendants failed to follow the Court's direction to determine whether the purportedly privilege material was "circulated no further than among the members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communications." July 11 Order at 36 (internal quotation marks omitted). Law's inquiry would not capture whether the information was shared with, for example, low level employees of FEMA, TSA, or the Coast Guard—all component agencies of DHS—who certainly are not authorized to speak or act on behalf of ICE regarding Secure Communities.

Finally, the Defendants' argument that Plaintiffs bear the burden off proof to establish that confidentiality was not maintained is both incorrect and foreclosed. *See* Def. Ltr. Accompanying Rev. Law Decl. dated Aug. 23, 2011, at p.2. The Court's July 11 Order plainly held "[t]he agency bears the burden of showing that the information exchanged was confidentiality" *Id.* at 19; *see also id.* at 37. Defendants did not appeal this ruling and, thus, are foreclosed from arguing that they do not bear the burden of establishing confidentiality. More importantly, the Court was correct. As a matter of FOIA law, an agency bears the burden of showing that withheld responsive information falls within one of FOIA's nine exemptions. *Halpern v. FBI*, 181 F.3d 279, 286, 287 (2d Cir. 1999); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). As a matter of evidence law the "[b]urden of establishing the applicability of [attorney-client] privilege rests with the party invoking it." *In re the County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007); *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) ("It is well settled that 'the burden of establishing the existence of an attorney-client

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October 2 Memo, have indeed been shared outside the zone of privilege. Pls. Aug. 11, 2011 Ltr,. at n.5.

privilege, in all of its elements, rests with the party asserting it.'"). As the Second Circuit has explained, a "party invoking the attorney-client privilege must show, [inter alia] that [the communication] *was intended to be and was in fact kept confidential.*" *In re County of Erie*, 473 F.3d at 419 (emphasis added).[4]

A principal purpose of FOIA is to ensure that the public has access to the documents which purport to justify our government's behavior. The documents at issues here, in particular the October 2 Memo, are essential to inform an active ongoing public debate that is happening right now. *See* Announcement of DHS Public Meeting on Secure Communities on August 24, 2011, *available at* http://www.arlnow.com/2011/08/22/dhs-to-hold-meeting-on-secure-communities-in-arlington/ (announcing public meeting today of Homeland Security Advisory Council's Task Force on Secure Communities, tasked with making recommendation how how to improve the Secure Communities program). Every day that such documents are withheld from the public it undermines that debate.

[4] Further, the cases cited by the government claiming that "plaintiffs bear the burden of demonstrating that there has been a waiver of the attorney-client privilege" are misleading. Def's Ltr. at 2. First, the government erroneously relies upon cases addressing the "official acknowledgement" or "public disclosure" doctrine involving withholdings under Exemptions 1 and 3 for classified information, a doctrine wholly inapplicable here. *See Assassination Archive & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002); *Davis v. DOJ*, 968 F.2d 1279, 1279 (D.C. Cri. 1992); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (2nd Cir. 1983). Second, the additional cases cited by the government fail to address the attorney-client privilege issues in this case. *See, e.g., Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700-703 (1989) (discussing voluntary disclosure issues in the context of different documents disclosed than the requested record as well as privileges other than the attorney-client privilege); *Occidental Petroleum Corp v. SEC*, 873 F.2d 325, 342 (D.C. Cir. 1989) (addressing questions of "non-public availability" in a reverse-FOIA case). The government's out-of-context quotes and attempt to describe these cases as involving generic "waiver" issues misstates the law.

If, for any reason, the Court remains uncertain whether disclosure of the October 2 Memo is warranted, the Plaintiff's request the opportunity to elicit sworn testimony from relevant actors within ICE to explore the applicability of the exemptions.

Respectfully submitted,

Sunita Patel /gv

Sunita Patel

On Behalf of the Plaintiffs

cc:
*(All counsel by electronic mail)*

# EXHIBIT A

*Office of the Principal Legal Advisor*

**U.S. Department of Homeland Security**
**500 12th Street, SW**
**Washington, DC 20024**

**U.S. Immigration and Customs Enforcement**

October 2, 2010

**MEMORANDUM FOR:** Beth N. Gibson
Assistant Deputy Director

**FROM:** Riah Ramlogan
Deputy Principal Legal Advisor

**SUBJECT:** Secure Communities – Manda[illegible]y in 2[illegible]

Executive Summary

[redacted]

[redacted]

Background

A review of the Secure Communities information-sharing technology, which is admittedly complicated, aids the understanding of the applicable law and the corresponding conclusion that participation will become mandatory in 2013. The process by which fingerprint and other information is relayed will change in 2013 to create a more direct method for ICE to receive that information from DOJ. Consequently, choices available to law enforcement agencies who have thus far decided to decline or limit their participation in current information-sharing processes will be streamlined and aspects eliminated. In that way, the process, in essence, becomes "mandatory" in 2013, when the more direct method will be in place. The year 2013 was chosen by ICE and DOJ for policy and resource feasibility reasons.

*Secure Communities' Use of IDENT/IAFIS Interoperability*[1]

In Fiscal Year 2008, Congress appropriated $200 million to ICE 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 judged deportable...."[2] In response, ICE launched the Secure Communities initiative to transform the way ICE identifies and removes criminal aliens from the United States. Through this initiative, Secure Communities utilizes existing technology, *i.e.* the ability of IDENT and IAFIS to share information, not only to accomplish its goal of identifying criminal aliens, but also to share immigration status information with state and local law enforcement agencies (LEAs). The Secure Communities "Program Management Office" provides the planning and outreach support for ongoing efforts to activate IDENT/IAFIS Interoperability in jurisdictions nationwide. *See generally* Secure Communities: Quarterly Report Fiscal [illegible] Quarterly Report to Congress Third Quarter, at iv, 20. (Aug 1[illegible]

The following is a description of the IDENT/IAFIS Interoperability process:

1. When a subject is arrested and booked into custody, the arresting LEA sends the subject's fingerprints and associated biographical information to IAFIS via the appropriate State Identification Bureau (SIB).
2. CJIS[3] electronically routes the subject's biometric and biographic information to US-VISIT/IDENT to determine if there is a fingerprint match with records in its system.
3. As a result of a fingerprint match with data in IDENT, CJIS generates an Immigration Alien Query (IAQ) to the ICE Law Enforcement Support Center (LESC).

[1] "Interoperability" was previously defined as the "sharing of alien immigration history, criminal history, and terrorist information based on positive identification and the interoperable capabilities of IDENT and IAFIS." DHS IDENT/IAFIS Interoperability Report, at p. 2 (May, 2005). Currently, Secure Communities officially refers to the process as "IDENT/IAFIS Interoperability."

[2] Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat 1844, 2050 (2007).

[3] "CJIS," which stands for the FBI's Criminal Justice Information Services Division, manages IAFIS.

4. The LESC queries law enforcement and immigration databases to make an initial immigration status determination and generates an Immigration Alien Response (IAR) to prioritize enforcement actions.
5. The LESC sends the IAR to CJIS, which routes it to the appropriate State SIB to send to the originating LEA. The LESC also sends the IAR to the local ICE field office, which prioritizes enforcement actions based on level of offense.

There are two types of participation in Secure Communities by which IDENT/IAFIS Interoperability is deployed. First, participation may involve "full-cycle" information-sharing in which the SIB and LEA choose to participate and receive the return message from the IDENT/IAFIS Interoperability process informing about the subject's immigration status (See Step 5, first sentence). Second, a state or LEA may choose to participate but elect not to receive the return message or the state may not have the technological ability to receive the return message from CJIS or relay the message to the LEA.

*IDENT/IAFIS Interoperability in 2013*

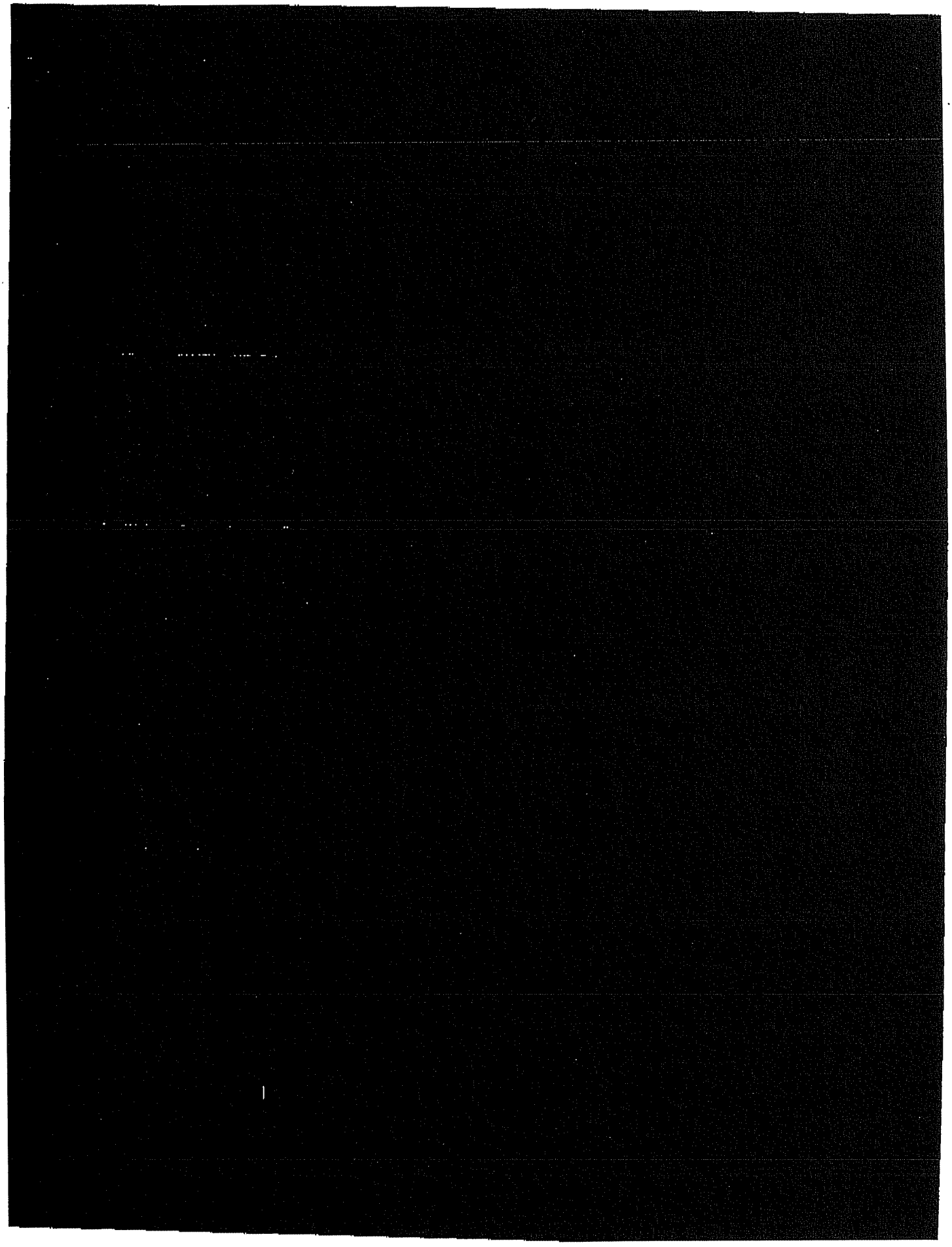
According to Secure Communities, Assistant Director David Venturella and the CJIS Director reached an agreement by which CJIS will send ICE, starting in 2013, all fingerprint requests from any LEAs that are not participating in Secure Communities. This future information sharing will not include the component of the current IDENT/IAFIS Interoperability process where the SIB and LEA receive (if technically feasible) the automatic return message from ICE regarding the subject's immigration status. According to Secure Communities, this process is technologically available now; however for policy reasons and to ensure adequate resources are in place, CJIS and Secure Communities have recently chosen to wait until 2013, when all planned deployments could be completed, until instituting this process.

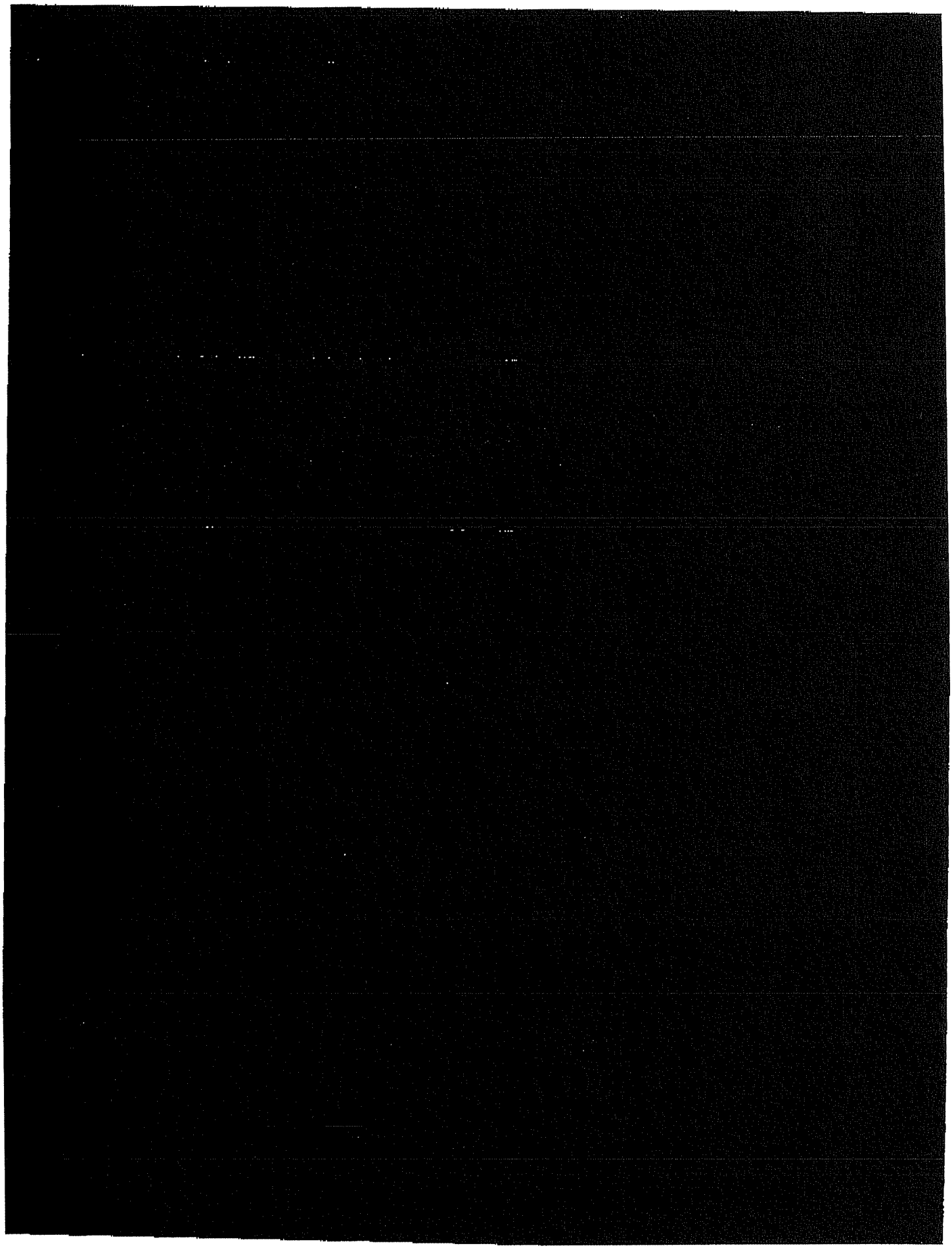
*Current CJIS-Required Tasks In Order to Physically Deploy IDENT/IAFIS Interoperability to an LEA*

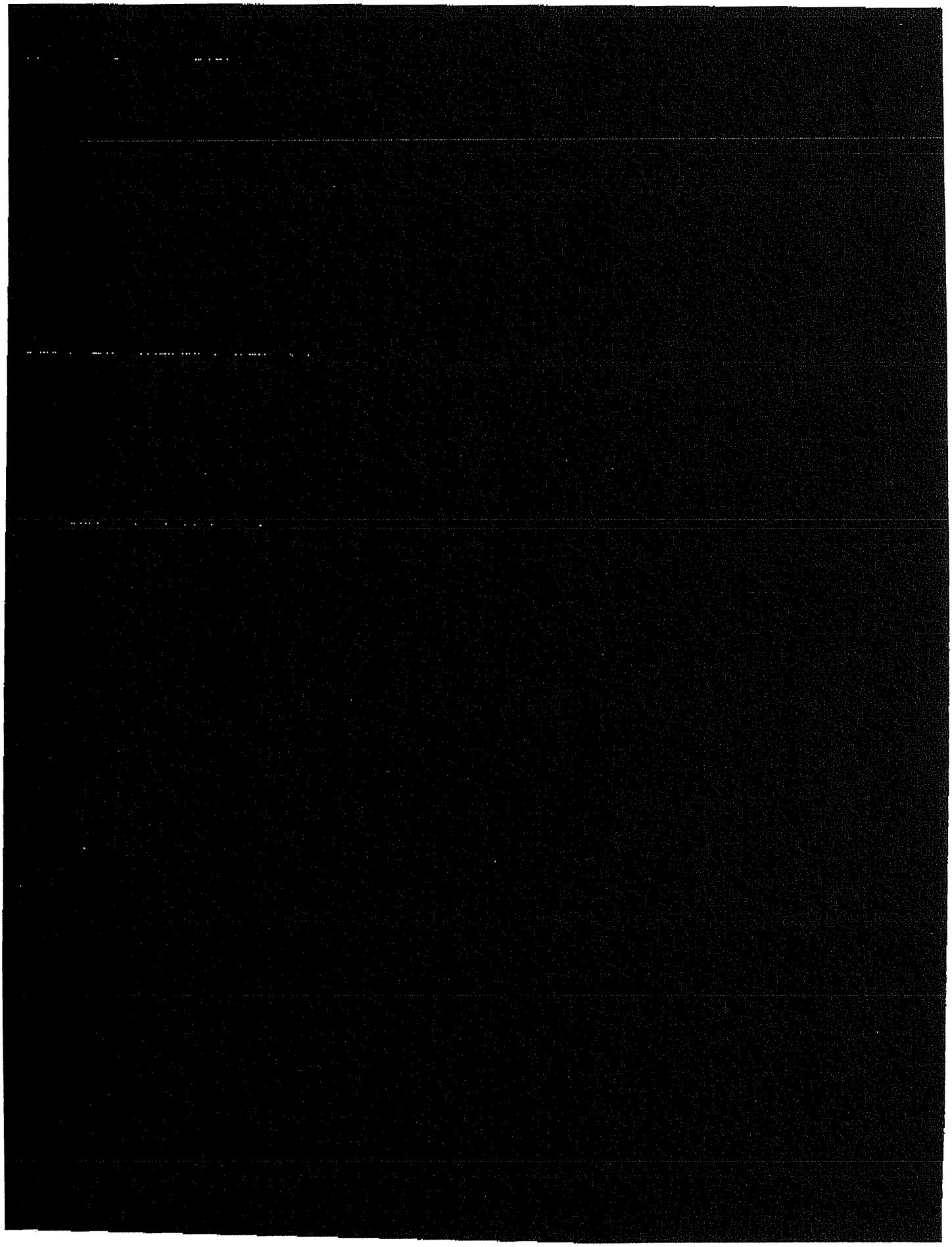
According to Secure Communities, there are two ministerial-related IT tasks that, pursuant to current CJIS policy, must be performed in order to physically deploy IDENT/IAFIS Interoperability to a LEA. The LEA must "validate" its "unique identifier" (called an "ORI") that is attributed to its terminal (*i.e*, a state or local official contacts CJIS to inform CJIS that the ORI pertains to the LEA's terminal). Once this validation occurs, CJIS must note within IAFIS the LEA's ORI so that IAFIS will be informed to relay fingerprints to IDENT that originate from the LEA.

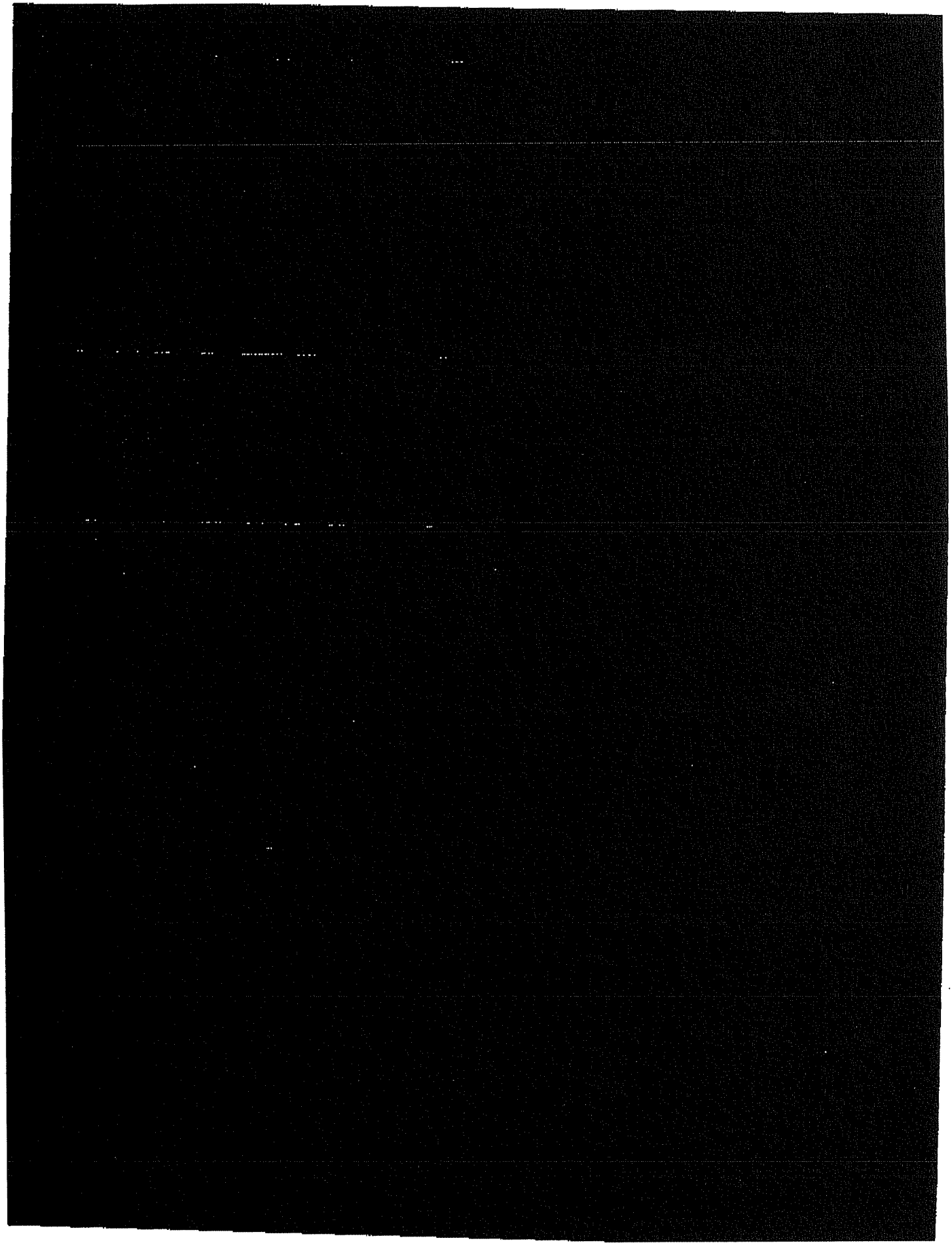
Please note, however, that Secure Communities, CJIS, and US-VISIT are currently discussing whether CJIS will eliminate this pre-activation "ORI validation" requirement.[4] In this respect, Secure Communities learned that CJIS already has a biannual ORI-review process to validate all ORIs within a state. Secure Communities has, therefore, questioned whether CJIS could rely on the most recent ORI validation without necessitating an additional pre-activation "ORI validation." Although Secure Communities has informed that CJIS is currently uncomfortable relying solely on the bi-annual ORI review with the states for IDENT/IAFIS Interoperability

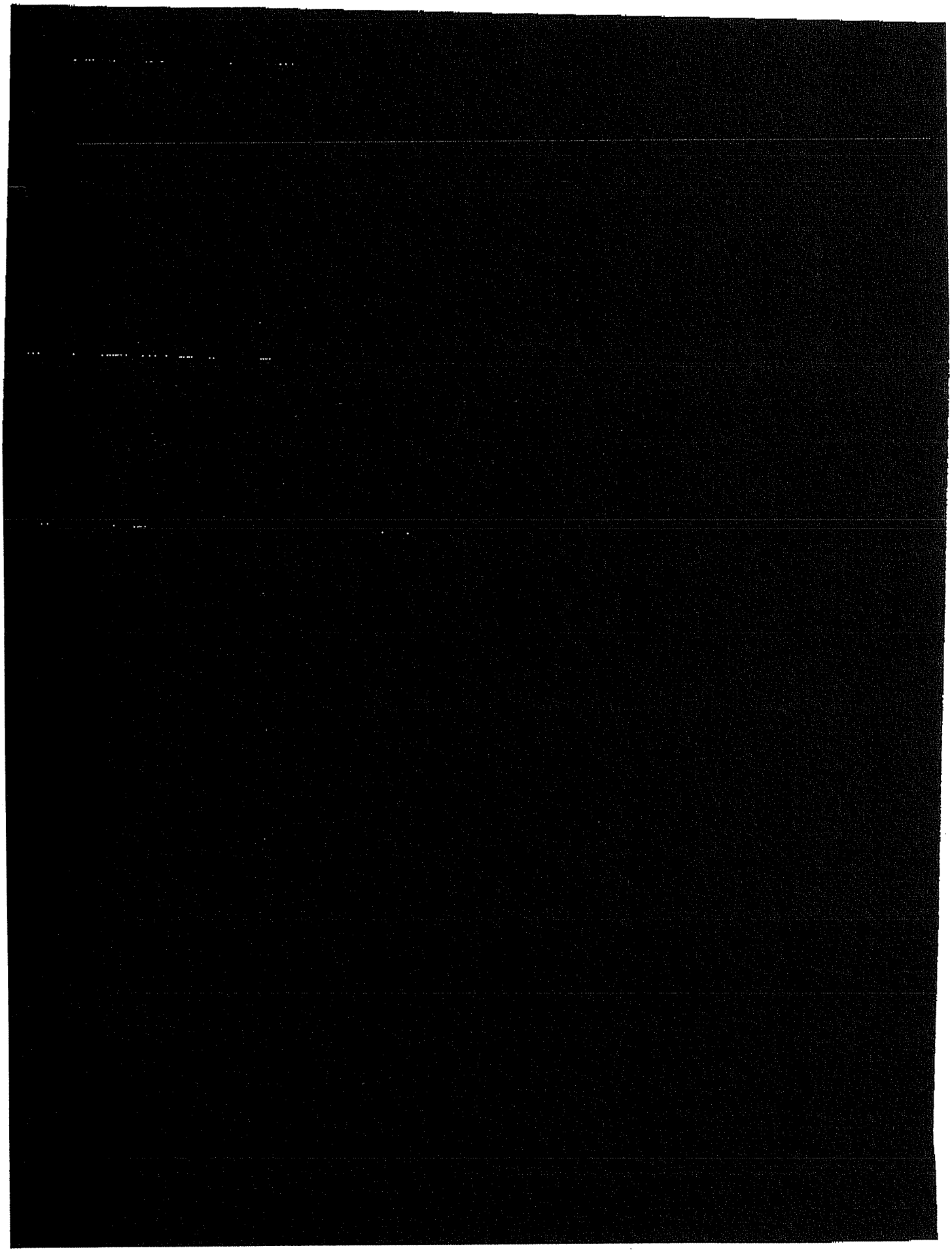
[4] According to Secure Communities, the agencies discussed this issue at a September 21, 2010 meeting, but did not come to a resolution.











# EXHIBIT B

**Schildcrout, Jeremy**

**From:** Sonia Lin [slin@yu.edu]
**Sent:** Friday, August 19, 2011 8:41 PM
**To:** christopher.connolly@usdoj.gov
**Cc:** joseph.cordaro@usdoj.gov; christopher.harwood@usdoj.gov; spatel@ccrjustice.org; ggutierrez@ccrjustice.org; Diana, Anthony J.; Craparo, Therese; Plush, Lisa R.; Schildcrout, Jeremy; Bridget Kessler; Peter L Markowitz
**Subject:** NDLON v. ICE, No. 10 Civ. 3488 (SAS)

Chris,

I write to provide the government with further information regarding Plaintiffs' concerns about the maintenance of attorney-client confidentiality and the assertions made in the Ryan Law declaration dated August 8, 2011 and in the supplemental Vaughn Index.

Please ensure that the supplemental declaration by Mr. Law ordered by the Court yesterday addresses the following:

- Identify all steps ICE personnel took to determine whether attorney-client confidentiality was maintained.
- In determining whether attorney-client confidentiality was maintained, did ICE personnel communicate with all custodians of the challenged documents? What steps did ICE take to ensure that all custodians were contacted?
- Were the custodians asked whether they kept both documents and the relevant information within the documents confidential? What questions did ICE pose to the custodians?
- Were the custodians asked whether they distributed the documents and/or the relevant information within the documents to others, and if so, did ICE personnel follow up with those other individuals about whether confidentiality of the information was maintained?
- What form of communication was utilized by ICE personnel with the custodians – for example, by email, in-person interview, or telephone? If by email, did ICE personnel verify that each person contacted responded, and did they ask any follow-up questions?
- Identify the number and positions of ICE employees who had possession of the contested documents.
- What steps were taken to determine whether the documents or information within the documents were shared with any individuals outside of ICE (such as Congress, DHS, other federal agencies, or the media)? Did ICE personnel contact individuals outside of ICE to determine whether confidentiality of the information was maintained by them? If so, what form of communication was utilized – for example, by email, in-person interview, or telephone? If by email, did ICE personnel verify that each person responded, and did they ask any follow-up questions?
- Did ICE personnel communicate the legal meaning of confidentiality or maintaining confidentiality? With respect to the ICE personnel involved in determining whether confidentiality was maintained, what communications did they send or receive regarding the legal meaning of maintenance of confidentiality? What was the precise language used in any emails or any other communications with such personnel about the legal meaning of maintenance of confidentiality?

Please attach as exhibits all emails that Law, or others, sent or received to assist in preparing his August 8, 2011 declaration.

Thank you.

Sonia Lin

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