

**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,**

Plaintiffs,

- against -

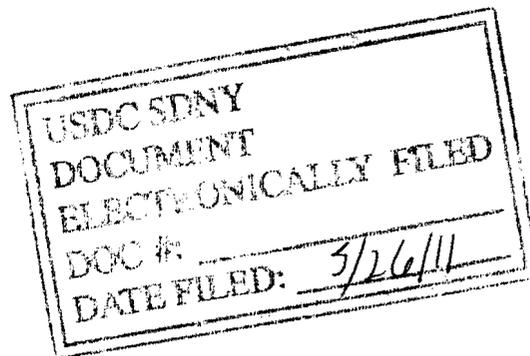
**UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT AGENCY,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW,
FEDERAL BUREAU OF
INVESTIGATION, and OFFICE OF
LEGAL COUNSEL,**

Defendants.
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SHIRA A. SCHEINDLIN, U.S.D.J.:

The parties have cross-moved for partial summary judgment on the application of Freedom of Information Act (“FOIA”) exemptions to the “Opt-out Production.”¹ Having reviewed the motions, and in the interest of a speedy

¹ “Opt-out Production” refers to “records relating to the ability of states or localities to decline or limit participation in Secure Communities, including documents, memoranda, manuals, and communications referencing the technological capacity of ICE and the FBI to honor requests to opt-out, opt-in or



ORDER

10 Civ. 3488 (SAS)

resolution, I hereby order that defendants produce for *in camera* review the following documents, as identified in the Declaration of James Horton:²

(A) the ten documents identified in Ex. A to the Horton Declaration as “Exemption 5 Priority Policy Document[s];”³

(B) the twenty documents identified in Ex. B to the Horton Declaration as “Exemption 5 Priority Legal Documents;”⁴

(C) the following ten documents selected by the Court from among those identified in Ex. C to the Horton Declaration as “Exemption 5 Deliberative Process Challenges:”

- (1) [#1]⁵ FBI-SC-1413-1415 (“Emails among DHS, FBI and state employees concerning NY Commissioner letter to Northern Manhattan Coalition for Immigrant Rights”);
- (2) [#2] DHS000118-DHS000119 (“Issue paper entitled

limit participation in Secure Communities.” 12/17/10 Court Order [Docket No. 25] ¶ 1.

² 2/11/11 Declaration of James Horton, law student intern in plaintiff Immigration Justice Clinic of Benjamin N. Cardozo School of Law, submitted in conjunction with Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Partial Summary Judgment and in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment (“Horton Decl.”).

³ See attached spreadsheet entitled “Exhibit A - Exemption 5 Priority Policy Document[s].”

⁴ See attached spreadsheet entitled “Exhibit B - Exemption 5 Priority Legal Documents.”

⁵ Numbering corresponds to that of the Horton Decl.

- ‘Originating Agency Identifier (ORI) Validation Process’);
- (3) [#3] DHS000196-DHS000317 (‘Email chain between The CRCL Officer and ICE Personnel’);
 - (4) [#4] ICE FOIA 10-2674.0003393-.0003395 (‘Email between SC PMO staff’);
 - (5) [#5] ICE FOIA 10-2674.0003396-.0003403 (‘Email between SC program staff elements’);
 - (6) [#12] ICE FOIA 10-2674.0003461-.0003463 (‘DraftMemo from SC PMO to department staff component’);
 - (7) [#15] ICE FOIA 10-2674.0003544-.0003547 (‘mail between SC PMO staff’);
 - (8) [#47] ICE FOIA 10-2674.0012235-.0012255 (‘Email from FBI to SC’);
 - (9) [#60] ICE FOIA 10-2674.0013008-.0013009 (‘Briefing Paper’);
 - (10) [#81] ICE FOIA 10-2674.0003237-.0003239 (‘Document outlines updated messaging to support ICE maintaining its position to fullyuse federal information sharing by 2013’).

(D) the following ten documents selected by the Court from among those identified in Ex. D to the Horton Declaration as “Exemption 5 Attorney Client Challenges:”

- (1) [#1] ICE FOIA 10-2674.0003386-.0003389 (‘Emails among OCR, ICE senior leadership, ICE Office of the Assistant Secretary’s Counsel, and SC PMO staff addressing a response to Representative Anna Eshoo’s concerns re San Mateo County, California’);
- (2) [#5] ICE FOIA 10-2674.0003496-.0003498 (‘Email string between SC PMO staff and legal office preparing Draft response to media inquiry’);
- (3) [#8] ICE FOIA 10-2674.0003582-.0003583 (‘Draft letter response to Congressional inquiry’);

- (4) [#25] ICE FOIA 10-2674.0010639-.0010641 (“Email string from SC asking OPLA for legal advice”);
- (5) [#30] ICE FOIA 10-2674.0010815 (“Memo from an Associate Legal Advisor to Peter Vincent”);
- (6) [#39] ICE FOIA 10-2674.0010839 (“Email from Associate Legal Advisor to OPLA Team”);
- (7) [#49] ICE FOIA 10-2674.0011149-.0011151 (“Email from a Secure Communities Employee to an ICE Attorney seeking legal advice and recommendations and the Attorney’s response to that inquiry”);
- (8) [#50] ICE FOIA 10-2674.0003211-.0003219 (“Emails between SC PMO staff regarding draft response letter attachment to the County Counsel, County of Santa Clara”);
- (9) [#60] ICE FOIA 10-2674.0002534-.0002547 (“Email between ICE senior leadership and among OPLA attorneys with one attachment – a draft OPLA memo entitled “Secure Communities – Mandatory in 2013”);
- (10) [#79] ICE FOIA 10-2674.0003149-.0003153 (“Draft letter from ICE to locality”).

(E) the following five documents selected by the Court from among those identified in Ex. F to the Horton Declaration as “Reasonably Segregable Challenges:”

- (1) [#14] ICE FOIA 10-2674.0003740-.0003748 (“Draft memorandum from OPLA attorneys”);
- (2) [#15] ICE FOIA 10-2674.0003754-.0003759 (“Draft of a legal memorandum prepared by OPLA”);
- (3) [#16] ICE FOIA 10-2674.0008861-.0008867 (“Draft Talking Points Sent by Public Affairs”);
- (4) [#20] ICE FOIA 10-2674.0010589-.0010592 (“Emails string within OPLA”);
- (5) [#36] ICE FOIA 10-2674.0010833 (“Email from Associate Legal Advisor to OPLA team”).

Defendants are to submit these documents no later than June 1, 2011.

SO ORDERED:

A handwritten signature in black ink, appearing to read 'Shira A. Scheindlin', written over a horizontal line. The signature is cursive and extends to the right with a long, thin flourish.

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 26, 2011

- Appearances -

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NDLON, et al., v. ICE, et al., 10 CV 3488

Exhibit A - Exemption 5 Priority Policy Document

#	Bates Number	Date(s)	Vaughn Document Description	Vaughn Description of Withheld Information
1	ICE FOIA 10-2674.0003457 - ICE FOIA 10-2674.0003460		Draft –internalPMO SC Issue Paper	Issues and comments addressed regarding the interoperability deployment strategy. The comments do not reflect any final agency policy or decision.
2	ICE FOIA 10-2674.0008844 - .0008845	2/11/2010	Email between SC PMO Staff	Predecisional discussion of how DHS can respond to a State's position regarding local jurisdiction's participation and suggested posture in presenting interoperability to the States.
3	ICE FOIA 10-2674.0010776- ICE FOIA 10-2674.0010778	9/28/2010	Email from Deputy Press Secretary	Trying to clarify the issue of interoperability so he can draft a response to a reporter
4	ICE FOIA 10-2674.0013116 - ICE FOIA 10-2674.0013117	7/27/2010	Draft paper on LEA Deployment issues	DP – Draft proposal that includes deployment strategies for various jurisdictions, listing pros and cons, perceived adverse consequences, and recommendations for various options described in the proposed strategies
5	ICE FOIA 10-2674.0013894 - ICE FOIA 10-2674.0013896	10/1/2010	Email exchange between the ICE Office of the Director, OPLA and SC Program Office	Draft paper seeking to identify a new manner in which to describe the program to the public so that the agency's description more accurately reflects the manner in which SC operates
6	ICE FOIA 10-2674.0012488 - ICE FOIA 10-2674.0012493	10/1/2010	10-1-10 Predecisional draft (Comments) document	Draft document contains legal advice from OPLA staff regarding opting out and SC. This draft document with numerous comments and revisions was withheld
7	ICE FOIA 10-2674.0011411- 0011421	3/8/2010	Draft Public Affairs Guidance Memo	The draft portions of the memorandum which were not finalized. These portions of the memorandum deliberated public affairs guidance that did not reflect any final agency policy or position.
8	ICE FOIA 10-2674.0003140 - ICE FOIA 10-2674.0003143	11/5/2010	Emails between SC and OPLA.	Discussion and comments regarding proposed changes to Kansas MOA. Comments discuss possible inclusion or exclusion of specific language regarding racial profiling, including legal and policy implications. Emails also include discourse on possible reasons states and localities might wish to opt-out as well as opt-out permissibility.

Case 1:10-cv-03488-SAS Document 48-1 Filed 02/11/11 Page 3 of 3

*NDLON, et al., v. ICE, et al., 10 CV 3488***Exhibit A - Exemption 5 Priority Policy Document**

#	Bates Number	Date(s)	Vaughn Document Description	Vaughn Description of Withheld Information
9	ICE FOIA 10-2674.0002912-0002976	9/20/2010	Email from OPLA containing attachments with drafts of documents in preparation for meetings	Draft language and attorney recommendations sent by ELD OPLA.
10	DHS000196-DHS000317	September 20, 2010 - October 5, 2010	Email chain between The CRCL Officer and ICE Personnel.	Pre-decisional and deliberative conversation via Email on Implementation of Policy and how to respond to inquiries about said Policy

NDLON, et al., v. ICE, et al., 10 CV 3488
Exhibit B - Exemption 5 Priority Legal Documents

#	Bates Number	Date(s)	Vaughn Document Description	Vaughn Description of Withheld Information
1	ICE FOIA 10-2674.0010794 - ICE FOIA 10-2674.0010800	10/2/2010	Memo from the Deputy Principal Legal Advisor to Beth Gibson	Deliberations and legal opinions regarding SC becoming mandatory in 2013
2	ICE FOIA 10-2674.0003008 - ICE FOIA 10-2674.0003022	10/4/2010	Emails between SC and ICE OPLA	Discussion regarding attached pre-decisional draft of new language describing the manner in which SC program operates. Attached draft memo also discusses legal authority for the proposition that participation in Secure Communities will be mandatory in 2013.
3	ICE FOIA 10-2674.0009132 - .0009145	10/2/2010	Draft Memorandum from OPLA to Beth Gibson	Legal analysis of the mandatory nature of the 2013 Secure Communities deployment
4	ICE FOIA 10-74.0002534 ICE FOIA 10-74.0002547	10/01/2010, 10/02/2010	Email between ICE senior leadership and among OPLA attorneys with one attachment —a draft OPLA memo entitled “Secure Communities —Mandatory in 2013.”	Email between ICE senior leadership for the purpose of seeking review of a predecisional draft of SC promotional materials. The draft SC promotional materials did not reflect any final agency policy or position. The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.

NDLON, et al., v. ICE, et al., 10 CV 3488
Exhibit B - Exemption 5 Priority Legal Documents

5	ICE FOIA 10-2674.0002522 ICE FOIA 10-2674.0002533	10/01/2010, 10/02/2010	Email among OPLA attorneys with one attachment –a draft OPLA memo entitled “Secure Communities–Mandatory in 2013.”	Email between OPLA attorneys containing draft legal opinion regarding whether SC will be mandatory in 2013. The draft OPLA email contains legal advice and did not reflect any final agency policy or position. The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
6	ICE FOIA 10-74.0002548 ICE FOIA 10-74.0002555	10/01/2010, 10/04/2010	Email among OPLA attorneys containing a draft OPLA memo entitled “Secure Communities –Mandatory in 2013.”	Email between OPLA attorneys containing draft legal opinion regarding whether SC will be mandatory in 2013. The OPLA email contains legal advice provided by OPLA and did not reflect any final agency policy or position.
7	ICE FOIA 10-2674.0010839- ICE FOIA 10-2674.0010849	10/1/2010	Email from Associate Legal Advisor to OPLA team	Deliberation and discussion of legal issues surrounding mandatory participation by 2013
8	ICE FOIA 10-2674.0002509 ICE FOIA 10-2674.0002521	10/1/2010	Email between ICE senior leadership and among OPLA attorneys with one attachment –a draft OPLA memo entitled “Secure Communities –Mandatory in 2013.”	Email between ICE senior leadership for the purpose of seeking review of a predecisional draft of SC promotional materials. The draft SC promotional materials did not reflect any final agency policy or position. The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
9	ICE FOIA 10-2674.0003740 - ICE FOIA 10- 2674.0003748	9/30/2010	Draft memorandum from OPLA attorneys.	Draft memorandum with prepared to discuss issues related to the mandatory nature of SC in 2013.

NDLON, et al., v. ICE, et al., 10 CV 3488
Exhibit B - Exemption 5 Priority Legal Documents

10	ICE FOIA 10-2674.0002686 - ICE FOIA 10-2674.0002693	12/15/2010	Draft document from OPLA attorneys to OPLA leadership related to Secure Communities deployment.	The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
11	ICE FOIA 10-2674.0002666 - ICE FOIA 10-2674.0002675	10/2/2010	Draft document from OPLA to ICE senior leadership related to Secure Communities deployment.	The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
12	ICE FOIA 102674.0013854- ICE FOIA 10-2674.0013860	9/29/2010	Document entitled, "Secure Communities Opt Out Memo.doc"	Draft legal guidance by ICE lawyers on SC.
13	ICE FOIA 10-2674.0012494 - ICE FOIA 10-2674.0012503	10/2/2010	Draft memo on Secure Communities becoming mandatory in 2013	Draft document contains legal deliberation and advice from OPLA staff regarding SC becoming mandatory by 2013.
14	ICE FOIA 10-2674.0002713 - ICE FOIA 10-2674.0002721	10/2/2010	Draft document from OPLA to ICE senior leadership related to Secure Communities deployment.	The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
15	ICE FOIA 10-2674.0002676 - ICE FOIA 10-2674.0002685	10/2/2010	Draft document from OPLA to ICE senior leadership related to Secure Communities deployment.	The draft memo contains legal advice provided by OPLA and did not reflect any final agency policy or position.
16	ICE FOIA 10-2674.0011360- 0011365	9/7/2010	Opt Out Memorandum between OPLA ELD to the Principal Legal Advisor	The draft material of the legal justification for interoperability and whether or not participation is mandatory. These discussions were deliberative of the final form of the draft and did not reflect any final agency policy or position and consisted of the privileged legal counsel from attorneys advising their client.

NDLON, et al., v. ICE, et al., 10 CV 3488
Exhibit B - Exemption 5 Priority Legal Documents

17	ICE FOIA 10-2674.0003754 - ICE FOIA 10-2674.0003759	9/7/2010	Draft of a legal memorandum prepared by OPLA	Draft internal memorandum containing deliberations and legal advice about the policies and procedures for SC, including options for states that wish to "Opt-Out." The deliberations and legal advice did not reflect any final agency policy or position.
18	ICE FOIA 10-2674.0003162 - ICE FOIA 10-2674.0003169	9/16/2010	Email among ICE Office of the Principal Legal Advisor (OPLA) attorneys with one attachment	Memorandum discussing whether a law enforcement agency may "opt out" of the SC initiative and email communications among attorneys regarding the memorandum and reflecting client-supplied information.
19	ICE FOIA 10-2674.0013894 - ICE FOIA 10-2674.0013896	10/1/2010	Email exchange between the ICE Office of the Director, OPLA and SC Program Office	Draft paper seeking to identify a new manner in which to describe the program to the public so that the agency's description more accurately reflects the manner in which SC operates
20	ICE FOIA 10-2674.0003023 - ICE FOIA 10-2674.0003026	10/12/2010	Emails and attachment between SC and ICE OPLA	Discussion regarding attached pre-decisional draft of new language describing the manner in which SC program operates.