UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK, *et al.*,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY, *et al.*,

Defendants.

No. 10 Civ. 3488 (SAS)
ECF Case

DEFENDANT UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT ON ITS WITHHOLDINGS PURSUANT TO EXEMPTION (b)(5) AND THE ATTORNEY-CLIENT PRIVILEGE AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT OR FOR DISCOVERY

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PRELIMINARY STATEMENT

In this Freedom of Information Act ("FOIA") case, Defendant United States Immigration and Customs Enforcement ("ICE") has withheld certain information from 73 "opt-out" records pursuant to exemption (b)(5) and the attorney-client privilege (the "attorney-client information" or the "withheld information"). Pursuant to this Court's July 11, 2011 decision, ICE was required to establish that the attorney-client information has been kept confidential in order to sustain its exemption. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 (SAS), 2011 WL 2693655, at *10, *18 (S.D.N.Y. July 11, 2011).[1] ICE has done this. It has contacted the senders and recipients of each of the 73 relevant documents, and has confirmed that none of those individuals disseminated the documents outside of the agency. ICE thus has carried its burden under FOIA and shown, with reasonably specific detail, that "'the [withheld] information logically falls within the claimed exemption[].'" *Wilner v. NSA*, 592 F.3d 60, 72-73 (2d Cir. 2009).[2]

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[1] Consistent with the applicable burdens of proof (*see infra* Part II.C.1), this Court also invited Plaintiffs to submit "any additional proof that the [withheld information] has been adopted or incorporated by reference by the agency, such that it can be considered secret law that should be released." *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *18.

[2] Plaintiffs mistakenly suggest that ICE must do more to carry its burden, and that *Wilner* is distinguishable on this point. (*See* Pls.' Br. at 11 n.32.) *Wilner* and many other cases make clear that an agency carries its burden under FOIA where it shows a logical connection between the withheld information and the claimed exemption. *See, e.g.*, *Wilner*, 592 F.3d at 73 ("'Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.'"); *N.Y. Civil Liberties Union v. DHS*, 771 F. Supp. 2d 289, 290 (S.D.N.Y. 2011) (same); *Kalwasinski v. BOP*, No. 08 Civ. 9593 (PAC)(MHD), 2010 WL 2541363, at *5 (S.D.N.Y. Mar. 12, 2010) (same); *NAACP Legal Defense & Educ. Fund v. HUD*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *9 (S.D.N.Y. Nov. 30, 2007) (an agency must show that "the withheld information 'logically falls within the claimed exemption'").

Plaintiffs, however, argue that all of the attorney-client information in each of the 73 relevant documents should be disclosed because ICE has not done enough to show that the information was kept confidential. (*See* Pls.' Br. at 12, 15-16.) Yet, as this Court has already recognized, the additional steps that Plaintiffs argue ICE should have taken would have been unduly burdensome and are unnecessary. ICE's inquiry was more than sufficient to show the requisite logical connection between the withheld information and the claimed exemption. (*See infra* Part I.)

Plaintiffs have also raised three additional arguments as to why the withheld information in one specific document, the October 2 Memorandum, should be disclosed. Specifically, Plaintiffs argue that: (1) ICE has failed to explain "'whether [the October 2 Memorandum] was written to justify an already existing policy or to lend support to an ongoing new policy or change of policy'"; (2) "ICE [has] fail[ed] to demonstrate that the Oct. 2 Memo was drafted with the intention of keeping the information contained therein confidential"; and (3) "the Oct. 2 Memo . . . was 'adopted as . . . [ICE] policy' and is therefore non-exempt 'working law.'" (*See* Pls.' Br. at 12, 14, 17.)

Each of these arguments fails. *First*, for purposes of the attorney-client privilege, it is irrelevant "whether [the October 2 Memorandum] was written to justify an already existing policy or to lend support to an ongoing new policy or change of policy." (*See infra* Part II.A.) What matters is whether the document was drafted for the purpose of providing legal advice, which, as this Court has already concluded, it was. (*See id.*) *Second*, there can be no reasonable dispute that ICE intended to keep the October 2 Memorandum confidential. (*See infra* Part II.B.) ICE labeled each version of the document "draft"; the first page of the document included a

disclaimer that "[t]his document contains confidential attorney-client communications . . . [and] is EXEMPT FROM RELEASE TO THE PUBLIC"; and ICE has never publicly referred to the document or the analysis contained therein. (*See id.*) *Third*, Plaintiffs have failed to establish that ICE has adopted the conclusions and reasoning of the October 2 Memorandum as the authoritative legal interpretation and guidance of the agency. (*See infra* Part III.C.) This deficiency is fatal to Plaintiffs' claim that the October 2 Memorandum constitutes the "working law" of the agency. (*See id.*)

Accordingly, this Court should grant ICE's renewed motion for summary judgment as to the withheld information, deny Plaintiffs' cross-motion for summary judgment as to the October 2 Memorandum, and deny Plaintiffs' request for discovery.

ARGUMENT

I. ICE HAS MET ITS BURDEN WITH RESPECT TO THE WITHHELD INFORMATION

As stated above, to meet its burden, ICE need only demonstrate, with reasonable specificity, that "'the information withheld logically falls within the claimed exemption.'" *See, e.g.*, *Wilner*, 592 F.3d at 73; *N.Y. Civil Liberties Union*, 771 F. Supp. 2d at 290; *Kalwasinski*, 2010 WL 2541363, at *5; *NAACP Legal Defense & Educ. Fund*, 2007 WL 4233008, at *9. ICE did so by submitting a detailed *Vaughn* index that: (1) describes the withheld information in each of the 73 relevant documents; (2) makes clear that the withheld information reflects confidential legal advice; and (3) for each document, states that the "[c]onfidentiality of the redacted information has been maintained." (*See* Connolly Decl., Ex. A.)

For example, the first document on the *Vaughn* index is an "[e]mail from OPLA [the Office of the Professional Legal Advisor] containing attachments with drafts of documents in

preparation for client meetings." (*Id.*) ICE has described the withheld information from this document as "[d]raft language and attorney recommendations sent by ELD [the Enforcement Law Division] OPLA," and has stated that "[c]onfidentiality of the redacted information has been maintained." (*Id.*) This description — which shows a logical connection between the withheld information and the claimed exemption — is representative of the entries for the other relevant documents. If anything, some of the other entries contain even more detail.[3] (*See id.*)

Moreover, ICE has submitted a declaration in which it describes the basis for its assertion that "[c]onfidentiality . . . has been maintained." (*See id.*, Ex. D, at ¶¶ 5-9.) That declaration explains that ICE engaged in a thorough process pursuant to which it: (1) identified the senders and recipients of each of the 73 relevant documents (based on the information reflected on the face of each document); (2) contacted each of those individuals; and (3) confirmed that none of those individuals has disseminated the documents to anyone outside of the agency. (*See id.*) In a case like this (where a FOIA requester makes a blanket challenge to the exemptions applied to dozens of documents), the FOIA requester will always be able to point to something else that the agency arguably could have done to support its claims of privilege. But that argument fails here because the steps ICE took were more than sufficient to establish that confidentiality was maintained.

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[3] For example, the second document on the *Vaughn* index is an email exchange "between SC [the Secure Communities program office] and OPLA." (Connolly Decl., Ex. A.) ICE has described the withheld information from this document as "[d]iscussion 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." (*Id.*) ICE has further stated that the "[c]onfidentiality of the redacted information has been maintained." (*Id.*)

In asserting that ICE should have done more to show that the withheld information was "kept confidential," Plaintiffs essentially argue that ICE should have sought to locate and question any person who at any time may have obtained a copy of any of the 73 relevant documents. (*See* Pls.' Br. at 15 (criticizing ICE for failing to locate and question all "individuals who were provided with hard copies of the document[s], in meetings for example, or people who received the documents via email after the cut-off date for the opt-out production").) This is no different from saying that ICE should have "trac[ed] the history of every movement of every document through every person in [the] agency" — a suggestion this Court has already rejected as "unduly burdensome, expensive, time consuming, [and] unnecessary."[4] (*See* Connolly Decl., Ex. C (Aug. 18, 2011 Hearing Tr.), at 28; *see also id.*, Ex. E (Aug. 24, 2011 Hearing Tr.), at 29 (stating that requiring ICE to "trac[e] the history of every single document would be nutty").)

Since ICE has carried its burden with respect to the withheld information, the burden now shifts to Plaintiffs to show that confidentiality has been waived. *See, e.g.*, *Bronx Defenders v. DHS*, No. 04 CV 8576 (HB), 2005 WL 3462725, at *3 (S.D.N.Y. Dec. 19, 2005); *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003). (*See also* Defs.' Br. at 10-11.) To carry their burden, Plaintiffs must demonstrate that ICE previously disclosed the *exact* information it is now withholding. *See, e.g.*, *id.* Plaintiffs have not come close to making this showing with respect to any of the withheld information.

Plaintiffs vaguely assert that "ICE [has] 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

[4] While Plaintiffs assert that "the disclosed documents demonstrate[] that individuals outside of ICE did, in fact, have custody of some of the contested documents" (Pls.' Br. at 16 n.41), the documents they cite do not support this assertion (*see id.*). Indeed, there is nothing in the record to suggest that ICE disclosed any of the specific information at issue here.

the agency." (Pls.' Br. at 9; *see id.* at 16.) Yet, Plaintiffs cite only one document to support this assertion: the March 30, 2010 email from the Washington D.C. Metropolitan Police Department (the "MPD") to the D.C. Coalition Against Domestic Violence (the "Bromeland Email"). (*See id.* at 10 n.31). As ICE explained in its opening brief, however, this email does not support Plaintiffs' assertion. At most, the Bromeland Email suggests that, at some point prior to March 30, 2010, someone at ICE or at the FBI disclosed to the MPD certain authorities that he or she then believed supported the proposition that participation in Secure Communities is mandatory. (*See* Lin Decl., Ex. GG.) This email does not suggest — much less establish — that ICE previously disclosed the precise information it is now withholding. This is particularly true with respect to the October 2 Memorandum, which was drafted approximately six months *after* the Bromeland Email was sent, and which was "rewrit[ten]" in late September/early October 2010. (*See, e.g.*, Lin Decl., Ex. N.)[5]

[5] As indicated in ICE's opening brief, to the extent ICE claimed additional exemptions over the documents at issue here, ICE reaffirms those exemption claims. (*See* Defs.' Br. at 1 n.1.) This includes ICE's application of the deliberative process privilege to the October 2 Memorandum. (*See id.* at 15-19.) Plaintiffs contend that ICE's continued assertion of the deliberative process privilege with respect to the October 2 Memorandum is an attempt to "relitigate issues already decided by this Court." (Pls.' Br. at 11.) To the contrary, in its July 11, 2011 decision, the Court left open the issue of whether the deliberative process privilege applied to the October 2 Memorandum. *See Nat'l Day Laborer Org. Network*, 2001 WL 2693655, at *18 (directing ICE to "provide more information as to the role that the [October 2 Memorandum] played in the deliberative process"). Although the Court subsequently issued an oral ruling that the October 2 Memorandum was not protected by the deliberative process privilege, it later rescinded that ruling. (*See* Docket No. 116.) For the reasons set forth in ICE's opening brief, ICE continues assert the deliberative process privilege over the October 2 Memorandum.

II. PLAINTIFFS' ARGUMENTS SPECIFIC TO THE OCTOBER 2 MEMORANDUM FAIL TO OVERCOME ICE'S ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE

A. The Nature of the Legal Advice Contained in the October 2 Memorandum Is Irrelevant

Plaintiffs argue that the October 2 Memorandum should be disclosed because ICE has not explained "'whether [the document] was written to justify an already existing policy or to lend support to an ongoing policy or change of policy.'" (*See* Pls.' Br. at 14.) This argument seeks to draw a false distinction between different types of legal advice. For purposes of the attorney-client privilege, there is no difference between legal advice regarding "an already existing policy" and legal advice regarding "an ongoing policy or change of policy." The attorney-client privilege protects both types of advice.[6] *See In re the County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (protected legal advice encompasses "the interpretation and application of legal principles to guide future conduct or to assess past conduct").

Moreover, this Court has already held that the October 2 Memorandum reflects protected legal advice. *See Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *17 (observing that the October 2 Memorandum "constitutes, as defendants have maintained, legal advice and analysis about a Secure Communities mandate"). Indeed, during the last hearing, this Court stated that, "[o]n its face, [the October 2 Memorandum] is attorney advice. There's no question about that." (Connolly Decl., Ex. E, at 24.) Accordingly, there is no open issue with respect to

[6] Plaintiffs assert that "at the time . . . 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." (Pls.' Br. at 14.) That assertion is irrelevant. Even if true (*i.e.*, even if the October 2 Memorandum contains legal advice seeking to justify a previously-implemented policy), that would not render the attorney-client privilege inapplicable. The attorney-client privilege would still apply unless Plaintiffs could show that ICE adopted both the conclusions and reasoning of the October 2 Memorandum, which they have not done. (*See infra* Part II.C.)

the legal advice prong of the attorney-client privilege. Plaintiffs' argument that the October 2 Memorandum does not contain the right type of legal advice is a non-starter.

B. ICE Intended to Keep the October 2 Memorandum Confidential

Plaintiffs also argue that the October 2 Memorandum should be disclosed because ICE has not shown that it intended to keep the document confidential. (*See* Pls.' Br. at 15.) It is clear, however, that ICE did in fact intend to keep this document confidential. Not only did ICE label each version of the document "draft," but it included the following language on the first page of each version:

> A Department of Homeland Security Attorney prepared this document for INTERNAL GOVERNMENT USE ONLY. This document is pre-decisional in nature and qualifies as an intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to legal matter for which the client has sought professional legal advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

(*See* Connolly Decl., Ex. H (Pls.' Aug. 24, 2011 Ltr.), at Ex. A.) This language is clear evidence of ICE's intent to keep the document confidential. *See Hollar v. IRS*, No. 95-1882, 1997 WL 732542, at *5 (D.D.C. Aug. 7, 1997) (inferring that "the IRS' employees were attempting to solicit confidential legal advice" based on the nature of the communications). Moreover, ICE has never referred to the document and its analysis publicly, which further supports the conclusion that ICE intended for the document to remain confidential.

To support their contrary argument, Plaintiffs make two assertions: (1) the document "was intended to be used as the basis for ICE's position that state and locality participation in Secure Communities was mandatory"; and (2) "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." (*See* Pls.' Br. at 15.) Even if true, these assertions do not establish that ICE intended to disclose the October 2 Memorandum publicly. Nor do any of Plaintiffs' exhibits suggest that this was ICE's intent. In short, Plaintiffs have failed to rebut the significant evidence that ICE intended to keep the October 2 Memorandum confidential.

C. Plaintiffs Have Failed to Establish Adoption

Plaintiffs' final argument — that the October 2 Memorandum should be disclosed because "it was 'adopted as . . . [ICE] policy' and is therefore non-exempt 'working law'" (Pls.' Br. at 17) — likewise fails. Plaintiffs bear the burden of proof with respect to adoption. (*See infra* Part C.1.) As explained below, they have failed to carry that burden. (*See infra* Part C.2.)

1. Plaintiffs Bear the Burden of Proving Adoption

Plaintiffs wrongly assert that ICE has the burden of proof with respect to adoption. (*See* Pls.' Br. at 18-19.) In fact, it is Plaintiffs who bear this burden. *See, e.g.*, *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184-85 (1975) (refusing to find that certain reports constituted the final opinions of the Renegotiation Board because there was no evidence "to support the conclusion that the reasoning in the reports [was] adopted by the Board as its reasoning"); *Brinton v. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) (refusing to find adoption because the plaintiff had failed to submit evidence sufficient to show adoption; "[a]lthough appellant alleges that advisory material from some of the requested documents was used extensively in a later State Department memorandum, there is no indication that any material was expressly adopted or incorporated by reference"); *Elec. Privacy Info. Ctr. v. DOJ*, 548 F. Supp. 2d 65, 78 (D.D.C. 2008) (observing that the government does not carry the burden

of proving adoption); *Security Fin. Life Ins. Co. v. Dep't of Treasury*, No. 03-102, 2005 WL 839543, at *6-*7 (D.D.C. Apr. 12, 2005) (same); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 70-71 (D.D.C. 2001) ("The agency does not have the burden of establishing that a document was not adopted by the agency. Rather, where it is unclear whether a recommendation provided the basis for the regulation, the recommendation is exempt from disclosure.").[7]

Placing the burden with respect to adoption on Plaintiffs makes perfect sense. In a case like this, where there is no evidence of adoption, the agency should not be required to bear the burden of disproving adoption. *Cf. Davis v. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (refusing to make the agency disprove waiver). Once an agency has met its initial burden of showing that the withheld information logically falls within the claimed exemption, it is incumbent on the FOIA requester to come forward with evidence of adoption. This conclusion is consistent with the case law cited above, in which courts — including the Supreme Court and the D.C. Circuit — have rejected adoption arguments where there is nothing concrete in the record to suggest that adoption has occurred. *See Renegotiation Bd.*, 421 U.S. at 184-85; *Brinton*, 636 F.2d at 605; *Trans Union LLC*, 141 F. Supp. 2d at 70-71.

[7] The cases on which Plaintiffs rely to support their contrary position that the agency bears the burden with respect to adoption either do not support it, are distinguishable, or are not persuasive. *See, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997) (holding that an agency invoking the deliberative process privilege has the burden of showing that the withheld information is both predecisional and deliberative (*i.e.*, that it qualifies for the privilege); this case does not state that the agency has the burden of disproving adoption); *Afshar v. Dep't of State*, 702 F.2d 1125, 1140 (D.C. Cir. 1983) (declining to address which party bears the burden of proof with respect to adoption because "there [was] substantial evidence in th[e] record that the memoranda at issue were . . . adopted"; here, by contrast, there is no such evidence — there is only Plaintiffs' conjecture); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 259 (D.C. Cir. 1982) (refusing to "impose on the IRS the obligation to account for the ultimate disposition and use of the disputed documents"); *FPL Group, Inc. v. IRS*, 698 F. Supp. 2d 66, 90 (D.D.C. 2010) (finding that the agency had not carried its burden with respect to certain documents because there was evidence in the record sufficient to suggest that adoption had occurred).

2. Plaintiffs Have Failed to Present Evidence of Adoption

Plaintiffs have failed to identify any evidence in the record sufficient to demonstrate that the October 2 Memorandum was adopted as a final agency position. As set forth in ICE's opening brief, to prove adoption, Plaintiffs must demonstrate that ICE accepted both the conclusions and the reasoning in the October 2 Memorandum. (*See* Defs.' Br. at 12-13.) *See also Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 358 (2d Cir. 2005); *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005). To carry that burden, Plaintiffs must present "evidence that [ICE] *actually* adopted or incorporated by reference the document at issue; *mere speculation will not suffice*." *La Raza*, 411 F.3d at 359 (second emphasis added). Here, Plaintiffs' adoption arguments amount to nothing more than speculation.

As a threshold matter, Plaintiffs fail to show that ICE ever made explicit, public reference to either the October 2 Memorandum's conclusions or its reasoning. While the Second Circuit has not adopted a "bright-line test" for determining whether a document has been adopted, *id.* at 357 n.5, courts in this Circuit have found adoption on the basis of explicit public references, *see id.* at 357-60; *Bronx Defenders*, 2005 WL 3462725, at *3-*5, and have found no adoption where such references are lacking, *see Wood*, 432 F.3d at 84 (finding no adoption where no "high-level DOJ officials made any public references to the . . . Memo"). Here, as the Court recognized in its July 11, 2011 decision, ICE "has not publicly relied upon the [October 2 Memorandum] or adopted it by reference." *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *17.

Plaintiffs are thus left to attempt to connect the dots using various declarations and exhibits in what amounts to a speculative effort to show that ICE adopted the October 2 Memorandum's conclusions and reasoning. In effect, as noted in ICE's opening brief, Plaintiffs'

adoption argument hinges on their claim that because the October 2 Memorandum contains a proposed legal justification for the position that Secure Communities is mandatory, and because ICE publicly stated that Secure Communities is mandatory shortly after the October 2 Memorandum was written, the October 2 Memorandum must contain the rationale for ICE's position. (*See* Defs.' Br. at 14.) This is precisely the type of speculation that is insufficient to prove adoption. "Certainly . . . where an agency, having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate's report." *La Raza*, 411 F.3d at 359.

Moreover, Plaintiffs' own declarations and exhibits contradict their assertion that the October 2 Memorandum represents the adopted position of the agency. For example, in one of the declarations, a representative of a non-governmental organization states that several months after the October 2 Memorandum was written, DHS officials informed him that participation in Secure Communities was mandatory on the basis of a single statute. (*See* Seckhavat Decl. at ¶¶ 8-9.) Meanwhile, in a different declaration, a representative of a different non-governmental organization states that, on November 8, 2010, ICE stated that the legal basis for its mandatory participation position rests on "the culmination of a number of statutes" (*see* Uribe Decl. at ¶ 15), whereas later ICE stated that its mandatory position rests on a single statute (*see id.* at ¶ 21).

Likewise, in their brief, Plaintiffs cite to a number of documents indicating that, since October 2, 2010, ICE has at various times identified "various legal authorities" to support its position on Secure Communities, including, *inter alia*, the Enhanced Security and Visa Entry Reform Act of 2002, the 9/11 Commission Report, the USA Patriot Act, the Border Security Act

of 2002, and DHS and DOJ appropriations bills. (Pls.' Br. at 9 & nn.29, 30.) That ICE has publicly stated that participation in Secure Communities is mandatory, and has provided various legal justifications for its position, is insufficient to prove that ICE adopted the analysis and conclusions in the October 2 Memorandum as the "working law" of the agency. *See La Raza*, 411 F.3d at 358. Plaintiffs' scattershot allegations are therefore insufficient to defeat ICE's application of the attorney-client privilege.

Furthermore, Plaintiffs misconstrue many of the internal agency communications regarding the October 2 Memorandum to which they cite. Plaintiffs assert that "the Oct. 2 Memo was duly circulated with clear statements that it represented the adopted legal interpretation of the agency." (Pls.' Br. at 7.) The exhibits they cite in support of this assertion, however, show no such thing. One email merely describes the October 2 Memorandum as "discuss[ing] the 'legal underpinning' of the 'opting out.'" (Lin Decl., Ex. O.) The remaining emails merely describe the nature of the document; they do not suggest that it is a final product, much less that it reflects the adopted views of the agency. (*See id.* Exs. P, Q, R.) In one of these emails, the Chief of the Enforcement Law Division ("ELD") — the ICE legal division responsible for drafting the October 2 Memorandum — noted that she had made minor edits to the document, stated that she wanted "to review again first thing in the morning," and asked the recipients of the email to inform ELD "whether [they had] any major concerns with [the October 2 Memorandum]." (*Id.* Ex. P.) The remaining emails refer to the October 2 Memorandum as a draft (*see id.* Exs. Q, R), and in one of the emails, the Chief of the ELD indicates that ELD is

"still reviewing" an email from ICE Deputy Director Beth Gibson, presumably in connection with the October 2 Memorandum (*see id.* Ex. R).[8]

In short, at most, these emails demonstrate that the October 2 Memorandum was circulated within the agency among employees involved in Secure Communities, and was edited and reviewed by these same employees. Plaintiffs' contentions notwithstanding, these emails contain no clear statement that the October 2 Memorandum represented the adopted legal position of the agency on the opt-out issue.

The purpose of the attorney-client privilege is "to promote open communication between attorneys and their clients so that fully informed legal advice may be given." *In re John Doe, Inc.*, 13 F.3d 633, 635-36 (2d Cir. 1994). While documents otherwise protected by the privilege may be subject to disclosure where the agency adopts their analysis and conclusions, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), the case law is clear that such adoption must be "*express*," *Access Reports v. DOJ*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (emphasis in original), and that "mere speculation will not suffice," *La Raza*, 411 F.3d at 359. Here, Plaintiffs urge the Court to order disclosure of the October 2 Memorandum on the basis of their speculation with respect to a host of documents, none of which make any explicit

[8] Plaintiffs also misstate Beth Gibson's role in drafting and reviewing the October 2 Memorandum. Specifically, Plaintiffs allege that "[t]he 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 . . . ." (Pls.' Br. at 7.) In fact, the email correspondence Plaintiffs cite suggests only that Gibson commented on a possible legal basis for the mandatory decision *before* reviewing an actual draft of the October 2 Memorandum. (*Compare* Lin Decl., Ex. L *with id.* Ex. N.) Moreover, even if Gibson had directed ICE attorneys to provide a legal basis for a policy position, that does not destroy the attorney-client privilege with respect to the legal advice that the attorneys ultimately provided. (*See supra* Part II.A.) In neither event does Gibson's comments during the drafting of the October 2 Memorandum demonstrate that the agency ultimately adopted the document's analysis and conclusions.

reference to the October 2 Memorandum, and which, at most, suggest a continuing evolution of ICE's legal analysis of the opt-out issue.

D. Plaintiffs' Request for Discovery Should Be Denied

As set forth above, Plaintiffs have failed to raise any material issues of fact with respect to the October 2 Memorandum. Most of their arguments are based on speculation, and all are insufficient as a matter of law. (*See supra* Parts I, II.) Accordingly, this Court should deny Plaintiffs' request for discovery as to this document. *See Carney v. Dep't of Justice*, 19 F.3d 807, 813 (2d Cir. 1994) (affirming the denial of a request for discovery where the request was "grounded in mere speculation"). Alternatively, if this Court were to conclude that there are still open issues with respect to the October 2 Memorandum, ICE respectfully requests an opportunity to address the issues in a further declaration.

CONCLUSION

For the reasons set forth above and in ICE's opening brief, this Court should: (1) find that ICE properly withheld the attorney-client information, including the October 2 Memorandum, under exemption (b)(5); (2) grant ICE's renewed motion for summary judgment; and (3) deny Plaintiffs' cross-motion for summary judgment or for discovery.

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Respectfully submitted,

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