EXHIBIT I

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, Third Floor
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August 23, 2011

BY E-MAIL AND HAND DELIVERY
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. Pursuant to the Court's direction during the conference held on August 18, 2011, attached is the Supplemental Declaration of Ryan Law dated August 23, 2011 (the "Supplemental Law Declaration" or "Supp. Law Decl."). The Supplemental Law Declaration further explains the basis for the representation by defendant United States Immigration and Customs Enforcement ("ICE") that it has maintained the confidentiality of certain "opt-out records." Plaintiffs have challenged ICE's withholding of these records based on the attorney-client privilege by claiming that ICE has waived its claims of privilege.

As an initial matter, ICE's supplemental *Vaughn* index dated August 8, 2011, which represented that ICE has maintained the confidentiality of the material over which it asserted the attorney-client privilege, "establish[es] a logical connection between the information withheld and the exemption claimed," and therefore is accorded a presumption of good faith. *Adamowicz v. IRS*, 672 F. Supp. 2d 454, 468 (S.D.N.Y. 2009) (citations and internal quotation marks omitted). Moreover, an agency only waives its claim to an exemption where "the withheld information has already been *specifically* revealed to the public and . . . appears to *duplicate* that being withheld." *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) (citation and internal quotation marks omitted); *see also Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that previous disclosures did not constitute waiver because they "did not precisely track the records sought to be released"); *Afshar v. Dep't of State*, 702 F.2d 1125, 1131-32 (D.C. Cir. 1983) (finding that plaintiff failed to establish waiver where "the withheld information is in some material respect different from that to which plaintiff refers"); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 965 (C.D. Cal. 2003) (finding that "for Customs to have waived its right to argue exemptions, it must have disclosed the exact information at issue"); *Nissen Foods, Co. v. NLRB*, 540 F. Supp. 584, 586 (E.D. Pa. 1982) (finding that "the scope of any waiver [under Exemption 5] is defined by, and co-extensive

with, the breadth of the prior disclosure"). "'Specificity is the touchstone in the waiver inquiry, and thus, neither general discussions of topic nor partial disclosures of information constitute waiver of an otherwise valid FOIA exemption.'" *Bronx Defenders v. Dep't of Homeland Security*, No. 04 CV 8576 (HB), 2005 WL 3462725, at *3 (S.D.N.Y. Dec. 19, 2005) (quoting *Dow Jones & Co., Inc. v. Dep't of Justice*, 880 F. Supp. 145, 151 (S.D.N.Y. 1995)). Accordingly, "the release of certain documents" does not "waive[] the exemption as to other documents." *Mobil Oil*, 879 F.2d at 701.

Importantly, plaintiffs bear the burden of demonstrating that there has been a waiver of the attorney-client privilege. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and obviously fairer, to place the burden of production on the party who claims that the information is publicly available."). *See also Lopez v. Dep't of Justice*, No. 03-5192, 2004 WL 626726, at *1 (D.C. Cir. Mar. 29, 2004); *Assassination Archives & Research Ctr.*, 334 F.3d at 60; *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002); *Afshar*, 702 F.2d at 1130; *Bronx Defenders*, 2005 WL 3462725, at *3. The burden appropriately falls to plaintiffs "because the task of proving the negative—that the information has *not* been revealed—might require the government to undertake an exhaustive, potentially limitless search." *Davis v. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992). Indeed, during the August 18, 2011, conference, the Court recognized that requiring ICE to submit "a separate affidavit for thousands of documents one by one by one, sort of like a chain of custody tracing the history of every movement of every document through every person in an agency" would be "unduly burdensome, expensive, time consuming, [and] unnecessary." Aug. 18, 2011 Transcript ("Aug. 18 Tr.") at 28:10-15.

Here, plaintiffs have failed to carry their burden and proffer evidence that the attorney-client privilege has been waived. The sole example of such alleged waiver that plaintiffs cited in their summary judgment brief is a March 30, 2010 e-mail from a representative of the Washington, D.C. Metropolitan Police Department to a representative of a non-governmental organization (the "Bromeland E-Mail"). Plaintiffs argued that the Bromeland E-Mail demonstrates that ICE and the FBI had waived the attorney-client privilege by informing the D.C. police department that certain authorities supported the position that participation in Secure Communities is mandatory. *See* Pls.' Mem. of Law in Support of Cross-Mot. for Summ. J. on Exemptions dated Feb. 11, 2011 [Docket # 49], at 21-22; Decl. of James F. Horton dated Feb. 11, 2011 [Docket # 48], Ex. I (Bromeland E-Mail). The Court also relied on the Bromeland E-Mail in support of its observation that defendants may have publicly disclosed "at least some of the information found in the documents that they now withhold as privileged communications." *See* Opinion & Order dated July 11, 2011 ("July 11 Order") at 36-37. The Bromeland E-Mail, however, is insufficient to show that the information ICE has withheld across the challenged attorney-client records has specifically been disclosed outside of the agency.[1] The existence of

[1] The information conveyed in the Bromeland E-Mail is different than that which would be released as a result of disclosure of the withheld attorney-client records. For example, disclosure of a particular withheld record would reveal the precise advice that ICE counsel

the Bromeland E-Mail certainly does not demonstrate that ICE has waived its attorney-client privilege with respect to the versions of the memorandum dated October 2, 2010 (the "October 2 Memorandum"). The October 2 Memorandum is obviously different in material respects from the Bromeland E-Mail, *see Afshar*, 702 F.2d at 1132, and, moreover, it was written roughly six months *after* the Bromeland E-Mail was sent. In short, plaintiffs have failed to meet their burden of rebutting ICE's representation that the attorney-client material has been kept confidential, *see Occidental Petroleum Corp.*, 873 F.2d at 342, and therefore ICE should not be required to undertake "the task of proving the negative" with respect to each application of the attorney-client privilege, *see Davis*, 968 F.2d at 1279.

Nevertheless, as identified by the Court, the sole issue with respect to the records withheld under the attorney-client privilege is whether the confidentiality of the records has been maintained, *see* July 11 Order at 37; Aug. 18 Tr. at 27:15-30:12, and, at the Court's direction, ICE respectfully submits the Supplemental Law Declaration as a further demonstration that the attorney-client privilege has not been waived. ICE's supplemental *Vaughn* index establishes this fact, and has not been rebutted by plaintiffs. Moreover, through the Supplemental Law Declaration, ICE further explains the basis for its assertion of confidentiality. ICE confirmed that the records have been kept confidential by directing the senders and recipients of each withheld record to review the record and report whether they had disseminated the record to anyone outside of the Department of Homeland Security ("DHS") or its component agencies. Supp. Law Decl. ¶¶ 7-8. In each instance, the senders and recipients responded that they had not disseminated the withheld records to any non-DHS personnel. *Id.* ¶ 9. Among the records subject to this review process were versions of the October 2 Memorandum. *Id.* ¶ 11.

In light of these circumstances, ICE is entitled to summary judgment on its application of the attorney-client privilege to the challenged "opt-out records," including its application of the privilege to the challenged versions of the October 2 Memorandum.

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conveyed to their client as of a particular date. The Bromeland E-Mail does not reveal any of that information. *See Coastal Delivery Corp.*, 272 F. Supp. 2d at 966 (rejecting the requester's waiver argument because the withheld information was "merely the same category of information, not the exact information, that has been disclosed").

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

Respectfully,

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