UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,	No. 10 Civ. 3488 (SAS)
Plaintiffs,	[Rel. No. 10 Civ. 2705]
v.	
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, FEDERAL BUREAU OF INVESTIGATION, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, and OFFICE OF LEGAL COUNSEL	
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT ON ITS WITHHOLDINGS PURSUANT TO EXEMPTION (b)(5) AND ATTORNEY-CLIENT PRIVILEGE, AND IN SUPPORT OF PLAINTIFFS' RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT ON THE INAPPLICABILITY OF EXEMPTION (b)(5) TO WITHHELD INFORMATION IN THE OCTOBER 2 MEMORANDUM, OR FOR DISCOVERY PURSUANT TO FED. R. CIV. P. 56(d)

PETER L. MARKOWITZ
SONIA R. LIN
Kathryn O. Greenberg
Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue
New York, New York 10003

Attorneys for Immigration Justice Clinic and National Day Laborer Organizing Network

GITANJALI GUTIERREZ
SUNITA PATEL
SCOTT PALTROWITZ
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

Attorneys for Center for Constitutional Rights and National Day Laborer Organizing Network

PAULA A. TUFFIN
ANTHONY J. DIANA
THERESE CRAPARO
LISA R. PLUSH
JEREMY D. SCHILDCROUT
JARMAN RUSSELL
Mayer Brown LLP
1675 Broadway
New York, New York 10019

Attorneys for National Day Laborer Organizing Network

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Plaintiffs the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively, "Plaintiffs") submit this memorandum of law (1) in opposition to Defendant United States Immigration and Customs Enforcement's ("ICE's") Renewed Motion for Summary Judgment on the applicability of the Freedom of Information Act (FOIA) Exemption 5, 5 U.S.C. § 552(b)(5), to withheld documents including versions of an ICE memorandum dated October 2, 2010 and titled "Secure Communities – Mandatory in 2013" (collectively, the "Oct. 2 Memo"), and (2) in support of Plaintiffs' Renewed Cross-Motion for Summary Judgment on the inapplicability of Exemption 5 to the withheld information in the Oct. 2 Memo. In the alternative, Plaintiffs seek discovery on the applicability of Exemption 5 to the Oct. 2 Memo.

PRELIMINARY STATEMENT

The "strong policy" of the Freedom of Information Act ("FOIA") is to ensure that the public "know[s] what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868-69 (D.C. Cir. 1980). In this case, FOIA's power to shine light on government action is particularly important because ICE and the Department of Homeland Security ("DHS") spent much of the first two years of the Secure Communities program going "out of their way to mislead the public" about local and state autonomy with respect to the program. *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency* ("*NDLON v. ICE*"), No. 10 Civ. 3488 (SAS), 2011 WL 2693655, at *9 (S.D.N.Y. July 11, 2011).

Central to clarifying the confusion ICE has created is a memorandum dated October 2, 2010 and titled "Secure Communities – Mandatory in 2013." The Oct. 2 Memo is critical because it explains the government's purported legal authority to impose its controversial Secure Communities program on unwilling states and localities. The public, the fifty states, and the

thousands of localities across the United States have a right to know the legal basis for the government's decision to force state and local criminal justice systems into this flawed federal immigration enforcement program. The memo goes to the heart of the purpose of FOIA.

This Court should order the disclosure of the information in the Oct. 2 Memo because ICE has failed to meet its burden justifying continued withholding of this information. There is no material disputed fact about the purpose and use of the information in the Oct. 2 Memo. Contrary to ICE's conclusory and insufficient statements, Plaintiffs have submitted overwhelming documentary evidence demonstrating that the purpose of the Oct. 2 Memo was to memorialize ICE's post-hoc legal justification for the Mandatory in 2013 Policy, which, as this Court found, had been adopted at least six months previously. Moreover, the evidence shows the information in the Oct. 2 Memo was used, as was intended, to provide justification of the policy to ICE employees and employees of other federal agencies implementing Secure Communities, to state and local officials, to public interest organizations, and to the general public. Accordingly, ICE cannot withhold this information because: (1) the information in the Oct. 2 Memo was not intended to be confidential, attorney-client privileged legal advice, and was not used as such; and (2) the information in the Oct. 2 Memo was adopted as ICE's policy and working law.

STATEMENT OF FACTS

I. Procedural History of ICE's Withholding of the Oct. 2 Memo

From the outset of this FOIA matter, ICE has withheld information in all versions of the Oct. 2 Memo, citing the attorney-client and deliberative process privileges under FOIA Exemption 5. In its efforts to meet its burden under FOIA and for summary judgment, ICE originally submitted *Vaughn* indices describing the Oct. 2 Memo with variations of "[l]egal

analysis of the mandatory nature of the 2013 Secure Communities deployment." *NDLON v. ICE*, 2011 WL 2693655 at *17. In its July 11, 2011 Order, following summary judgment briefing, the Court affirmatively ruled that the Oct. 2 Memo "is not protected by the deliberative process privilege." *Id.* at *17-*18. In addition, given the limited information provided by Defendants, the Court found that ICE had failed to meet its burden to show that the information withheld in the Oct. 2 Memo was protected by the attorney-client privilege and withheld judgment on whether the Oct. 2 Memo should be disclosed under the working law doctrine. *Id.*

Having denied summary judgment as to both parties without prejudice, *id.*, the Court granted ICE another opportunity to meet its burden by submitting more information about the role the document played in the deliberative process and to establish that the confidentiality of the document was maintained.[1] The Court also indicated it would accept additional submissions from Plaintiffs regarding whether the Oct. 2 Memo had been adopted or incorporated by reference by the agency. *Id.*

Following the Court's July 11 Opinion and Order, Defendants submitted two supplemental *Vaughn* indices and two declarations from ICE Deputy FOIA Officer Ryan Law ("Law") in support of its claimed FOIA exemptions.[2] Despite the Court's instructions, ICE did not attempt to explain the role of the Oct. 2 Memo in the agency's deliberative process. Accordingly, the Court reaffirmed its ruling that the Oct. 2 Memo is not protected by the deliberative process privilege. (Aug. 18, 2011 Tr. at 26; Aug. 24, 2011 Tr. at 24).

---

[1] With respect to other documents withheld based on the attorney-client privilege, the Court held that ICE had not demonstrated that the documents were kept confidential, but gave ICE another opportunity to make this showing. *NDLON v. ICE*, 2011 WL 2693655, at *15-*24.

[2] Declaration of Christopher Connolly ("Connolly Decl.") Exs. A, B, D. The description contained in the Supplemental Vaughn (Ex. A) about the purpose of the memo is controverted by the evidence in the record, discussed *infra.*

The two Ryan Law declarations submitted by ICE purported to address whether the confidentiality of the withheld documents, including the Oct. 2 Memo, had been maintained. The first declaration contained the conclusory statement that the confidentiality of the withheld documents had been maintained.[3] At the Court's direction, the second Law Declaration provided some additional details about ICE's efforts to determine whether confidentiality was maintained, but left significant questions about confidentiality unanswered.[4]

II. Creation and Use of the Oct. 2 "Mandatory in 2013" Memo

Despite repeated opportunities, Defendants have failed to address why the Oct. 2 Memo was written, its role in ICE's decisionmaking process, or "whether it was written to justify an already existing policy or to lend support to an ongoing new policy or change of policy." (Aug. 18, 2011 Tr. at 21-24). However, based upon reviews of documents produced from this litigation, some in the past few weeks, and through outreach to national and local advocates, Plaintiffs have uncovered evidence, discussed *infra*, which demonstrates both that the Oct. 2 Memo does contain the purported legal justification for ICE's previously adopted Mandatory in 2013 policy[5] and that it is not protected by attorney-client privilege.

At least as of March 2010, ICE, along with DHS and the FBI, determined that participation in the Secure Communities program would be mandatory for localities and states and began working to modify its messaging to reflect this fact. *See NDLON v. ICE*, 2011 WL 2693655, at *9. The record is clear that the decision to make Secure Communities mandatory was in place well before the Oct. 2 Memo was drafted:

---

[3] *Id.* Ex. B (Aug. 8, 2011 Law Decl.).
[4] *Id.* Ex. D (Aug. 23, 2011 Law Decl.).
[5] In its original *Vaughn*, ICE conceded that the memorandum contained the agency's "legal authority for the proposition that participation in Secure Communities will be mandatory in 2013." (Doc. #35 Jan. 28, 2011 Declaration of Catrina Pavlik-Keenan Ex. A (*Vaughn* Index) at 22)).

- On or around March 17, 2010, ICE officials prepared a draft memo to be sent from Assistant Director of Secure Communities Marc Rapp ("Rapp") to ICE Director John Morton that stated that the agencies had realized that a mandate existed to make Secure Communities mandatory and, therefore, that "Secure Communities is modifying its definition of voluntary participation by state and local jurisdictions;"[6]
- On August 2, 2010, an ICE communications official requested information from the Office of the Principal Legal Advisor ("OPLA") on statutes supporting mandatory fingerprint sharing, in advance of an ICE meeting with California congressional representatives;[7]
- On August 11, 2010, FBI officials confirmed that "by 2013, to fulfill the Congressional mandate for increased information sharing, the federal government plans to activate IDENT/IAFIS interoperability for all criminal fingerprint submissions nationwide," and that the FBI will send all fingerprints to search DHS-US-Visit IDENT regardless of state opt-in;[8]
- On August 16, 2010, Santa Clara County Board of Supervisors wrote to ICE with the understanding that the agency did not view its participation in Secure Communities as voluntary;[9]
- On August 24, 2010, FBI and ICE officials held a meeting to discuss their plan that ICE will "respond nationwide to all fingerprint matches" by 2013;[10]
- On September 9, 2010, ICE officials circulated a "draft messaging plan" with memo attached describing the plan to inform stakeholders that Secure Communities was not optional;[11]
- On September 21, 2010, ICE Chief Public Engagement Officer Andrew Lorenzen-Strait told DHS's Officer for Civil Rights and Civil Liberties Margo Schlanger ("Schlanger") that the policy on opt out had changed;[12]
- On September 22, 2010, ICE Assistant Deputy Director Beth Gibson ("Gibson") stated that "there is no ability to opt out after 2013" in an email to Schlanger;[13] and
- On September 30, 2010, ICE officials corresponded about language to be used to describe the mandatory nature of Secure Communities.[14]

---

[6] Declaration of Sonia Lin ("Lin Decl.") Ex. A (ICE FOIA 10-2674.0011425-11426 (Mar. 17, 2010 email from Secure Communities Communications & Outreach Branch Chief Randi Greenberg to Rachel Canty attaching draft memoranda)).

[7] *Id.* Ex. B (ICE FOIA 10-2674.0013173 (Aug. 2, 2010 email by Randi Greenberg to unknown)).

[8] *Id.* Ex. C (FBI-SC-FPL-334-336 (Aug. 11, 2010 FBI emails)).

[9] *Id.* Ex. D (Aug. 16, 2010 Letter to Venturella from Santa Clara County Counsel).

[10] *Id.* Ex. E (ICE FOIA 10-2674.0007508-7509 (Aug. 24, 2010 email from Rapp to unknown summarizing issues for interagency meeting)).

[11] *Id.* Ex. F (ICE-FOIA 10-2674.0003192 (Sept. 9, 2010 email to and from unknown)).

[12] *Id.* Ex. G (DHS 0000284 (Sept. 21, 2010 email from Lorenzen-Strait to Schlanger, "I believe we will be pulling away from this stance and the program will be mandatory w/o opt out")).

[13] *Id.* Ex. H (DHS 000272 (Sept. 22, 2010 email from Gibson to Schlanger)).

[14] *Id.* Ex. I (ICE FOIA 10-2674.0003393-3395 (Sept. 30, 2010 emails between Secure Communities officials)).

After making this determination, ICE sought to memorialize a clear articulation of its legal basis for its established Mandatory in 2013 policy. As part of this effort, in early September 2010, one of the agency's top officials, Gibson, charged ICE's Principal Legal Advisor Peter S. Vincent ("Vincent") with "gathering the legal support for the 'mandatory' nature of participation in 2013."[15] The Oct. 2 Memo was the result of Gibson's instruction to Vincent, which she made at the *same* time she tasked the Secure Communities Assistant Director David Venturella ("Venturella") with drafting revised language to describe the change from the "voluntary" formula to the "2013 formula."[16] The agency communications from this time period demonstrate that ICE's decision to adopt a mandatory "formula" had already been made and that ICE (and DHS) were simultaneously reworking their messaging, documenting the legal justification for that policy, and drafting FAQs and other changes to their websites.

Gibson requested the Oct. 2 Memo in early September 2010 because ICE wanted a memorandum that explained a decision the agency had already made, not to get advice about the best decision to make. Towards the end of September 2010, Gibson followed up with Vincent and Venturella on their "get backs" from the beginning of the month. She noted that her focus was on "rework[ing] our messaging" on the opt-out issue.[17] Critically, Gibson instructed Vincent on the theory or explanation that his "get back" – the Oct. 2 Memo – should outline, namely that the mandatory nature of Secure Communities stemmed from the FBI's Criminal

---

[15] *Id.* Ex. J (ICE FOIA 10-2674.0002999-3000 (Sept. 9, 2010 email from Gibson to Vincent and Secure Communities Assistant Director David Venturella ("Venturella") describing two "get backs" for completion: 1) OPLA "gathering the legal support for the 'mandatory' nature of [Secure Communities] participation in 2013," and 2) SC "drafting revised language to describe the shift from the current 'voluntary' formula.")). *See also* U.S. ICE, ICE Leadership, http://www.ice.gov/about/leadership/ (last visited Sept. 11, 2011).

[16] *Id.* Ex. J.

[17] *Id.* Ex. K (ICE FOIA 10-2674.0002998-2999 (Sept. 29, 2010 email from Gibson to Vincent and Venturella)).

Justice Information Services ("CJIS") agreements, and that "if you want their data, you play ball with all federal partners."[18] The record makes clear that Gibson reviewed early drafts of the Oct. 2 Memo and directed OPLA attorneys to "rewrite" the memo "to argue for the 'mandatory' participation in 2013, which per [Gibson] flows from the CJIS agreement."[19] Indeed, John Morton, the head of ICE, had simultaneously tasked Vincent with compiling a "binder of the legal underpinnings" of the mandatory policy; this assignment "dovetail[ed]" with Gibson's assignment to memorialize the agency's legal position in the Oct. 2 Memo.[20] Evidently, then, the memorandum was not part of a deliberative process to determine whether there was a legal basis for the mandatory decision; rather a high-level agency official charged a subordinate with writing up a pre-decided legal theory which had been adopted as the agency's policy.

In the subsequent days, the Oct. 2 Memo was duly circulated with clear statements that it represented the adopted legal interpretation of the agency.[21] Although the memo was

[18] *Id.* Ex. L (ICE FOIA 10-2674.0002653 (Sept. 29, 2010 email from Gibson to Vincent and Venturella)). *See also id.* Ex. M (ICE FOIA 10-2674.0003728 (Sept. 29, 2010 email noting that the head of ICE John Morton asked Vincent and Venturella to "pull together a binder of the legal underpinnings")).

[19] *Id.* Ex. N (ICE FOIA 10-2674.0003726 (Sept. 29, 2010 email from OPLA attorney)).

[20] *Id*. Ex. M (ICE FOIA 10-2674.0003728 (Sept. 29, 2010 email from Gibson to Vincent)).

[21] *Id.* Ex. O (ICE FOIA 10-2674.0003708 (Sept. 29, 2010 email with Oct. 2 Memo attached, described as a "memo that discusses the 'legal underpinning' of the 'opting out'")); Ex. P (ICE FOIA 10-2674.0003487 (Sept. 30, 2010 email with Oct. 2 Memo attached, indicating that attached document was the "draft memorandum regarding the legal support for the 'mandatory' nature of participation in Secure Communities in 2013")); Ex. Q (ICE FOIA 10-2674.0002509 (Oct. 1, 2010 email noting that attached document was the ICE Enforcement Law Section's "memorandum regarding the legal support for the 'mandatory' nature of participation in Secure Communities in 2013")); Ex. R (ICE FOIA 10-2674.0002977 (Oct. 1, 2010 email with Oct. 2 Memo attached, indicating that attached document was "ELS' draft memorandum regarding the legal support for the 'mandatory' nature of participation in Secure Communities in 2013)).

strategically referred to as a "draft," as the Court has recognized, *NDLON v. ICE*, 2011 WL 2693655, at *18, the Defendants admit that the Oct. 2 Memo was indeed the final version.[22]

The timeline following completion of the memorandum further demonstrates that it contains the adopted legal justification for a policy decision made much earlier:

- On Monday, October 4, 2010, the Oct. 2 Memo was sent to Gibson again for review;[23]
- On Wednesday, October 6, 2010, presumably when Gibson's review was complete, DHS Secretary Napolitano made the first unequivocal public statement confirming the agency's view that participation in the Secure Communities program was mandatory and states and localities would not be permitted to opt out;[24]
- On October 8, 2010, Vincent conveyed the compliments of DHS Principal Deputy General Counsel David Martin to the author of the Oct. 2 Memo and characterized the memo as "excellent," demonstrating that the memorandum had also been vetted by the upper reaches of the Department of Homeland Security;[25]
- Throughout October, ICE repeatedly insisted that its position on mandatory participation was justified and claimed a legal basis for its position.[26]
- Following Napolitano's official announcement, top ICE officials held a series of meetings in November 2010 with local officials who sought to opt out of the Secure Communities program where it explained its legal position that participation in the program was mandatory and required by federal law;[27]

---

[22] *Id.* Ex. S (Apr. 20, 2011 email from opposing counsel confirming Oct. 2 Memo was never characterized as final).

[23] *Id.* Ex. T (ICE FOIA 10-2674.0013893-94 (Oct. 2 and Oct. 4, 2010 emails forwarding the Oct. 2 Memo for review by Gibson)); Ex. U (ICE FOIA 10-2674.0002997 (Oct. 4, 2010 email "I sent Beth [Gibson] the draft memo")).

[24] Shankar Vedantam, U.S. Deportations Reach Record High, Washington Post, Oct. 7, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html.

[25] Lin Decl. Ex. V (ICE FOIA 10-2674.0010794 (Oct. 8, 2010 email forwarding Vincent email to drafter of Oct. 2 Memo)).

[26] *See, e.g.*, ARL Now, *ICE Director: Arlington Can't Opt Out of Secure Communities*, ARLNow.com, Oct. 11, 2010, available at http://www.arlnow.com/2010/10/11/ice-director-arlington-cant-opt-out-of-secure-communities/); Lin Decl. Ex. W (ICE FOIA 10-2674.0003149-3153 (Draft Letter from Venturella to Arlington, VA County Manager Barbara Donnellan explaining fingerprint sharing by 2013 was "mandated by Congress and in accord with the recommendations of the 9/11 Commission")); Declaration of Sarahi Uribe ("Uribe Decl.") ¶¶ 12-21; Declaration of Sarang Sekhavat ("Sekhavat Decl.") ¶¶ 6-9.

[27] Uribe Decl. ¶ 15 (describing Nov. 8, 2010 meeting between ICE officials, including Venturella, and San Francisco Sheriff Michael Hennessy where ICE explained that its authority to mandate the program came from the "culmination of a number of statutes" and that ICE

- ICE also met with Congressional representatives to discuss its legal position regarding mandatory participation in Secure Communities.[28]

Since the Oct. 2 Memo was written and circulated, ICE has repeatedly alluded to its legal authority to mandate participation in Secure Communities.[29] Moreover, since the issuance of the Oct. 2 Memo, ICE has publicly discussed its legal justification for its mandatory position on multiple occasions, identifying various legal authorities including, *inter alia*:

- Enhanced Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, title II, Sec. 202, codified at 8 U.S.C. § 1722;
- The 9/11 Commission Report, requiring that all federal agencies have information sharing capabilities in 2013;
- The USA Patriot Act;
- The Border Security Act of 2002;
- DHS and DOJ Appropriations Bills.[30]

Other evidence indicates that both before and after October 2010, ICE shared at least some of its legal analysis with individuals outside of the agency or with those who did not have authority to speak on behalf of the agency.[31]

---

participation was, among other reasons, mandated by Congress through appropriations for Secure Communities).

[28] Lin Decl. Ex. X (ICE 2010 FOIA 2674.020373-74 (Oct. 25, 2010 email re questions about mandatory participation sent by Congressman Jared Polis (D-CO) in advance of meeting with ICE)); Uribe Decl. ¶ 13.

[29] Lin Decl. Ex. Y (DHS001811 (Feb. 17, 2011 DHS Weekly Report noting Washington Post article where DHS confirmed that states and localities cannot opt out)); Ex. Z (FBI-SC-FPL-00095-98 (May 25, 2011 draft DHS responses to Congressional Questions for the Record declaring participation in Secure Communities mandatory and acknowledging that prior public statements unclear and led to confusion about opt-out)); Ex. AA (ICE 2010 FOIA2674.0024257-58 (May 31, 2011 email from ICE spokesperson discussing answers to give to reporter questions, including that "[t]he U.S. government has determined that a jurisdiction cannot choose to have the fingerprints it submits to the federal government processed only for criminal history checks.")); Ex. BB (ICE FOIA 2674.0032912 (June 20, 2011 Gibson email asserting "the decision to activate Secure Communities in a jurisdiction rests with the federal government.")); Ex. CC (ICE FOIA 2674.0023243 (July 13, 2011 email stating mandatory implementation in 2013 is required by the 9/11 Commission Report)); Uribe Decl. ¶¶ 12-21; Sekhavat Decl. ¶¶ 6-9.

[30] *See* Uribe Decl. ¶¶ 12-21; Sekhavat Decl. ¶¶ 6-9; Lin Decl. Ex. CC; Ex. DD (ICE 2010 FOIA 2674. 0023522 (July 13 & 14, 2011 email correspondence stating that Sheriff of Skagit County, Washington, could be told that "2013 date came from the 9/11 commission report")), Ex. EE (FBI-SC-FPL-00170 (Secure Communities Briefing Notes)).

ARGUMENT

Under Rule 56 of the Federal Rules of Civil Procedure, an agency is entitled to summary judgment only if it can demonstrate that a record is exempt from disclosure pursuant to an enumerated FOIA exemption. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). As set forth below, because ICE fails to establish that FOIA Exemption 5 is applicable to the Oct. 2 Memo, Defendants' motion for summary judgment should be denied and the Court should grant Plaintiffs' cross motion for summary judgment and order the release of the unredacted Oct. 2 Memo or, in the alternative, order further discovery.

As the Court set out in its July 11, 2011 order, ICE has the burden of establishing an exemption under FOIA. *NDLON v. ICE*, 2011 WL 2693655, at *4. *See also Coastal States*, 617 F.2d at 862. ICE must "substantially justif[y]" any claimed exemption, *Dolin, Thomas & Solomon LLP v. U.S. Dep't of Labor*, 719 F.Supp.2d 245, 249 (W.D.N.Y. 2010), by providing a "relatively detailed justification," *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). ICE may not rely on "sweeping and conclusory" justifications. *Id.*

Moreover, FOIA exemptions are "narrowly construed with all doubts resolved in favor of disclosure." *Lee v. Fed. Deposit Ins. Corp.*, 923 F. Supp. 451, 453 (S.D.N.Y. 1996). *See also Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 286 (2d Cir. 1999) (FOIA evinces "policy strongly favoring public disclosure of information in the possession of federal

[31] In addition to the support cited *supra*, *see also* Lin Decl. Ex. FF (Mar. 24, 2010 email from Amy Loudermilk to Matthew Bromeland, Metropolitan Police Department, Washington D.C., requesting information "about the various federal mandates . . . that exist with respect to the Secure Communities program going nationwide by 2013."); Ex. GG (Mar. 30, 2010 email from Matthew Bromeland to Amy Loudermilk responding "according to ICE and the FBI, there is no one specific mandate, but rather it is grounded in a multitude of information sharing initiatives. They shared with us the main ones listed below.").

agencies"). An agency's decision that withheld information is exempt from disclosure receives no deference. *NDLON v. ICE*, 2011 WL 2693655, at *4.[32]

I. Defendants Mischaracterize the Court's Prior Orders and Attempt to Relitigate Issues Already Decided by this Court

Much of ICE's motion appears to be an improper effort to recast the Court's July 11 and August 18 orders to confuse or relitigate issues already decided by this Court. First, ICE's effort to re-argue that the Oct. 2 Memo is exempt from disclosure pursuant to the deliberative process is both unavailing and precluded. (Defs. Br. at 15-19). This Court has already definitively and correctly ruled that the Oct. 2 Memo is not covered by deliberative process privilege. *NDLON v. ICE*, 2011 WL 2693655, at *17-*18; (August 18 Tr. at 21-24; August 24 Tr. at 24).[33] ICE elected not to appeal "any aspect" of the Court's July 11 Order.[34] Thus, ICE is precluded from now relitigating the deliberative process privilege applicability to the Oct. 2 Memo.

Second, contrary to ICE's allusions, this Court has not ruled that the Oct. 2 Memo is protected by the attorney-client privilege. (Defs. Br. at 7-8). Rather, after reviewing multiple versions of the document *in camera*, the Court found that ICE had not shown that the Oct. 2

---

[32] ICE mistakenly relies on *Wilner v. Nat'l Sec. Agency* in claiming that it need only show that the information withheld "logically falls within the claimed exemption" to meet its burden. (Defs. Br. at 2) (citing *Wilner v. NSA*, 592 F.3d 60, 72-73 (2d Cir. 2009). This is a mis-reading of *Wilner* and a misconception of ICE's burden in this case. Not only were the facts and circumstances in *Wilner* wildly different from the facts and circumstances here, *Wilner* did not change or lower an agency's burden to justify a FOIA exemption with "reasonably specific detail" as set out in agency affidavits. *Wilner*, 592 F.3d at 73-75. Moreover, the *Wilner* court noted that an agency cannot meet its burden on summary judgment if its showing is "controverted by . . . contrary evidence in the record." *Id.*

[33] The Court found that ICE failed to meet its burden of "establish[ing] the role the memorandum played in the deliberative process." *NDLON v. ICE*, 2011 WL 2693655, at *17. Not only was the Court unable to determine the reason why the memorandum was written, but the Court noted that: (1) the memorandum does not reflect the personal opinions of a single writer; (2) "there is no risk of confusing the public by the inaccurate or premature disclosure of agency views, as the public *is* confused, and it is plaintiffs who seek to clarify by obtaining the release of a fuller explanation of agency views"; and (3) the memorandum's analysis was viewed as persuasive and at no point rejected for inaccurately reflecting agency views. *Id.* at *18.

[34] Lin Decl. Ex. HH (Defs. Aug. 16, 2010 Ltr. to the Ct.).

Memo was protected by the attorney-client privilege, because (1) ICE failed to demonstrate that the confidentiality of the document had been maintained; and (2) ICE had not provided sufficient information regarding the role the Oct. 2 Memo played in the decision-making process to determine whether it had been adopted as "working law" and thus not covered by the attorney-client privilege. *NDLON v. ICE*, 2011 WL 2693655, at *17-*18.

II. ICE Has Not Met Its Burden of Showing that the Oct. 2 Memo is Protected by Attorney-Client Privilege

ICE fails to satisfy its burden of demonstrating that the Oct. 2 Memo is protected by the attorney-client privilege in at least two ways: (1) ICE fails to show that the Oct. 2 Memo contains confidential legal advice about a shift in policy, as opposed to simply memorializing the legal justification for an existing policy; and (2) ICE fails to demonstrate that the Oct. 2 Memo was drafted with the intention of keeping the information contained therein confidential and that it and the legal analysis contained therein was thereafter kept confidential.

A. ICE Bears the Burden of Showing that the Attorney-Client Privilege Applies to the Withheld Documents

FOIA Exemption 5 permits, in part, the nondisclosure of information that is "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975). "A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) *was intended to be and was in fact kept confidential*, and (3) was made *for the purpose of obtaining or providing legal advice*." *In re the County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (emphasis added). *See also Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec.*, 738 F. Supp. 2d 93, 113 (D.D.C. 2010); *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004). And as with all other FOIA exemptions, the burden is on the agency to demonstrate the attorney-client privilege applies, including "that

confidentiality was expected in the handling of these communications." *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479, 519 (S.D.N.Y. 2010) (citing *Coastal States*, 617 F.2d at 863).

However, "the privilege as applied in FOIA cases is not in every case consistent with the privilege between private parties." *Falcone v. Internal Revenue Serv.*, 479 F. Supp. 985, 989 (E.D. Mich. 1979). Its application in the FOIA context "must be limited to communications essential to the purpose of the privilege in the agency context." *Id.* Thus, "the attorney-client privilege does not give the agency the ability 'to withhold a document merely because it is a communication between the agency and its lawyers.'" *Am. Civil. Liberties Union*, 738 F. Supp. 2d at 113 (citation omitted) (internal punctuation omitted). Similarly, the attorney-client privilege may not be invoked in the FOIA context to shield statements or interpretations of an agency's legal policy. *NDLON v. ICE*, 2011 WL 2693655, at *18. *See also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 250, 360 (2d Cir. 2005); *Lee*, 923 F. Supp. at 457-58; *Falcone*, 479 F. Supp. at 989–990.

A document is only protected by the privilege if it was *created with the expectation* of secrecy and the secrecy of the document – *and the information contained therein* – was maintained. That is, ICE must show that the information was supplied to or conveyed by its lawyers with the expectation of secrecy, and that the document and the information contained therein was not disclosed to any third party. *See Judicial Watch*, 297 F. Supp. 2d at 267; *Mead Data Central, Inc.*, 566 F.2d at 253-54. To demonstrate that such secrecy was maintained, ICE must be able to show that the document at issue was circulated only to "members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communications." *Coastal States Gas Corp.*, 617 F.2d at 863.

As discussed below, ICE has failed to meet its "substantial" burden of justifying the withholding of the Oct. 2 Memo, and its meager showing is controverted by substantial evidence.[35]

B. The Oct. 2 Memo Represents the Established Legal Justification for an Existing Policy, Not Privileged Legal Advice

Despite the Court's explicit instructions, ICE's revised *Vaughn* index description of the information withheld in the Oct. 2 Memo "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." (Aug. 18, 2011 Tr. at 23).[36] There is a clear reason for this omission: All the relevant evidence, including public statements by ICE and DHS, demonstrates that the Oct. 2 Memo contains the post-hoc legal rationale for ICE's existing policy that participation in Secure Communities is mandatory.[37]

In fact, contemporaneous documentation makes clear that at the time that the Oct. 2 Memo was drafted, ICE had *already* decided that participation in Secure Communities was mandatory and was in the process of documenting the legal justification for that policy and changing its messaging to that effect.[38] That the agency previously "went out of its way to mislead the public," *NDLON v. ICE*, 2011 WL 2693655, at *9, does not make this a change in

[35] Defendants attempt to confuse the analysis by introducing the issue of waiver. The issue of waiver only arises after the party asserting the privilege, here ICE, satisfies its initial burden of establishing the elements of the privilege—including that the confidentiality of the purportedly privileged material has been maintained. *In re the County of Erie*, 473 F.3d at 419. Since ICE fails to satisfy its initial burden on this and other elements of the privilege, the issue of waiver never arises.

[36] Defendants' Supplemental Vaughn Index provides the following description of the information withheld in the Oct. 2 Memo: "Draft language and comments circulated by client program office to OPLA seeking legal review of sufficiency and direction. The draft memo on SC participation was drafted by OPLA as advice to the client in response to a client request for guidance on the mandatory v. voluntary question of participation in SC." Connolly Decl. Ex. A.

[37] *See* Statement of Facts *supra* at n.6-31 and accompanying text.

[38] *Id.* at n.6-20 and accompanying text.

policy, just a change in agency's appetite for obfuscation. Defendants have not contradicted this evidence with anything other than conclusory statements. Thus, there is no issue of material fact and the Oct. 2 Memo should be disclosed in its entirety.

C. ICE Fails to Demonstrate that the Oct. 2 Memo and the Information Contained Therein was Intended to be Kept – and Was Kept – Confidential

In a similar vein, ICE has not established that the information contained within the Oct. 2 Memo was kept – and was intended to be kept – confidential. Indeed, given the overwhelming evidence regarding the purpose of the Oct. 2 Memo, it is clear that the Oct. 2 Memo and the information contained therein was *not* intended to be kept confidential. Rather, it was intended to be used as the basis for ICE's position that state and locality participation in Secure Communities was mandatory. And in the weeks and months after October 2, 2010, ICE and DHS both represented to individuals outside the agencies that there was, in fact, a legal basis for the mandatory nature of Secure Communities resting on a group of statutes.[39]

Neither the supplemental Law Declaration nor any of the *Vaughn* indices satisfy ICE's burden to establish that the contested privileged information was kept within 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 had asked all custodians whether they maintained confidentiality. The supplemental Law Declaration states only that he queried the "sender and recipients" of the contested document "based on the information reflected on the face of the withheld documents."[40] This means that individuals who were provided with hard copies of the document, 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

[39] *Id.* at n.24-30 and accompanying text.
[40] Connolly Decl. Ex. D (Aug. 23, 2011 Law Decl.) at ¶¶ 5-9.

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.[41]

Second, despite Plaintiffs' specific query, Law asked only whether the "senders and recipients" had "disseminated the documents"[42] and failed to follow the Court's direction to query whether the "legal analysis contained in the document[s] was shared outside the agency." *NDLON v. ICE*, 2011 WL 2693655, at *18. As demonstrated in the evidence submitted by Plaintiffs, such legal analysis was shared outside the agency as it attempted to justify its mandatory in 2013 policy.[43] Moreover, given the inter-agency nature of Secure Communities, it defies reason that this analysis was not shared with the FBI and state and local officials, particularly where the FBI had a part in the formulation of the policy and its justifications.[44] Third, Law misstated the proper zone of privilege in his query to "senders and recipients" asking whether they had shared the documents "with anyone outside the Department of Homeland Security or its component agencies."[45] Again, Defendants failed to follow the Court's direction to determine whether the purportedly privileged 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." *NDLON v. ICE*, 2011 WL 2693655, at *10. Nothing in Defendants' Motion corrects these deficiencies.

[41] Law states that "the senders and recipients of the withheld documents are all ICE employees," but the disclosed documents demonstrated that individuals outside of ICE did, in fact, have custody of some of the contested documents. *See* Statement of Facts, *supra* at FN 23.
[42] Connolly Decl. Ex. D (Aug. 23, 2011 Law Decl.) at ¶ 7.
[43] *See* Statement of Facts *supra* at n.26-30 and accompanying text.
[44] *Id*. at n.10 and accompanying text.
[45] Connolly Decl. Ex. D (Aug. 23, 2011 Law Decl.) at ¶ 7.

ICE has now had multiple opportunities to demonstrate that the Oct. 2. Memo was written for the purpose of providing legal advice to ICE with respect to a shift in policy and was kept (and intended to be kept) confidential. Yet ICE has refused to provide the Court with a clear statement as to the purpose of the Oct. 2 Memo. Having now had three bites at the apple, it is clear that ICE has failed to meet its burden and the unredacted Oct. 2 Memo should be disclosed.[46]

III. ICE Cannot Meets its Burden with respect to Exemption 5 because the Oct. 2 Memo was Adopted by the Agency as its "Working Law"

ICE must also be ordered to disclose the Oct. 2 Memo because it was "adopted as . . . [ICE] policy" and is therefore non-exempt "working law" under FOIA Exemption 5. *Nat'l Council of La Raza*, 411 F.3d at 360.

FOIA requires agencies to make available to the public "statements of policy and interpretations which have been adopted by the agency" and "instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(B), (C). Documents that are adopted or incorporated by reference by an agency constitute the agency's "working law" and must be disclosed. *Sears, Roebuck & Co.*, 421 U.S. at 153 (noting that the "desirability of disclosing such [working law]" is "powerfully supported by affirmative disclosure requirements of [the FOIA]"). The government cannot meet its burden under Exemption 5 once a document or its

[46] For the reasons discussed in Section II.C., above, ICE also has not met its burden of showing that other documents withheld based on the attorney-client privilege and subject to the July 11 Order were kept confidential. *NDLON v. ICE*, 2011 WL 2693655, at *10. The Supplemental Law Declaration utterly fails to demonstrate that ICE conducted the proper inquiries with respect to the withheld documents, including determining whether the information contained within those documents was kept confidential and whether the information was disseminated only to those ICE employees authorized to speak on behalf of ICE. As ICE has failed to meet its burden, the Court should order that the withheld documents be disclosed. Further, given the insufficient *Vaughn* indices and the paucity of information regarding the other withheld documents, Plaintiffs are not in a position to further challenge Defendants' claimed exemptions and reserve the right the right to do so at a later date if additional information becomes available.

contents have been adopted as agency policy, because the "principal rationale" behind the attorney-client and deliberative process privileges "evaporates." *Nat'l Council of La Raza*, 411 F.3d at 360.

The public's "vital interest" in "discovering the basis for an agency policy actually adopted" goes to the heart of the FOIA. *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991). *See also Audobon Soc. v. U.S. Forest Serv.*, 104 F.3d 1201, 1204 (10th Cir. 1997) ("primary target of FOIA is 'secret law' – that is, information withheld from the public which defines the legal standards by which the public's conduct is regulated") (citing *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980)). Accordingly, an agency "will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Coastal States*, 617 F.2d at 867.

A. The Great Weight of Authority Dictates that The Government Bears the Burden of Establishing Whether or Not a Contested Document has been Adopted as Working Law

Defendants incorrectly claim that Plaintiffs bear the burden in this instance of demonstrating that the Oct. 2 Memo was adopted by ICE. The question of whether an agency has adopted a document as its "working law" is inextricable from the inquiry of whether the document or its contents are privileged and thus, the great weight of authority dictates that the burden remains with the government to establish that the agency did not adopt the document or its contents. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1143 (D.C. Cir. 1983) (remanding for government to show documents had not been adopted); *Arthur Andersen & Co. v. Internal*

Revenue Serv., 679 F.2d 254, 258 (D.C. Cir. 1982) (explicitly holding that the government bears the burden of proving that a document has not been adopted as working law).[47]

Indeed, in a circumstance such as the instant matter, where Plaintiffs have set forth significant evidence strongly suggesting that the legal memorandum in question was informally adopted by the agency, where any definitive proof of such adoption lies in the exclusive hands of the Defendants, and where the Defendants have refused to comply with the Court's order to explain the document's role in the decision-making process, it would be illogical to place the burden anywhere other than where it belongs: on the Defendant agency.[48]

B. An Agency Record Constitutes Working Law if All Facts and Circumstances Indicate that it was Explicitly or Implicitly Adopted by the Agency

It is well established that agency adoption may be formal or informal, explicit or implicit. *See Coastal States*, 617 F.2d at 866 (Exemption 5 inapplicable if information is "adopted, *formally or informally*, as the agency position on an issue or is used by the agency in its dealings with the public") (emphasis added); *Nat'l Council of La Raza*, 411 F.3d at 357 n.5 (rejecting test

[47] *See also FPL Group, Inc. v. Internal Revenue Serv.*, 698 F. Supp.2d 66, 90 (D.D.C. 2010) ("defendant [IRS] has failed to satisfy its burden with respect to eight documents whose descriptions suggest that they could contain unprivileged agency working law"); *United States v. Philip Morris USA Inc.*, 218 F.R.D. 312, 317 (D.D.C. 2003) ("Government . . . has the burden of establishing that a purportedly privileged document has not been adopted formally or informally"); *Lee*, 923 F. Supp. at 456 (requiring government to show disputed documents inaccurately reflect its position on the issues discussed in the documents); *Am. Civil Liberties Union Found. v. U.S. Dep't of Justice*, 833 F. Supp. 399, 405-06 (S.D.N.Y. 1993) (requiring agency to establish that document was not later incorporated as agency policy); *Cook v. Watt*, 597 F. Supp. 545, 551-52 (D. Alaska, 1983) (explicitly holding that the government bears the burden of proving that a document has not been adopted as working law); *Tax Analysts v. I.R.S.*, 117 F.3d 607, 616 (D.C. Cir. 1997) ("The government has the burden of showing that the materials were generated before the adoption of an agency policy") (internal quotation marks omitted).

[48] Defendants' argument to the contrary, resting on two non-binding distinguishable district court cases, is unavailing. (Defs. Br. at 10). In the two cases Defendants cite, in sharp contrast to the instant matter, the plaintiff-requesters offered "no evidence" suggesting agency adoption. *See Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78 (D.D.C. 2008); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 71 (D.D.C. 2001).

requiring "specific, explicit language of adoption or incorporation"); *Bronx Defenders v. Dep't of Homeland Sec.*, No. 04 Civ. 8576 (HB), 2005 WL 3462725, at *6 – *7 (S.D.N.Y. Dec. 19, 2005) (agency's implicit reliance on document's reasoning and conclusions showed adoption).[49]

Because documents may be adopted as working law in a variety of ways, the Second Circuit has directed that there is no "bright-line test" to determine adoption, and that courts "must examine *all* the relevant facts and circumstances" to make the determination. *Nat'l Council of La Raza*, 411 F.3d at 357 n.5 (emphasis in the original). *See also Bronx Defenders*, 2005 WL 3462725, at *6-*7 (explaining that Courts do not require "magic language" or for an agency to "hold[] out a document to the public" or make an "express statement . . . of its reliance" to determine that a statement or document has been adopted).

Relevant factors include, *inter alia*, consideration of "the function and significance of the document in the agency's decisionmaking process," *Philip Morris USA*, 218 F.R.D. at 320; whether agency staff use or used the document as guidance in discussions or negotiations with outside parties, *id.*; whether the document would be inevitably superceded by later formal agency action, *Coastal States*, 617 F.2d at 867; and whether the document represented "an unreviewable rejection" of a private party's position following the reaching of a final agency determination, *Taxation with Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 680 (D.C. Cir. 1981) (quoting *NLRB v. Sears*, 421 U.S. at 155). *See also Arthur Andersen*, 679 F.2d at 258 (working law inquiry must focus on "the function and significance of the document(s) in the agency's decisionmaking process, the nature of the decisionmaking authority vested in the office

[49] While the facts in *Nat'l Council of La Raza* show explicit adoption by the Attorney General of a legal memorandum through public statements, the *la Raza* court allowed for situations where no such explicit action occurs and rejected the government's arguments to the contrary. *Nat'l Council of La Raza*, 411 F.3d at 357 n.5.

or person issuing the disputed document(s), and the positions in the chain of command of the parties to the documents") (internal citations and quotation marks omitted).

Accordingly, based on all relevant facts and circumstances, informally and implicitly adopted records have been recognized by courts as non-exempt agency working law in a variety of circumstances. *See, e.g.*, *Taxation with Representation Fund*, 646 F.2d at 682-84 (informal, non-binding legal memoranda analyzing regulations deemed adopted where used internally even though not referenced publicly); *Coastal States*, 617 F.2d at 859 (informal, non-binding legal memoranda deemed agency "working law" where non-legal staff used memoranda for guidance); *Sec. Fin. Life Ins. Co. v. Dep't of Treasury*, No. 03-102, 2005 WL 839543, at *6 (D.D.C. Apr. 12, 2005) (Exemption 5 inapplicable to agency actions that "constitute statements of policy," or "explain actions an agency has already taken").

C. The Totality of the Circumstances Establishes That ICE Adopted the Legal Reasoning Contained within the Oct. 2 Memo as its Working Law

Plaintiffs have presented extensive evidence showing that the information in the Oct. 2 Memo was informally adopted by ICE as its legal justification for its Mandatory in 2013 policy.[50] The evidence is clear and uncontested; the decision to make the program mandatory was firmly in place before the drafting of the memorandum. Moreover, the memorandum was drafted at the direction of a high-level ICE official, Assistant Deputy Director Beth Gibson, to provide a clear articulation of ICE's legal position that it could make the program mandatory. Gibson did not request a memorandum evaluating whether or not ICE could make the program mandatory, rather she directed her subordinates to draft a specific preordained legal justification.

[50] *See* Statement of Facts *supra* at n.6-31 and accompanying text.

She reviewed drafts of the memo and required specific revisions to ensure it accurately reflected the agency's policy.[51]

Four days later, after the memorandum entitled "Secure Communities: Mandatory in 2013" had been circulated to top level ICE and DHS officials, Secretary Napolitano publicly announced that participation would be mandatory by 2013. The next month, ICE officials were providing the legal justification to state and local officials for the Mandatory in 2013 policy.[52] The memorandum received specific praise from the upper echelon of DHS—suggesting that the analysis of the memo "was viewed as persuasive, and was at no point rejected for inaccurately reflecting agency views." *NDLON v. ICE*, 2011 WL 2693655, at *18.[53] Indeed, internal ICE emails make clear the agency's view, that the memorandum spelled out the "legal underpinning" of, and "legal support" for, the agency's mandatory decision.[54]

ICE admits that there is no subsequent version of that memorandum,[55] and it has failed to identify any other document which purports to provide the legal analysis underlying the mandatory in 2013 position. Nor has ICE made any representation that disclosure of the Oct. 2 Memo would "inaccurately reflect or prematurely disclose [its] views," *Sec. Fin. Life Ins. Co.*, 2005 WL 839543, at *6. In the meantime, ICE has made, and continues to make, repeated public statements referring to the agency's understanding of its legal authority to make this program mandatory in 2013, and has used this analysis in negotiations and discussions with state and local officials and public interest organizations.[56] *See Philip Morris USA*, 218 F.R.D. at 320 (use of

[51] *Id.* at n.15-20 and accompanying text.
[52] *Id.* at n.24-28 and accompanying text.
[53] *Id.* at n.25 and accompanying text.
[54] *Id.* at n.21 and accompanying text.
[55] *Id.* at n.20 and accompanying text.
[56] *Id.* at n.27-31 and accompanying text. Perhaps most tellingly, ICE has refused to comply with the Court's order to explain the role the memorandum played in the mandatory in 2013 decision.

document for guidance in discussions and negotiations with outside parties a factor in determining it had been adopted).

The evidence in the record supports a strong inference that ICE adopted the reasoning and conclusions of the Oct. 2 Memo in the public campaign it started mere days after the last draft of the memo was circulated.[57] Plaintiffs' showing rises far above the level of "mere speculation." (Defs. Br. at 13-14 and cases cited therein).[58]

ICE has simply failed to satisfy its burden of demonstrating, *inter alia*, "the function and significance of the document[] in the agency's decisionmaking process." *Arthur Andersen*, 679 F.2d at 258. Accordingly, the Court must order the Oct. 2 Memo disclosed.

Instead, ICE seeks to duck the issue of adoption and does not even affirmatively argue in its brief that the reasoning of the Oct. 2 Memo has not been adopted. Instead, it offers only narrow arguments rested on an improper assertion of the burdens. (Defs. Br. at 14-15). The burden argument is a red herring designed to avoid ICE's affirmative duty to explain the role the document played.

[57] Unlike the cases relied upon by the Government, the Oct. 2 Memo is the only document providing legal support for ICE's mandatory in 2013 policy in the run-up to its public announcement and series of agency meetings with opt-out jurisdictions held in the Fall 2010. *Cf. Azmy v. Dep't of Defense*, 562 F. Supp. 2d 590, 604 (S.D.N.Y. 2008) (agency decisionmaker had competing recommendations from various agencies in deciding whether to transfer, detain, or release Guantanamo detainee and made determination without indicating what was compelling or persuasive); *Renegotiation Bd. v. Grunman Aircraft Eng'g Corp.*, 421 U.S. 168, 185-86 (1965) (Board received two reports from subordinate divisions to aid deliberation and then issued final ruling without providing substantive reasoning or referring to reports in any way).

[58] Compare with the cases cited by Defendants: *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005) ("no evidence in the record from which it could be inferred" that DOJ adopted reasoning of the challenged memo); *Elec. Privacy Info. Ctr*, 584 F. Supp. 2d at 78 (requester provided no evidence other than speculation to support assertion that Office of Legal Counsel legal opinions had been adopted by agency); *Trans Union LLC v. Fed. Trade Com'n*, 141 F. Supp. 2d at 71 (no evidence that recommendations in withheld documents had been adopted by the FTC).

IV. In the Alternative, the Court Should Order Discovery on the Applicability of the Exemptions Claimed for the Oct. 2 Memo[59]

If the Court determines that there remains a material issue of fact with respect to the applicability of Exemption 5 to the Oct. 2 Memo, the Court should order depositions or in court testimony to determine the applicability of that exemption. A court may permit additional discovery, including depositions and in court testimony, when a defendant agency fails to meet its burden in establishing summary judgment because genuine issues of material fact remain on the applicability of a FOIA exemption. *See, e.g.*, *Horowitz v. Peace Corps*, 428 F.3d 271, 275-78 (D.C. Cir. 2005) (describing evidentiary hearing held by district court after denial of summary judgment) (upholding *Horowitz v. Peace Corps*, No. 00-0848 (TFH), 2004 U.S. Dist. LEXIS 30456, at *6-*7 (D.D.C. Jan. 6, 2004)).[60]

A party requesting additional discovery need only show something more than "bare allegations . . . grounded in mere speculation," and need not provide evidence that would be admissible at a trial. *Carney*, 19 F.3d at 812-13. Indeed, a party may obtain discovery by showing that the facts that would justify opposition to summary judgment were in the sole

[59] As noted above, Defendants have not met their burden to show that FOIA Exemption 5 applies to any of the withheld documents at issue. However, in the interests of limiting the burden on Defendants and given the critical importance of the Oct. 2 Memo, Plaintiffs limit their request for discovery to the Oct. 2 Memo.

[60] *See also Miccosukee Tribe of Indians of Fla. v. U.S.*, 516 F.3d 1235, 1240-42, 1254 (11th Cir. 2008) (describing depositions taken of agency employees and an attorney advisor on applicability of Exemption 5; and vacating grant of summary judgment because genuine issues of material fact existed); *Coastal States*, 617 F.2d at 858-70 (relying on depositions of agency employees and counsel in upholding district court order to release documents withheld under Exemption 5); *Taxation with Representation Fund*, 646 F.2d at 670-84 (relying on agency deposition testimony in affirming, in part, district court's order of disclosure of documents withheld under FOIA Exemption 5); *El Badrawi v. DHS*, 583 F. Supp. 2d 285, 299-309 (D. Conn. 2008) (denying summary judgment to government in part and permitting discovery, namely depositions of agency employees who submitted affidavits and an employee with knowledge of a missing file, where several agencies failed to demonstrate the adequacy of their search in response to FOIA requests).

control of the agency. *See Shaffer v. Kissinger*, 505 F.2d 389, 390-91 (D.C. Cir. 1974) (remanding to permit plaintiff to undertake discovery). Discovery is especially appropriate here, where past officials of DHS and ICE have misled the public and the Court.[61]

Here, if the Court determines that Plaintiffs are not yet entitled to disclosure of the Oct. 2 Memo on their cross-motion for summary judgment, then Plaintiffs seek discovery. The Court should order agency depositions or in court testimony regarding the applicability of FOIA exemptions to the Oct. 2 Memo as an alternative to granting Plaintiffs' motion. Fed. R. Civ. P. 56(d). *See also Londrigan v. FBI*, 670 F.2d 1164, 1175, & n. 63 (D.C. Cir. 1981) (remanding to permit plaintiff to depose agents who prepared withheld documents).[62] Several issues of material fact related to attorney-client privilege could be resolved through further discovery including, *inter alia*: (1) whether the Oct. 2 Memo, or the analysis contained therein, was disclosed to any individual who did not have authority to speak on behalf of the agency; (2) whether the purpose of the Oct. 2 Memo was to provide legal advice about the shift in a policy, or to provide a legal justification for an existing policy; and (3) whether Defendants adopted the Oct. 2 Memo as the agency position on any issue or in dealings with the public.[63]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Renewed Motion for Summary Judgment and order the disclosure of the withheld documents, including the Oct. 2 Memo or, in the alternative, order further discovery with respect to the Oct. 2 Memo.

---

[61] *Compare* Doc. #58 Feb. 20, 2011 Declaration of Catrina Pavlik-Keenan ¶¶ 5, 11, 15, 18-20, Doc. #68 Mar. 23, 2011 Declaration of Ryan Law ¶¶ 28, 33, 35, *with* Doc. #86 Apr. 11, 2011 Declaration of Ryan Law ¶¶ 5-8.

[62] Plaintiffs submit the Declaration of Sunita Patel ("Patel Decl.") in support of their request.

[63] Patel Decl. ¶ 10.

Dated: September 12, 2011
New York, New York

Respectfully submitted,

/s/

PETER L. MARKOWITZ
SONIA R. LIN
Kathryn O. Greenberg Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
Tel: 212-790-0213
Fax: 212-790-0256
slin@yu.edu
pmarkowi@yu.edu

Attorneys for IJC and NDLON

/s/

GITANJALI GUTIERREZ
SUNITA PATEL
SCOTT PALTROWITZ
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
Tel: 212-614-6439
Fax: 212-614-6499
GGutierrez@ccrjustice.org
SPatel@ccrjustice.org
SPaltrowitz@ccrjustice.org

Attorneys for CCR and NDLON

/s/

PAULA A. TUFFIN
ANTHONY J. DIANA
THERESE CRAPARO
LISA R. PLUSH
JEREMY D. SCHILDCROUT
JARMAN RUSSELL
Mayer Brown LLP
1675 Broadway

New York, New York 10019
Tel: 212-506-2500
Fax: 212-262-1910
ptuffin@mayerbrown.com
adiana@mayerbrown.com
TCraparo@mayerbrown.com
lplush@mayerbrown.com
jschildcrout@mayerbrown.com
JRussell@mayerbrown.com

Attorneys for NDLON