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,

Plaintiffs,

- against -

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

Defendants.

No. 10 Civ. 3488 (SAS)
ECF Case

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON EXEMPTIONS APPLIED TO OPT-OUT RECORDS

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PRELIMINARY STATEMENT

Defendants United States Immigration and Customs Enforcement ("ICE"), United States Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), and Executive Office for Immigration Review ("EOIR") ("defendants"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in support of their motion for partial summary judgment on exemptions applied within their production of "opt-out records."[1]

On January 17, 2011, defendants produced over 14,000 pages of opt-out records in partial response to plaintiffs' Freedom of Information Act ("FOIA") request. Pursuant to FOIA's statutory exemptions, defendants withheld information that, if released, would risk circumvention of agency regulations or statutes, as well as information that would disclose law enforcement techniques, guidelines, and procedures. *See infra* Part B. Defendants also withheld portions of records that include information protected by the deliberative process and attorney-client privileges. *See infra* Part C. Finally, throughout their respective productions, defendants redacted information that, if released, would constitute an unwarranted invasion of personal privacy. *See infra* Part D.

Defendants' declarations and indexes demonstrate that the withholdings and redactions they applied fall squarely within FOIA's statutory exemptions. Accordingly, defendants' motion for partial summary judgment should be granted.

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[1] Defendant Office of Legal Counsel identified no documents responsive to plaintiffs' request for opt-out records, and therefore did not make a production in which exemptions were taken.

BACKGROUND[2]

This litigation concerns identical FOIA requests (collectively, the "Request") submitted by plaintiffs to each defendant on or about February 3, 2010. *See* Declaration of Bridget P. Kessler dated October 28, 2010 ("Kessler Decl."), Ex. A (FOIA request dated Feb. 3, 2010).[3] The Request sought production of a vast array of "any and all" records related to the immigration enforcement strategy Secure Communities. *See id.*

By Order dated December 17, 2010 (Docket #25), the Court directed defendants to produce to plaintiffs, by January 17, 2011, "records relating to the ability of states or localities to decline or limit participation in Secure Communities, including documents, memoranda, manuals, and communications referencing the technological capacity of ICE and the FBI to honor requests to opt-out, opt-in or limit participation in Secure Communities" (the "opt-out records").

On January 17, 2011, through undersigned counsel, defendants produced over 14,000 pages of opt-out records, withholding all or part of certain records pursuant to

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[2] The Government has not submitted a Statement Pursuant to Local Civil Rule 56.1. *See NAACP Legal Def. & Educ. Fund, Inc. v. HUD*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *1 n.1 (S.D.N.Y. Nov. 30, 2007) (finding strict compliance with Rule 56.1 unnecessary in FOIA case where "none of the relevant facts of the case are in dispute," and case "involve[s] purely legal inquiries, and resolution of those inquiries is not contingent on resolution of any factual disputes"); *see also Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting that submission of statement under former Local Rule 3(g) would be "meaningless," and that "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment") (citing *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994)), *aff'd,* 83 F.3d 41 (2d Cir. 1996). Of course, if the Court wishes the Government to submit a Rule 56.1 Statement in support of its motion, it will do so promptly.

[3] The Kessler Declaration was filed on October 28, 2010 (Docket #12), with plaintiffs' motion for a preliminary injunction on the opt-out records.

FOIA's statutory exemptions. ICE withheld portions of certain opt-out records pursuant to 5 U.S.C. §§ 552(b)(2), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). DHS withheld all or part of certain opt-out records pursuant to 5 U.S.C. §§ 552(b)(2), (b)(5), and (b)(6). FBI withheld portions of certain opt-out records pursuant to 5 U.S.C. §§ 552(b)(2), (b)(6), (b)(7)(C), and (b)(7)(E). EOIR withheld portions of certain opt-out records pursuant to 5 U.S.C. § 552(b)(6).

Defendants now move for partial summary judgment on their withholdings, and submit declarations and indexes to invoke, assert, and explain the exemptions upon which the withholdings are based. For the reasons that follow, defendants' motion should be granted.

ARGUMENT

A. FOIA and Summary Judgment Standards

FOIA is intended to "'facilitate public access to Government documents,' . . . and was designed 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) and *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976)). "Recognizing, however, that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements." *Martin v. DOJ*, 488 F.3d 446, 453 (D.C. Cir. 2007) (citation and internal quotation marks omitted); *see also CIA v. Sims*, 471 U.S. 159, 166-67 (1985) ("Congress recognized . . . that public disclosure is not always in the

public interest . . . ."). FOIA was thus designed to provide a workable and balanced formula "between the public's right to know and the government's legitimate interest in keeping certain information confidential" in order to protect legitimate government functions. *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citation omitted).

FOIA requires that Government records be disclosed in response to an appropriate request unless the records or information sought are subject to at least one of nine statutory exemptions. *See* 5 U.S.C. §§ 552(a)(3)(A), 552(b). Although FOIA's basic policy is in favor of disclosure, *see Rose*, 425 U.S. at 361, the Supreme Court has emphasized that the statutory exemptions are intended to have "meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

Summary judgment is the procedure by which courts resolve nearly all FOIA actions. *See Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."). Summary judgment is to be freely granted where, as here, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, the Government bears the burden of justifying nondisclosure of information, *see* 5 U.S.C. § 552(a)(4)(B), which it may sustain through agency declarations that identify the information at issue and the bases for the exemptions claimed, *see Carney*, 19 F.3d at 812.

Where, as here, the withholding of records pursuant to FOIA exemptions is at issue, the court conducts a *de novo* review to determine whether the Government has

properly withheld these records. *See* 5 U.S.C. § 552(a)(4)(B). In light of the unique nature of FOIA cases, courts will accord agency declarations a presumption of good faith and weight, so long as they are reasonably detailed. *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999); *Carney*, 19 F.3d at 812 ("Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden. . . . Affidavits submitted by an agency are accorded a presumption of good faith." (citation and internal quotation marks omitted)). "'[D]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face,' and a district court may forego discovery and award summary judgment on the basis of submitted affidavits or declarations." *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005) (quoting *Carney*, 19 F.3d at 812).

B. Defendants Properly Invoked FOIA Exemptions 2 and 7(E)

Exemption 2 protects from disclosure information that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 applies to materials "'used for predominantly internal purposes.'" *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (quoting *Crooker v. Bur. of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (*en banc*)). This exemption has been held to protect two types of information: (1) "routine matters of merely internal interest" (known as "low 2"), *see Crooker*, 670 F.2d at 1069 (citation and internal quotation marks omitted), and (2) "[p]redominantly internal documents[,] the disclosure of which would

risk circumvention of agency statutes" (known as "high 2"), *see Schiller*, 964 F.2d at 1207. "High 2" information includes internal procedures and guidelines, disclosure of which would benefit those attempting to circumvent the law. *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036-37 (N.D. Cal. 2005) (Exemptions 2 and 7(E) properly invoked for materials created in course of maintenance of terrorist watch lists because terrorists could educate themselves about watch list procedures and devise ways to circumvent watch lists).

Likewise, records compiled for law enforcement purposes may be withheld under Exemption 7(E) where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The protection afforded by Exemption 7(E) is categorical for information related to law enforcement techniques. *See Smith v. Bureau of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997). Even if a law enforcement technique itself has been disclosed, but the public is not generally aware of the manner and circumstances in which the technique is employed, or the specific methods used by the particular agency, Exemption 7(E) still applies. *See, e.g.*, *Blanton v. Dep't of Justice*, 63 F. Supp. 2d 35, 49-50 (D.D.C. 1999). In some cases, even commonly known procedures have been protected from disclosure when "circumstances of their usefulness . . . may not be widely known," *Wickline v. FBI*, Civ. A. No. 92-1189 SSH, 1994 WL 549756, at *5 (D.D.C. Sept. 30, 1994) (citation and internal quotation marks omitted), or "their use in concert

with other elements of investigation and in their totality directed toward a specific investigative goal constitutes a 'technique' which merits protection," *Struth v. FBI*, 673 F. Supp. 949, 969 (E.D. Wis. 1987).

FBI, DHS, and ICE appropriately applied "high 2" and 7(E) exemptions to all or part of certain categories of records. While there is insufficient space in this brief to conduct an entry-by-entry analysis of each assertion of the privilege, a few examples are illustrative:

FBI correctly applied the "high 2" exemption to protected internal telephone numbers, facsimile numbers, and e-mail addresses. *See* Third Declaration of David M. Hardy dated January 28, 2011 ("Third Hardy Decl."), ¶¶ 10-11, Ex. A (*Vaughn* index).[4] Courts have found this kind of information protected by Exemption 2 because its release likely would result in circumvention of the law. *See, e.g., Skinner v. DOJ*, --- F. Supp. 2d ----, 2010 WL 3832602, at *14 (D.D.C. Sept. 30, 2010) ("Internal file numbers, case numbers and telephone numbers fall within the scope of Exemption 2."); *Wilson v. U.S. Air Force*, Civil Action No. 5:08cv324-JMH, 2009 WL 4782120, at *3 (E.D. Ky. Dec. 9, 2009) (sustaining agency's redaction of e-mail addresses pursuant to Exemption 2); *Antonelli v. BOP*, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (holding that ICE properly redacted employees' direct telephone numbers because "their disclosure . . . would pose a risk to ICE operations [by] subject[ing] ICE employees to harassing telephone calls by members of the public . . . and would thereby inhibit the ability of ICE to carry out its

[4] A *Vaughn* index describes how the agency searched for records responsive to the FOIA request and the rationale for its assertion of FOIA exemptions, if any. *See generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

statutory and regulatory responsibilities" (internal quotation marks omitted)); *Queen v. Gonzales*, No. Civ. A. 96-1387 (JAR), 2005 WL 3204160, at *4 (D.D.C. Nov. 15, 2005) (sustaining application of Exemption 2 to internal facsimile numbers of FBI special agents because disclosure would "significantly risk circumvention of agency regulations and statutes").

In one instance, DHS applied the "high 2" exemption to portions of an e-mail discussing procedures relating to the designation and processing of known or suspected terrorists and other individuals of interest. *See* Declaration of Donna Lewis dated January 17, 2011 ("Lewis Decl."), Attachment (*Vaughn* index) at DHS000194. The redacted material is exempt because it contains information concerning law enforcement procedures that, if disclosed, could allow terrorists to design ways to circumvent those procedures. *See Gordon*, 388 F. Supp. 2d at 1036-37; *ACLU v. FBI*, 429 F. Supp. 2d 179, 194 (D.D.C. 2006) (agency properly withheld records that "could allow individuals 'to develop countermeasures' that could defeat the effectiveness of the agency's domestic terrorism investigations").

Throughout its production, ICE applied the "high 2" exemption to secured intranet URL addresses and other internal technological information. *See* Declaration of Catrina Pavlik-Keenan dated January 28, 2011 ("Pavlik-Keenan Decl."), ¶¶ 7-9. This information is exempt because it could serve as a blueprint for individuals seeking to breach agency firewalls or reverse-engineer paths into agency computer systems. *See, e.g., Unidad Latina En Accion v. DHS*, 253 F.R.D. 44, 50 (D. Conn. 2008) (holding that "[a]ny computer coding or web site information . . . is covered by both Exemptions (b)(2)

High and (b)(7)(E), since the information is internal to DHS and would disclose information that might significantly risk circumvention of the law"); *Knight v. NASA*, No. 2:04-cv-2054-MCE-GGH, 2006 WL 3780901, at *6 (E.D. Cal. Dec. 21, 2006) ("high 2" protects "information facilitating a computer hacker's access to vulnerable agency databases, like file pathnames, keystroke instructions, directory addresses and other internal information"); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 109 (D.D.C. 2005) (protecting "information [that] would allow access to an otherwise secure database and internal agency telephone numbers and access codes").

ICE also applied both the "high 2" and 7(E) exemptions to portions of records discussing challenges faced in the deployment of Secure Communities, including the technological capabilities and deficiencies of certain local jurisdictions. *See* Pavlik-Keenan Decl., Ex. A (*Vaughn* index) at ICE FOIA 10-2674.0002396 to .0002402; ICE FOIA 10-2674.0011263 to .0011264; ICE FOIA 10-2674.0011455 to .0011456; ICE FOIA 10-2674.0012542 to .0012546. Such information is exempt not only because it provides internal information that could "benefit those attempting to violate the law and avoid detection," *Crooker*, 670 F.2d at 1054 (quoting agency declaration), but also because it assesses the strengths and weaknesses of the operational capabilities of ICE and local law enforcement agencies. *See, e.g., Schreibman v. U.S. Dep't of Commerce*, 785 F. Supp. 164, 166 (D.D.C. 1991) (protecting assessment of vulnerabilities in agency's computer plan).

Defendants do not yet know whether plaintiffs will challenge none, some, or all of their assertions of Exemptions 2 and 7(E). To the extent plaintiffs make challenges to

specific documents, defendants will address those challenges in their reply papers. The Court also may conduct an *in camera* review of any challenged documents. *See* 5 U.S.C. § 552(a)(4)(B). Here, however, such a review will not be necessary because defendants' *Vaughn* indexes are specific enough to allow the Court to determine whether defendants appropriately applied these exemptions. *See Robert v. HHS*, No. 01-CV-4778 (DLI), 2005 WL 1861755, at *6 (E.D.N.Y. Aug. 1, 2005) (courts should not "spend scarce judicial resources for in camera review where defendant's affidavits are sufficiently descriptive and make clear that the privileges asserted apply").

C. Defendants Properly Invoked FOIA Exemption 5

FOIA Exemption 5 shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption thus incorporates "all the normal civil discovery privileges," *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991), including the deliberative process privilege, attorney-client privilege, and attorney work-product privilege, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-55 (1975); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) ("Stated simply, [a]gency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work product, executive privilege) are protected from disclosure under Exemption 5." (citation and internal quotation marks omitted)). In this case, defendants rely on Exemption 5 to withhold information under the deliberative process and attorney-client privileges.

1. Defendants Properly Invoked the Deliberative Process Privilege

The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150 (citation and internal quotation marks omitted); *accord Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001); *Grand Cent. P'ship, Inc.*, 166 F.3d at 481. The rationale is that government officials will not communicate candidly among themselves if every remark prior to final agency decision making is a potential item of discovery and front page news. *Klamath*, 532 U.S. at 8-9. It thus enhances "the quality of agency decisions," by protecting open and frank discussion among those who make those decisions. *Sears*, 421 U.S. at 151; *Grand Central P'ship*, 166 F.3d at 481.

For the deliberative process privilege to apply in the FOIA context, three requirements must be met. *First*, the material withheld must be "inter-agency or intra-agency" material. 5 U.S.C. § 552(b)(5); *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002). *Second*, it must be predecisional, or antecedent to the adoption of an agency policy. In determining whether a document is predecisional, the Government need not "point to a specific decision" made by the agency, so long as a document "was prepared to assist [agency] decisionmaking on a specific issue." *Tigue*, 312 F.3d at 80; *see also Sears*, 421 U.S. at 151 n.18 ("Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process."). *Third*, the material withheld must be

deliberative, *i.e.*, "actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (citations and internal quotation marks omitted). The privilege thus "focus[es] on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150 (citation and internal quotation marks omitted); *Hopkins*, 929 F.2d at 84-85; *see Vaughn*, 523 F.2d at 1144 (deliberative documents "make[] recommendations or express[] opinions on legal or policy matters").

Here, ICE properly applied Exemption 5 to withhold portions of e-mail discussions and draft documents that contain "a record of the pre-decisional deliberations of agency employees." Pavlik-Keenan Decl., ¶ 14. As with the "high 2" and 7(E) exemptions discussed *supra*, while there is insufficient space in this brief to conduct an entry-by-entry analysis of each assertion of the privilege, a few examples are illustrative:

In one case, ICE asserted Exemption 5 over a portion of an e-mail containing a discussion of issues concerning Secure Communities that did not reflect a final agency policy or decision. *See* Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.0003393 to .0003395. This information is clearly privileged. *See, e.g., MacNamara v. City of New York*, 249 F.R.D. 70, 84 (S.D.N.Y. 2008) (sustaining application of deliberative process privilege to memorandum "because it contain[ed] summaries of internal discussions regarding a preliminary version of the [mass arrest processing plan] for the [Republican National Convention], which necessarily provide[d] insight into the deliberative processes of [New York Police Department] decisionmakers") (citing *Petroleum Info.*

Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("To the extent that predecisional materials . . . reflect an agency's preliminary positions . . . on some policy matter, they are protected . . . .")).

Also subject to Exemption 5 was a portion of an email that identified existing problems at a strategy meeting and made suggestions on possible solutions to be explored by the ICE Program Management Office, *see* Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.001759 to .001761, and a portion of an email that discussed a proposed response on the issue of Santa Clara County, California, wishing to opt-out of Secure Communities, *id.* at ICE FOIA 10-2674.0003243 to .0003244. These documents are deliberative because they were "prepared in order to assist an agency decision maker in arriving at his [or her] decision." *Grand Cent. P'ship*, 166 F.3d at 483; *see also Tigue*, 312 F.3d at 80 (finding deliberative process privilege applicable to an Assistant United States Attorney's memorandum because it was "specifically prepared for use by the Webster Commission [an IRS consultant] in advising the IRS on its future policy with respect to [its] Criminal Investigation Division").

ICE also asserted the deliberative process privilege over drafts, including an "[e]mployee's draft paper recommending strategy for deploying [Secure Communities] in certain jurisdictions, including the employee's assessment of issues particular to particular jurisdictions that could affect such strategy." Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.0012573 to .0012585. Draft documents, as well as employee recommendations and proposals, are quintessentially deliberative. *See Grand Cent. P'ship*, 166 F.3d at 482; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866

(D.C. Cir. 1980) (the deliberative process privilege covers "subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"); *Lead Indus. Ass'n v. Occupational Safety & Health Admin.*, 610 F.2d 70, 85-86 (2d Cir. 1979) (finding deliberative process privilege applicable to drafts of preamble of standards that appeared in Federal Register).

2. Defendants Properly Invoked the Attorney-Client Privilege

"The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (citing *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)). The privilege also attaches to the advice rendered by the attorney. *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943-44 (2d Cir. 1992). Its purpose is "to encourage full and frank communication between attorneys and their clients," a necessary predicate for sound advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts*, 117 F.3d at 618. Indeed, "the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice." *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (citing *United States v. Doe (In re Grand Jury Investigation*), 399 F.3d 527, 534 (2d Cir. 2005)).

ICE properly asserted Exemption 5 to withhold documents under the attorney-client privilege. In one case, ICE withheld e-mail correspondence between its Office of

the Principal Legal Advisor ("OPLA") and its Office of the Assistant Secretary ("OAS"). *See* Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.0002022 to .0002023. On other occasions, ICE withheld email correspondence between OPLA and Secure Communities staff. *See, e.g., id.* at ICE FOIA 10-2674.0002210 to .0002212, ICE FOIA 10-2674.0002632 to .0002644. ICE also withheld documents reflecting "attorney comments" and "legal advice to the client." *See, e.g., id.* at ICE FOIA 10-2674.0002726 to .0002803. For the reasons explained above, the attorney-client privilege protects all of these documents from release; therefore, ICE's assertion of Exemption 5 over them was correct.

ICE also properly asserted the work product privilege over one document: ICE FOIA 10-2674.0003508 to .0003521. The work product privilege is incorporated into Exemption 5 and applies "to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears*, 421 U.S. at 154 (citations omitted); *see A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 146 (2d Cir. 1994) ("The attorney work product privilege protects the files and the mental impressions of an attorney . . . reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways prepared in anticipation of litigation." (citation and internal quotation marks omitted)). Here, the portion of the document withheld under the work product privilege is a string of e-mails between Secure Communities staff and DHS legal staff that includes "legal advice between attorney and client" and was created on September 14, 2010—*i.e.*, during the current litigation. *See* Pavlik-Keenan Decl., Ex. A

at ICE FOIA 10-2674.0003508 to .0003521. Accordingly, the work product privilege—not to mention the deliberative process and attorney-client privileges—is applicable, and ICE properly withheld the document under Exemption 5.

D. Defendants Properly Invoked FOIA Exemptions 6 and 7(C)

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The Supreme Court has interpreted Exemption 6 broadly, making clear that all information that "applies to a particular individual" meets the threshold requirement for protection under this exemption. *Id.* at 602. The statutory language concerning files "similar" to personnel or medical files has been read broadly by the Supreme Court to encompass any "information which applies to a particular individual." *Id.*; *see also New York Times Co. v. NASA*, 920 F.2d 1002, 1005, 1010 (D.C. Cir. 1990) (finding voice tapes from the space shuttle Challenger to be "similar files" because they identified crew members by the sound and inflection of their voices).

Once it has been established that the information at issue "applies to a particular individual," the focus of the inquiry turns to whether disclosure of the record at issue would "constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), which requires a balancing of the public's interest in disclosure against the interest in privacy that would be furthered by non-disclosure, *see U.S. Dep't of Defense v.*

FLRA, 510 U.S. 487, 495 (1994). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] *significantly* to public understanding *of the operations or activities of the government*." *Id.* at 495-96 (internal citation and quotation marks omitted) (first emphasis added); *see Hopkins*, 929 F.2d at 88. "The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA." *Associated Press v. DOJ*, 549 F.3d 62, 66 (2d Cir. 2008) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)).

Similarly, Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Like Exemption 6, Exemption 7(C) "call[s] for a balancing of the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." *McCutcheon v. HHS*, 30 F.3d 183, 185 (D.C. Cir. 1994) (citation and internal quotation marks omitted). As the Supreme Court explained in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, however, "Exemption 7(C)'s privacy language is broader than [that of] Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be 'clearly unwarranted,' the adverb 'clearly' is omitted from Exemption 7(C) . . . . Second, whereas Exemption 6 refers to disclosures that 'would constitute' an invasion of privacy, Exemption 7(C) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion." 489 U.S. 749, 756 (1989) (quoting 5 U.S.C. §§ 552(b)(6), (b)(7)(C)).

Construing the public interest component, courts have noted that the public interest "must be assessed in light of FOIA's central purpose," and that this purpose "is not fostered by disclosure about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) (citation and internal quotation marks omitted). Rather, the information must "*contribute significantly* to public understanding of the operations or activities of government . . . ." *Reporters Comm.*, 489 U.S. at 775 (emphasis added).

Throughout their respective productions, defendants applied Exemptions 6 and 7(C) to certain names, telephone numbers, and e-mail addresses of government employees, as well as names, telephone numbers, and e-mail addresses of third parties. *See* Pavlik-Keenan Decl., ¶¶ 19-21; Lewis Decl., ¶¶ 13-15; Declaration of Crystal Rene Souza, dated January 14, 2011, ¶ 8; *see generally* Third Hardy Decl., Ex. A. Revelation of this information will tell citizens nothing about "what their government is up to," *Reporters Comm.*, 489 U.S. at 773, and therefore should remain withheld. *See, e.g.*, *Budik v. Department of Army*, --- F. Supp. 2d ----, 2010 WL 3833828, at *13 (D.D.C. Sept. 30, 2010) (finding no public interest in disclosing government employee's e-mail address); *Amnesty Int'l v. CIA*, No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at *15-16 (S.D.N.Y. June 19, 2008) (sustaining non-disclosure of third party name, phone number, and fax number); *Phillips v. ICE*, 385 F. Supp. 2d 296, 308 (S.D.N.Y. 2005) (withholding names and telephone numbers of government employees).

CONCLUSION

For the foregoing reasons, Defendants' partial motion for summary judgment on exemptions should be granted.

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Respectfully submitted,

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