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, v. 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

DEFENDANT UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S RENEWED MOTION FOR SUMMARY JUDGMENT ON ITS WITHHOLDINGS PURSUANT TO EXEMPTION (b)(5) AND THE ATTORNEY-CLIENT PRIVILEGE

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Defendant United States Immigration and Customs Enforcement ("ICE"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its renewed motion for summary judgment on information withheld from its January 17, 2011, production of "opt-out records" pursuant to Freedom of Information Act ("FOIA") exemption (b)(5), 5 U.S.C. § 552(b)(5).

PRELIMINARY STATEMENT

On January 17, 2011, in partial response to Plaintiffs' FOIA request, ICE produced thousands of pages of records relating to the issue of whether states and localities may "opt-out" of participation in Secure Communities, an immigration enforcement strategy. ICE withheld certain information from these records pursuant to exemption (b)(5) and the attorney-client privilege (the "attorney-client information" or the "withheld information").[1] After an initial round of summary judgment briefing, this Court identified only one deficiency with respect to ICE's withholdings under the attorney-client privilege—the Court was not yet satisfied that ICE had established that it has maintained the confidentiality of the attorney-client information. As a result, on July 11, 2011, the Court denied without prejudice ICE's motion for summary judgment on its withholding of the attorney-client information and stated that, "for each document that [ICE] seek[s] to withhold under the attorney-client privilege, [ICE] must represent that confidentiality has been maintained." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 (SAS), 2011 WL 2693655, at *10 (S.D.N.Y. July 11, 2011).

[1] Consistent with the Court's comments during the conference on August 24, 2011, this brief discusses primarily the applicability of the attorney-client privilege to the withheld information. To the extent ICE claimed additional exemptions over the documents at issue, ICE reaffirms, and does not waive any of its arguments regarding, the applicability of those exemptions. Moreover, with respect to the versions of the memorandum dated October 2, 2010, over which ICE asserted the attorney-client privilege, this brief also addresses the applicability of the deliberative process privilege to those documents. *See infra* Part III.

ICE has since submitted a supplemental *Vaughn* index and supplemental declarations in which it represents that confidentiality of the attorney-client information has been maintained, and explains the thorough inquiry it undertook to make that representation. Through these materials, ICE respectfully submits that it has carried its burden with respect to the withheld information—specifically, it has demonstrated that "the information logically falls within the claimed exemption[]." *Wilner v. NSA*, 592 F.3d 60, 72-73 (2d Cir. 2009) (citation and internal quotation marks omitted).

Plaintiffs have claimed that exemption (b)(5) does not apply because (1) ICE has waived the attorney-client privilege, and (2) ICE has adopted both the conclusions and reasoning set forth in the withheld information. Plaintiffs, however, bear the burden of proving both waiver and adoption—and, as explained below, they have failed to carry their burden. Accordingly, because ICE has demonstrated that the withheld information logically falls within exemption (b)(5), and because Plaintiffs have failed to carry their burden with respect to waiver or adoption, the Court should grant ICE's renewed motion for summary judgment with respect to the attorney-client information. In the alternative, ICE is entitled to summary judgment on its withholding of versions of the memorandum dated October 2, 2010 (collectively, the "October 2, 2010 Memorandum") because, in addition to being protected by the attorney-client privilege, the October 2 Memorandum is also protected by the deliberative process privilege.

BACKGROUND

On January 17, 2011, in partial response to Plaintiffs' FOIA request, ICE produced approximately 11,000 pages of records relating to the issue of whether states and localities may opt-out of participation in Secure Communities. *See Nat'l Day Laborer Org. Network*, 2011 WL

2693655, at *3. ICE withheld certain of these records in whole or in part pursuant to FOIA exemptions (b)(2), (b)(5), (b)(6), and (b)(7). *Id.* ICE invoked exemption (b)(5) to withhold, *inter alia*, information protected by the attorney-client privilege. *See id.* at *10. Among the records that ICE withheld pursuant to exemption (b)(5) and the attorney-client privilege were several versions of the October 2, 2010 Memorandum. *See id.* at *18. On January 28, 2011, ICE moved for summary judgment on all of its withholdings, including its withholding of the attorney-client information. *See id.* at *3. On February 11, 2011, Plaintiffs cross-moved for partial summary judgment, challenging, *inter alia*, ICE's application of exemptions (b)(5), (b)(6), and (b)(7) to a specific set of records identified in exhibits A-D and F to the Declaration of James F. Horton dated February 11, 2011. *See id.*

On July 11, 2011, the Court issued an Opinion and Order (the "July 11 Order") in which it granted in part and denied in part ICE's motion for summary judgment. *See id.* at *24. With respect to the attorney-client information, the Court denied the motion without prejudice, based on its finding that ICE had not established that it has maintained the confidentiality of the withheld information. *See id.* at *10. The Court, however, did not identify any other deficiencies with respect to ICE's withholding of the attorney-client information. *See id.* For example, the Court rejected Plaintiffs' argument that ICE had failed to establish that the withheld information constitutes legal advice. *See id*. Indeed, the Court stated only that "for each document that [ICE] seek[s] to withhold under the attorney-client privilege, [ICE] must represent that confidentiality has been maintained." *Id.*; *see also id.* at *18 (ordering ICE to "establish that the confidentiality of the [October 2, 2010 Memorandum] has been maintained"). Accordingly,

pursuant to the July 11 Order, the only thing left for ICE to do with respect to the attorney-client information was to confirm confidentiality pursuant to the Court's request.

In compliance with the July 11 Order, on August 8, 2011, ICE submitted a supplemental *Vaughn* index in which it represented that the "[c]onfidentiality of the [attorney-client] information has been maintained." *See* Declaration of Christopher Connolly dated Sept. 2, 2011 ("Connolly Decl."), Ex. A (Supplemental *Vaughn* index). In addition, ICE's Deputy FOIA Officer, Ryan Law, submitted a declaration (the "Law Declaration") in which he affirmed that confidentiality has been maintained. As Mr. Law explained:

> Pursuant to the Court's July 11, 2011, Order in this matter, ICE personnel involved in attorney client communications that ICE withheld from plaintiffs under FOIA Exemption (b)(5) have reviewed all such communications for the purpose of determining whether confidentiality has been maintained. Each of those personnel have responded that confidentiality has in fact been maintained.

See id., Ex. B (Declaration of Ryan Law dated Aug. 8, 2011) at ¶ 4.

On August 18, 2011, the Court held a conference during which it addressed, *inter alia*, the sufficiency of the Law Declaration. As an initial matter, the Court rejected any suggestion that ICE should be required to "trac[e] the history of every movement of every document through every person in [the] agency." *Id.*, Ex. C (Aug. 18, 2011 Hearing Tr.) at 28. The Court recognized that such a requirement would be "unduly burdensome, expensive, time consuming, [and] unnecessary," *id.*, and instead ordered ICE "to submit a supplemental declaration that simply says how it is [that Mr. Law] was able to make the representation that each of these personnel responded that confidentiality has in fact been maintained, what they [were] asked to do, what did they do, how did he make this determination," *id.* at 30.

On August 23, 2011, Mr. Law submitted a supplemental declaration (the "Supplemental Law Declaration") in which he explained in greater detail the steps that ICE took to determine that the confidentiality of the withheld information has been maintained. First, "Agency Counsel identified the senders and recipient(s) of each [relevant] document (based on the information reflected on the face of the . . . document), as well as the ICE program offices in which each of those individuals is located." *Id.*, Ex. D (Supplemental Declaration of Ryan Law dated Aug. 23, 2011) at ¶ 5. During the course of this work, agency counsel determined that the senders and recipients were all ICE or Department of Homeland Security ("DHS") employees. *Id.* at ¶ 6. None of the documents at issue "bears an external email address or non-Agency sender/recipient." *Id.*

ICE counsel then sent emails to a central point of contact ("POC") in each of the relevant program offices requesting that the POCs "(1) contact each sender and recipient located in their respective program offices; and (2) have the senders and recipients examine the . . . documents on which their names appear and report back on whether they had disseminated the documents to anyone outside of the Department of Homeland Security or its component agencies." *Id.* at ¶ 7. "Agency Counsel either attached the relevant . . . documents to the emails it sent to the program offices, or had the documents uploaded to a shared drive that could be accessed by the senders and recipients." *Id.* at ¶ 8.

Thereafter, "[t]he POCs advised Agency Counsel that they had received either a verbal or written response from each sender and recipient," and that "the senders and recipients had all confirmed that they had not disseminated the . . . documents to any non-Agency personnel." *Id.* at ¶ 9. ICE counsel conveyed that information to Mr. Law. *Id.*

Mr. Law explained that he based his representation that the confidentiality of the withheld information has been maintained on the above-described process. *Id.* at ¶ 10. Mr. Law also confirmed that the October 2, 2010 Memorandum was among the records reviewed pursuant to this process. *Id.* at ¶ 11. In total, 73 documents were reviewed pursuant to this process. *See id.* at ¶ 8 & Ex. A (list of attorney-client documents reviewed for confidentiality).

ARGUMENT

I. LEGAL STANDARDS

FOIA cases are typically and appropriately decided on motions for summary judgment. *See, e.g.*, *Ferrigno v. DHS*, No. 09-5878, 2011 WL 1345168, at *3 (S.D.N.Y. Mar. 29, 2011). An agency is entitled to summary judgment if it demonstrates that each exempt record either has been produced or is exempt from disclosure in whole or in part under a FOIA exemption. *See Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 270-71 (S.D.N.Y. 2009).

In moving for summary judgment, an agency may rely on a reasonably detailed and non-conclusory declaration. *See Wilner*, 592 F.3d at 73; *Carney*, 19 F.3d at 812. Agency declarations are accorded a presumption of good faith where they "establish a logical connection between the information withheld and the exemption claimed." *Adamowicz v. IRS*, 672 F. Supp. 2d 454, 468 (S.D.N.Y. 2009). Accordingly, summary judgment is appropriate based on an agency declaration so long as the agency's stated justifications for its withholdings "appear[] logical or plausible." *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

An agency "has the burden of proving the applicability of a FOIA exemption and „may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemption[].'" *Id.* at 72-73 (quoting *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996)); *see Adamowicz*, 672 F. Supp. 2d at 468. Importantly, however, once an agency has shown a logical connection between the withheld information and the claimed exemption, the burden shifts to the requester to prove waiver, adoption, or some other reason why the exemption should not apply. *See, e.g.*, *Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (requester bears the burden of proving waiver); *Bronx Defenders v. DHS*, No. 04-8576, 2005 WL 3462725, at *3 (S.D.N.Y. Dec. 19, 2005) (same); *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 78 (D.D.C. 2008) ("government does not carry the burden of proving that documents were not adopted formally or informally" (citing *Security Financial Life Ins. Co. v. Dep't of Treasury*, No. 03-102, 2005 WL 839543, at *6-*7 (D.D.C. Apr. 12, 2005))); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 70 (D.D.C. 2001) ("The agency does not have the burden of establishing that a document was not adopted by the agency.").

II. THE ATTORNEY-CLIENT INFORMATION IS PROPERLY WITHHELD UNDER EXEMPTION (b)(5) AND THE ATTORNEY-CLIENT PRIVILEGE

A. ICE Has Demonstrated that the Attorney-Client Information Logically Falls Within Exemption (b)(5)

Exemption (b)(5) protects confidential communications between agency attorneys and their clients that were made for the purpose of obtaining or providing legal advice. *See, e.g.*, *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *5; *Adamowicz*, 672 F. Supp. 2d at 470. Here, for each challenged document withheld pursuant to the attorney-client privilege, ICE's supplemental *Vaughn* index establishes that the withheld attorney-client information constitutes

communication between ICE attorneys and their clients that were made for the purpose of obtaining or providing legal advice. *See* Connolly Decl., Ex. A (describing the withheld information); *see also Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *18 (finding that the October 2, 2010 Memorandum "contains legal advice and analysis" sent by ICE attorneys to the Assistant Deputy Director of ICE). Indeed, following the July 11 Order, the only element of the attorney-client privilege that ICE still needed to show with respect to the attorney-client information was that "confidentiality has been maintained." *Id.* at *10; *see also* Connolly Decl., Ex. E (Aug. 24, 2011 Hearing Tr.) at 24 ("On its face, [the October 2 Memorandum] certainly is attorney advice. There's no question about that. So the only question is, has the government carried its burden to show that it's entitled to protection of the privilege because . . . it was kept confidential.").

ICE's supplemental *Vaughn* index sets forth the basis for the applicability of the attorney-client privilege with respect to each challenged document. *See* Connolly Decl., Ex. A. Furthermore, through the Law Declaration and the Supplemental Law Declaration, ICE has carried its burden as to confidentiality. Not only has ICE represented that "confidentiality has in fact been maintained," *see id.*, Ex. B at ¶ 4, but it has explained the steps it took to make that determination, *see id.*, Ex. D at ¶¶ 5-9. As detailed above and in the Supplemental Law Declaration, ICE initiated a thorough process through which it contacted the senders and recipients of each of the 73 relevant documents and confirmed that none of them had disseminated the documents outside of the agency. *See id.*

In light of the above, ICE has carried its burden as to the attorney-client information. It has shown that the information "logically falls" within exemption (b)(5). *Wilner*, 592 F.3d at 72-

73. To require ICE to make any additional showings as to confidentiality would be "unduly burdensome, expensive, time consuming, [and] unnecessary." Connolly Decl., Ex. C at 28; *see Davis*, 968 F.2d at 1279 (refusing to make the agency "prov[e] the negative—that information has *not* been revealed—[because that] might require the government to undertake an exhaustive, potentially limitless search" (emphasis in original)).

Because ICE has demonstrated that the withheld information "logically falls" within exemption (b)(5), it is now Plaintiffs' burden to show that there is some reason why that information should nonetheless be disclosed. *See* cases cited *supra* Part I. As demonstrated below, Plaintiffs have failed to satisfy their burden.

B. Plaintiffs Have Failed to Prove Waiver, Adoption, or Any Other Reason Why Exemption (b)(5) Should Not Apply to the Attorney-Client Information

Plaintiffs have argued that the withheld information should be disclosed because (1) it has been shared with non-agency personnel or low-level agency personnel unconnected to the Secure Communities policy-making process and, thus, there has been a waiver of the attorney-client privilege, and (2) ICE has adopted both the conclusions and analysis set forth in the withheld information. *See, e.g.*, Pls.' Mem. of Law in Support of Cross-Mot. for Summ. J. on Exemptions [Docket #49] ("Pls.' Mem.") at 13-16, 21-22; Connolly Decl., Ex. F (Pls.' Aug. 11, 2011 Ltr.) at 2-8[2]; *id.*, Ex. H (Pls.' Aug. 24, 2011 Ltr.) at 1-5[3]. These arguments are unavailing.

As an initial mater, Plaintiffs have wrongly argued that it is ICE's burden to prove that there has been no waiver or adoption. *See id.* at 5-6. In accordance with the cases cited above, Plaintiffs bear the burden of proof with respect to waiver and adoption. *See, e.g.*, *Bronx*

[2] Defendants responded to Plaintiffs' August 11, 2011 letter in a letter dated August 17, 2011. *See* Connolly Decl., Ex. G.

[3] Plaintiffs submitted their August 24, 2011 letter in response to a letter from Defendants dated August 23, 2011. *See* Connolly Decl., Ex. I.

Defenders, 2005 WL 3462725, at *3 (requester bears the burden of proving waiver); *Security Financial Life Ins. Co.*, 2005 WL 839543, at *6-*7 (requester bears the burden of proving adoption).

To establish waiver, Plaintiffs must "demonstrate „that the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld.'" *Bronx Defenders*, 2005 WL 3462725, at *3 (quoting *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989)); *see Lopez v. Dep't of Justice*, No. 03-5192, 2004 WL 626726, at *1 (D.C. Cir. Mar. 29, 2004); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that previous disclosures did not constitute waiver because they "did not precisely track the records sought to be released"); *Afshar v. Dep't of State*, 702 F.2d 1125, 1131-32 (D.C. Cir. 1983) (finding that plaintiff failed to establish waiver where "the withheld information is in some material respect different from that to which plaintiff refers"); *Davis*, 968 F.2d at 1279. "„Specificity is the touchstone in the waiver inquiry, and thus, neither general discussions of [a] topic nor partial disclosures of information constitute[s] waiver of an otherwise valid FOIA exemption.'" *Bronx Defenders*, 2005 WL 3462725, at *3 (quoting *Dow Jones & Co. v. Dep't of Justice*, 880 F. Supp. 145, 151 (S.D.N.Y. 1995)). Accordingly, for Plaintiffs to show that ICE has waived its right to withhold the attorney-client information, they must show that ICE has previously "disclosed the exact information at issue." *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 966 (C.D. Cal. 2003); *see Nissen Foods, Co. v. NLRB*, 540 F. Supp. 584, 586 (E.D. Pa. 1982) ("the scope of any waiver [under exemption 5] is defined by, and co-extensive with, the breadth of the prior disclosure"); *see also Mobil Oil*, 879 F.2d at 701

(finding that "the release of certain documents" does not "waive[] the exemption as to other documents").

Here, Plaintiffs have failed to submit evidence sufficient to establish waiver. They have cited only two documents to support their waiver argument, and neither supports even an inference of waiver. The first document is an October 8, 2010 "email to [the] author of [the] October 2 Memo showing [that the] memo [was] sent to DHS and conveying [the] compliments of [a] DHS official on the quote ‚excellent' memo." *See* Connolly Decl., Ex. F at 4. The second is a March 30, 2010 email from the Washington, D.C. Metropolitan Police Department (the "MPD") to a non-governmental organization identifying certain authorities that ICE and the FBI allegedly identified as supporting the position that participation in Secure Communities is mandatory. *See* Pls.' Mem. at 21-22; Decl. of James F. Horton [Docket #48] at Ex. I.

Neither of these emails demonstrates that ICE previously disclosed the "exact information" that it is now withholding. *Coastal Delivery Corp.*, 272 F. Supp. 2d at 966. The October 8, 2010 email merely suggests that the October 2, 2010 Memorandum was transmitted *within* DHS to individuals involved in the Secure Communities policy-making process. *Cf. Coastal States Gas Corp v. Dep't of Energy.*, 617 F.2d 854, 864 (D.C. Cir. 1980) (confidentiality is maintained so long as the documents "were circulated no further than among those members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication" (internal quotation marks omitted)). This plainly does not constitute a waiver. Furthermore, the October 8, 2010 email provides no basis for finding that ICE waived the attorney-client privilege with respect to the attorney-client information contained in the other challenged documents.

Moreover, the March 30, 2010 email at most suggests that, at some point prior to March 30, 2010, someone at ICE or the FBI may have disclosed to the MPD certain authorities that he or she then believed supported the proposition that participation in Secure Communities is mandatory. Plaintiffs have not established that this information is identical to any of the withheld information. Certainly, Plaintiffs cannot establish that fact with respect to the October 2, 2010 Memorandum, which was written six months *after* the March 30, 2010 email. Disclosure of the attorney-client information would therefore reveal information that is different in kind and far more detailed than that contained in the March 30, 2010 e-mail—namely, the precise advice that was conveyed by ICE attorneys to agency personnel on specific dates. Accordingly, Plaintiffs have failed to carry their burden with respect to waiver. *See Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *23 (holding that there was no waiver as to an attorney's comments on a document, even though the attorney's edits to the document were disclosed, because "the edits do not reflect the identical information as the comments"); *Bronx Defenders*, 2005 WL 3462725, at *7 (refusing to find waiver where there was "no evidence that the specific analysis provided in the [withheld] Email has been disclosed to the public"); *Coastal Delivery Corp.*, 272 F. Supp. 2d at 966 (rejecting the requester's waiver argument because the withheld information was "merely the same category of information, not the exact information, that has been disclosed").

Likewise, Plaintiffs have failed to carry their burden with respect to adoption. To prove adoption, Plaintiffs must demonstrate that ICE accepted both the conclusions and the reasoning set forth in the withheld information. *See Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005) ("Mere reliance on a document's conclusions does not necessarily

involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference."); *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005) ("There is no evidence in the record from which it could be inferred that DOJ adopted the reasoning of the Memo, and . . . this failure is fatal."); *see also Afshar*, 702 F.2d at 1143 n.22 ("If the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately reflected the decisionmaker's thinking."); *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C. Cir. 1991) (citing cases in support of its determination that the Supreme Court "has refused to equate reference to a report's conclusions with adoption of its reasoning, and it is the latter that destroys the privilege"). In sum, to carry their burden, Plaintiffs must present "evidence that [ICE] *actually* adopted or incorporated by reference the [conclusions and reasoning of the withheld information]; *mere speculation will not suffice*." *La Raza*, 411 F.3d at 359 (first emphasis in original; second emphasis added).

Here, Plaintiffs have identified only one attorney-client document that ICE allegedly adopted—the October 2, 2010 Memorandum. *See, e.g.*, Connolly Decl., Ex. F at 1-8; *id.*, Ex. H at 1-2. This is the only document for which Plaintiffs have even attempted to proffer evidence of adoption. Consequently, there can be no finding of adoption with respect to the rest of the attorney-client information at issue.

Moreover, the evidence that Plaintiffs have submitted in connection with the October 2, 2010 Memorandum is insufficient to show adoption. As a threshold matter, as the Court has already recognized in the July 11 Order, ICE "has not publicly relied upon the [October 2, 2010 Memorandum] or adopted it by reference." *Nat'l Day Laborer Org. Network*, 2011 WL

2693655, at *17. Nonetheless, Plaintiffs have cited various documents that they claim show that that the October 2, 2010 Memorandum contains "the rationale and legal basis" for ICE's position that participation in Secure Communities is mandatory. *See* Connolly Decl., Ex. F at 5-8 & nn. 4, 5. Yet these documents show no such thing. At most, they indicate that (1) the October 2, 2010 Memorandum was drafted to provide a proposed legal justification for the proposition that Secure Communities is mandatory, *see id.* at 5-6 & n.4, and (2) on October 6, 2010 (*i.e.*, after the October 2, 2010 Memorandum was drafted and circulated within the agency), ICE publicly stated that participation in Secure Communities is mandatory, *see id.* at 6-8 & n.5. At bottom, Plaintiffs' adoption argument boils down to the following: the October 2, 2010 Memorandum contains a proposed legal justification for the proposition that Secure Communities is mandatory; on October 6, 2010, ICE publicly stated that Secure Communities is mandatory; and therefore, because the October 2, 2010 Memorandum preceded ICE's public statement by only a few days, it *must*, by Plaintiffs' lights, contain the rationale that ICE accepted for its position. *See id.* at 5-8. However, this is precisely the type of "mere speculation" that is insufficient to demonstrate adoption. *La Raza*, 411 F.3d at 359; *see also id.* ("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.").

Even if ICE has taken a policy position consistent with the conclusions in the October 2, 2010 Memorandum (*i.e.*, that there is a legal basis for the proposition that participation in Secure Communities is mandatory), there is no evidence that ICE adopted the document's reasoning. ICE has not publicly referred to the October 2, 2010 Memorandum or otherwise indicated

agreement with its analysis. *See Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *17. Moreover, on October 6, 2010, when ICE publicly stated that participation in Secure Communities is mandatory, it did not explain its reasoning. Under these circumstances, there can be no finding of adoption. *See, e.g.*, *Wood*, 432 F.3d at 84 (declining to find adoption where no "high-level DOJ officials made any public references to the . . . Memo" and there was no other "evidence in the record from which it could be inferred that DOJ adopted the reasoning of the Memo"); *Azmy v. Dep't of Defense*, 562 F. Supp. 2d 590, 604 (S.D.N.Y. 2008) (refusing to find adoption where it was not clear "what information [the decision-maker] found compelling or persuasive in making his choice"); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 185-86 (1975) (declining to find adoption where the Renegotiation Board received the two reports from subordinate divisions to aid its deliberation and then issued a final ruling without giving any substantive reasoning or referring to the reports in any way).

Accordingly, Plaintiffs have failed to—and, indeed, cannot—carry their burden of demonstrating either waiver or adoption with respect to any of the attorney-client information, including the October 2, 2010 Memorandum. ICE is therefore entitled to summary judgment on its withholdings.

III. IN THE ALTERNATIVE, THE OCTOBER 2, 2010 MEMORANDUM IS ALSO PROPERLY WITHHELD UNDER EXEMPTION (b)(5) AND THE DELIBERATIVE PROCESS PRIVILEGE

For the reasons discussed above, the Court should grant ICE summary judgment on the FOIA exempt status of the withheld information, including the October 2, 2010 Memorandum, based on the attorney-client privilege. In the alternative, however, the Court should find that the October 2, 2010 Memorandum is subject to withholding under the deliberative process privilege.

The deliberative process privilege protects from disclosure documents that are both "predecisional and deliberative." *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations and internal quotation marks omitted). "A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision." *Id.* "A document is deliberative when it is actually . . . related to the process by which policies are formulated." *Id.* The purpose of this privilege is to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Accordingly, "[t]he privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policies of the agency." *Grand Central P'ship*, 166 F.3d at 482 (citations and internal quotation marks omitted).

ICE has withheld the October 2, 2010 Memorandum pursuant to both the attorney-client and deliberative process privileges. *See* Declaration of Catrina Pavlik-Keenan dated Jan. 28, 2011 [Docket # 35], Ex. A (*Vaughn* index). In the July 11 Order, the Court directed ICE to "provide more information as to the role that the [October 2, 2010 Memorandum] played in the deliberative process . . . ." *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *18. Accordingly, in its supplemental *Vaughn* index submitted on August 8, 2011, ICE explained that the October 2, 2010 Memorandum was "drafted by [the ICE Office of the Principal Legal Advisor] as advice to the client in response to a client request for guidance on the mandatory v. voluntary question of participation in [Secure Communities]." *See* Connolly Decl., Ex. A. In other words, the October 2, 2010 Memorandum was created "to lend support in an intra-agency

debate about shifting the policy" rather than to "justify an existing policy."[4] *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *17. ICE's description of the October 2, 2010 Memorandum is sufficient to demonstrate that the document is logically subject to withholding pursuant to the deliberative process privilege. *See Wilner*, 592 F.3d at 73.

As with the attorney-client privilege, the deliberative process privilege may be waived where the agency "expressly . . . adopt[s] or incorporate[s] [a document] by reference . . . in what would otherwise be a final opinion." *NLRB*, 421 U.S. at 161. In other words, an agency cannot 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 Gas Corp.*, 617 F.2d at 868. However, "there must be evidence that an agency has *actually* adopted or incorporated by reference the document at issue; mere speculation will not suffice." *La Raza*, 411 F.3d at 359 (emphasis in original).

[4] Moreover, even to the extent the October 2 Memorandum contains debates about how to present an agency policy to the public, it may still be subject to the deliberative process privilege. *See NLRB*, 421 U.S. at 153 n.18 ("Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing agency recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process."); *see also Fox News Network, LLC v. Dep't of the Treasury*, 739 F. Supp. 2d 515 (S.D.N.Y. 2010); *Sierra Club v. Dep't of the Interior*, 384 F. Supp. 2d 1, 22 (D.D.C. 2004); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008); *Judicial Watch, Inc. v. Dep't of the Treasury*, --- F. Supp. 2d ---, 2011 WL 2678930, at *14 (D.D.C. July 11, 2011); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Security*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 83 (D.D.C. 2007); *Judicial Watch, Inc. v. Dep't of Justice*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004); *Thompson v. Dep't of the Navy*, No. CIV A 95-347 (RMU), 1997 WL 527344, at *5 (D.D.C. Aug. 18, 1997), *aff'd* NO. 97-5292, 1998 WL 202253 (D.C. Cir. Mar. 11, 1998) (*per curiam*). Indeed, in the July 11 Order, the Court recognized that debates about presentation of policy, such as "talking points and public affairs guidance documents, when in draft form, *may* be protected under the deliberative process privilege . . . ." *Nat'l Day Laborer Org. Network*, 2011 WL 2693655, at *15. Therefore, the Government continues to reserve its right to appeal should the Court enter future disclosure orders resting on the principle that "messaging" communications are not deliberative.

Plaintiffs have failed to satisfy their burden of demonstrating that ICE has waived the deliberative process privilege with respect to the October 2, 2010 Memorandum. As a threshold matter, the evidence cited by Plaintiffs themselves supports the conclusion that the October 2, 2010 Memorandum is both predecisional and deliberative. For example, in one document cited by Plaintiffs, ICE Assistant Deputy Director Beth Gibson explains that, by means of the October 2, 2010 Memorandum and other memoranda, ICE was "drafting revised language to describe the shift from the *current* „voluntary' formula to the „2013' formula." *See* Connolly Decl., Ex. F at 6 n.4 (emphasis added). Likewise, in another e-mail relied upon by Plaintiffs, an ICE employee indicates that ICE is "*continu[ing] to refine* [its] implementation strategy" and that, as part of this process, ICE's Office of the Principal Legal Advisor was "asked to *look into* a legal mandate, provision, law, etc." and "*weigh in* and provide legal references and/or legal interpretation . . . ." *See id.* (emphasis added). Such statements are consistent with ICE's description of the October 2, 2010 Memorandum in its supplemental *Vaughn* index as "[d]raft language and comments" created as "advice . . . in response to a client request for guidance . . . ." *Id.*, Ex. A.

Nor do Plaintiffs' citations to public statements by ICE reflecting the mandatory nature of Secure Communities indicate that the October 2, 2010 Memorandum constitutes the "secret law" governing that policy. *See id.*, Ex. E at 6-7 n.5. These statements fail to demonstrate that the analysis in the October 2 Memorandum was adopted as the legal basis for that policy. *See La Raza*, 411 F.3d at 358. Indeed, some of these statements suggest that the basis for ICE's policy has changed over time. *See* Connolly Decl., Ex. F at 6-7 n.5 (citing an e-mail dated September 21, 2010 where 28 U.S.C. § 534 and certain agency Statement of Records Notices are identified

as the basis for the mandatory nature of Secure Communities, and also citing an undated draft letter and a media article dated June 9, 2011 in which the findings of the 9/11 Commission, the Patriot Act, and unspecified appropriations bills are cited as the basis for the mandatory policy), *id.* at 7-8 (quoting a recent letter from ICE Director John Morton indicating that Memoranda of Agreement between ICE and the states are not necessary for the operation of Secure Communities). In sum, the evidence cited by Plaintiffs does not support the conclusion that the October 2, 2010 Memorandum constitutes the agency's "secret law," but instead further supports ICE's continued withholding of the October 2, 2010 Memorandum on the grounds that it is both predecisional and deliberative.

CONCLUSION

For the reasons set forth above, ICE respectfully submits that this Court should (1) find that ICE properly withheld the attorney-client information, including the October 2, 2010 Memorandum, under exemption (b)(5), and (2) grant ICE's renewed motion for summary judgment.

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Respectfully submitted,

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