UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL DAY LABORER ORGANIZING NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs,

v.

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

Defendants.

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ECF CASE

10-CV-3488 (SAS)(KNF)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S OPINION AND ORDER OF JULY 11, 2011

Plaintiffs, National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR"), and the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law ("the Clinic"), by and through their respective counsel, hereby move this Court pursuant to Local Civil Rule 6.3 to partially reconsider its Opinion and Order dated July 11, 2011 ("July 11 Order"). Specifically, Plaintiffs respectfully seek the Court's reconsideration of its factual finding that January 27, 2010 was the earliest date that

Defendants made a clear and unambiguous public statement of the policy that Secure Communities was voluntary. *See* July 11 Order at 33-34. Instead, Plaintiffs request that the Court hold that the earliest date that Defendants made a clear and unambiguous statement of policy was April 2, 2009, based on submissions for the Congressional Record from Immigration and Customs Enforcement ("ICE") in connection with the House Appropriations Committee hearing held on April 2, 2009. The instant motion impacts only a narrow aspect of Section IV.A.1 of the July 11 Order and does not affect Defendants' Court-ordered August 1, 2011 deadlines to produce improperly withheld records and portions of records.[1]

I. BACKGROUND

A. *Plaintiffs' Cross-Motion*

In Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment and in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment, filed February 11, 2011 ("Cross-Motion"), Plaintiffs argued that Defendants had failed to meet their burden to demonstrate that the deliberative process exemption was appropriate, in part, because Defendants had not identified whether or when the agency made a decision about the voluntary or mandatory nature of Secure Communities. Cross-Motion at 18-19. Plaintiffs noted that for the first two years of Secure Communities' operation (2008 to 2010), ICE publicly

[1] Section IV.A.1 of the July 11 Order focused on the distinction between pre-decisional and post-decisional records. The instant motion only seeks reconsideration of the *date* after which records are deemed post-decisional. No records that the Defendants were ordered to process and produce on August 1, 2011 are impacted by the instant motion. That is, to the extent the Court grants Plaintiffs' motion, Defendants simply will be required to disclose *additional* information under Freedom of Information Act ("FOIA"). Thus, Plaintiffs expect that Defendants will fully comply with the Court's Order by August 1, as directed. *See e.g.*, *Tekkno Labs., Inc. v. Perales*,

portrayed the program as "voluntary." Cross-Motion at 6. Plaintiffs cited twelve documents as examples of this position.[2] Accordingly, Plaintiffs argued that "[d]ocuments referencing the policy position that Secure Communities is voluntary and states or localities may opt-out, or providing justifications for such policy decision[s] should be post decisional." Cross-Motion at 19. Plaintiffs argued that this date should at least be as early as January 2009. *Id.* Defendants failed to address this argument in their Reply, and did not identify the date that the agencies made their decision to make Secure Communities voluntary or mandatory. *See* Defendants' Reply in Support of Their Motion for Partial Summary Judgment on Exemptions Applied to Opt-Out Records and Opposition to Plaintiffs' Cross-Motion for Summary Judgment, filed February 18, 2011, at 4-10.

B. *The Lofgren Letter*

On June 2, 2011, Plaintiffs submitted a letter to the Court ("Pls.' June 2 Letter") to provide updated information relevant to the pending cross-motions for partial summary judgment on exemptions. In that letter, Plaintiffs described and attached a letter from Rep. Zoe Lofgren to the DHS Office of the Inspector General ("OIG") calling for an investigation into misrepresentations made by the agencies about the Secure Communities' opt-out policy. Pls'

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933 F.2d 1093, 1099 (2d Cir. 1991) (a party's request for reconsideration does not result in an automatic stay of the underlying order).

[2] Cross-Motion at 6 n.8, (citing two documents: Secure Communities MOA Template, U.S. Immigration and Customs Enforcement, available at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf (last visited July 25, 2011) and Secure Communities Frequently Asked Questions, Jan. 27, 2010. ICE FOIA 10-2764.001976-ICE FOIA 102674.0011976); Cross-Motion at 19 (citing 10 documents included in Exhibit C – Deliberative Process Challenges, attached to the Declaration of James Horton, Feb.11, 2011 ("Horton Decl.")). The documents were not attached to the motion itself; however, Plaintiffs stated that any document cited in the Memorandum but not attached would be provided to the Court upon request. Cross-Motion at 3 n.4.

June 2 Letter at 3 (citing letter from Rep. Lofgren to DHS Acting Inspector General C. Edwards, Apr. 28, 2011, attached to Pls.' June 2 Letter as Ex. E) (the "Lofgren Letter"). The Lofgren Letter concluded that DHS and ICE made misrepresentations regarding the voluntary nature of Secure Communities based on the determination that they had represented the program as voluntary early on, and continued to do so even after they had internally decided to make the program mandatory. Lofgren Letter at 2.

The Lofgren Letter cites several specific examples of ICE's representations that the program was voluntary in early 2009. *Id.* In particular, the Lofgren Letter cites a written question for the Congressional Record submitted to ICE by the former Chairman of the House Appropriations Committee David Price. *Id.*[3] The Lofgren Letter quotes and cites a document produced in the instant case, which contains the above-referenced question for the record. *Id.* at 2-3 (citing ICE FOIA 102674.001832).[4] In that document, Rep. Price asks: "[i]f a locality does not wish to participate in the Secure Communities program, is it allowed to opt out?" *Id.* ICE responds: "Yes. ICE does not require any entity to participate in the information sharing technology at the state or local level." *Id.*

The Lofgren Letter does not cite the exact date of the question for the record, but states that ICE submitted the response "over two years" before the date of her letter to the OIG–April

[3] The Lofgren Letter also cites a document that is a different version of one of the ten documents cited in Plaintiffs' Cross-Motion to support their argument that the agency had publicly taken the position that Secure Communities was voluntary since early 2009. *See* Doc. 42, Exhibit C to the Horton Decl., ICE FOIA 2674.11425. Both versions are memoranda for ICE Director John Morton which state: "[t]o date, Secure Communities has stated in *various* arenas, *including Congress*, that state and local participation in IDENT/IAFIS Interoperability is voluntary." ICE FOIA 102674.0007299 (emphasis added).

28, 2011, indicating that the response was submitted at least as early as April 2009. *See* Lofgren Letter. The public record confirms that ICE submitted the response to Rep. Price's question for the record in connection with a House Appropriations Committee hearing held on April 2, 2009. *See Dep't of Homeland Security Appropriations for 2010: Hearing on Priorities Enforcing Immigration Law Before the H. Appropriations Comm. Subcommittee On Homeland Security*, 111th Cong. 917-1280, at 1238 (2009) ("Appropriations Hearing").[5] During that hearing on April 2, 2009, David Venturella, Executive Director of Secure Communities for ICE also stated that ". . . the local law enforcement officials, as well as the local governments can opt out of participating in this type of program. So [Secure Communities] is not a mandatory program, it is certainly voluntary." *Id.* at 994.

C. *The Court's Opinion and Order*

In the July 11 Order, the Court correctly held that post-decisional documents or portions of documents cannot be withheld pursuant to Exemption 5. July 11 Order at 32. The Court noted that, in the instant case, it was difficult to determine what documents were post-decisional because the agencies failed to acknowledge when new policies had been created. *Id.* at 33. The

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[4] The document cited in the Lofgren Letter is available at: http://uncoverthetruth.org/wp-content/uploads/ICE-FOIA-10-2674.001831-32.pdf .

[5] An undated version of the question for the record was included in Defendant ICE's December 6, 2010 production. As this Court is aware, on that date, Defendants produced nearly 300 pages in a single PDF file, without parent-child relationships. The question for the record appears to have been attached to an email dated August 26, 2009, from Randi L. Greenberg to several recipients. (ICE FOIA 10-2674.00183-10-2674.001832). The email, referencing the question for the record, states that ". . . the response we provided is still our current stance on the issue. The SC initiative will remain voluntary at both the State and Local level." *Id.* In addition to the question for the record, the Lofgren Letter also cites and quotes the August 26, 2009 email. In part due to the format of the December 6, 2010 production, Plaintiffs did not identify the relationship between the question for the record and the email until after the filing of the Cross-

Court, therefore, held that discussions of a particular policy after the date on which the agency made a "clear and unambiguous" statement of that policy were post-decisional. *Id.* In determining on which date ICE or DHS made a "clear and unambiguous" statement of the policy that Secure Communities was voluntary, the Court referred to one of the twelve documents cited by Plaintiffs as an example of the agencies' consistent position that Secure Communities was voluntary. *Id.* at 34 (citing ICE FOIA 10-26001976-83, Secure Communities Frequently Asked Questions, ICE (Jan. 27, 2010) (stating "ICE does not require any entity to participate in the information sharing technology at the state or local level.")). The Court did not reference the other eleven documents cited by Plaintiffs for this position. Based on the Frequently Asked Questions document, the Court ordered production of any non-exempt or privileged documents discussing the voluntary policy after January 27, 2010. *Id.*

In the July 11 Order, the Court cites the Lofgren Letter in support of the statement that there was a shift in ICE and DHS' opt-out policy, and notes that the Lofgren Letter cites specific "examples of contradictory agency statements." *Id.* at 32 n.106. The Court does not, however, cite to the specific examples of agency statements of the voluntary policy in early 2009, including ICE's statement in the Congressional Record in connection with a hearing on April 2, 2009.

As a result, Plaintiffs respectfully seek reconsideration of the Court's finding of fact that the agency made a clear and unambiguous statement of the voluntary nature of the program first

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Motion. Moreover, though the email is dated August 26, 2009, it is not clear from the email and the attachment that the submission was for the April 2, 2009 hearing.

on January 27, 2010. Instead, the Plaintiffs request that the Court, at a minimum, apply the date of ICE's statements of public policy in the Congressional Record—April 2, 2009.

II. RECONSIDERATION IS WARRANTED IN THIS INSTANCE

"Motions for reconsideration are governed by Local Rule 6.3 and are committed to the sound discretion of the district court." *Newton v. City of N.Y.*, 738 F. Supp. 2d 397, 416 (S.D.N.Y. 2010) (Scheindlin, J.) (citing *Patterson v. United States*, No. 04 Civ. 3170, 2006 WL 2067036, at *1 (S.D.N.Y. July 26, 2006)). A motion for reconsideration is appropriate where "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court," and may also be granted to "correct a clear error or prevent manifest injustice." *Id.* (citing *In re BDC 56 LLC,* 330 F.3d 111, 123 (2d Cir. 2003)); *Pension Comm. of U. of Montreal Pension Plan v. Banc of Am. Secs.*, 617 F. Supp. 2d 216, 217 (S.D.N.Y. 2009) (granting, in part, motion for reconsideration in the interests of justice where the court had "overlooked" controlling data in the record, submitted in support of a separate claim, even though plaintiffs' counsel did not draw the court's attention to this data). However, motions for reconsideration should not be used to advance arguments that were already rejected, or "to mak[e] new arguments that could have been previously advanced." *See e.g., Associated Press v. U.S. Dept. of Def.*, 395 F. Supp. 2d 17 (S.D.N.Y. 2005) (citing cases).

As discussed above, in determining that January 27, 2010 is the date upon which the Defendants made public their policy that Secure Communities was voluntary, the Court overlooked controlling data cited in the Lofgren Letter that ICE and DHS had made clear policy statements in the Congressional Record in connection with a hearing on April 2, 2009. In

addition, the Court did not consider the totality of the evidence (the twelve documents) directly cited by Plaintiffs in support of their argument that the agencies had publicly taken the position that Secure Communities was voluntary since early 2009. *See Yurman Studio, Inc. v. Castaneda*, Nos. 07 Civ. 1241, 07 Civ. 7862, 2008 WL 4298582, at *1-2 (S.D.N.Y. Sept. 19, 2008) (Scheindlin, J.) (granting motion to reconsider in part because the plaintiffs pointed to a controlling fact that the court had overlooked—that its registered copyrights covered collections, not individual designs).

Moreover, the interests of justice militate strongly in favor of granting Plaintiffs' motion for partial reconsideration. As the Court noted, "[t]here is ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities." (July 11 Order at 32). The Court's order requiring Defendants to produce records related to the opt-out policy has been crucial to the public's ability to recognize that Defendants had not been honest with Congress or the public. In fact, the disclosure of documents as a result of the instant case has prompted several states to opt-out of the Secure Communities program, and the initiation of a DHS Office of the Inspector General investigation into the apparent misrepresentations. (*See* Pls.' June 2 Letter and attachments).

The disclosure of documents discussing the voluntary policy from the correct earliest known date that the policy was presented to the public will serve the interests of justice by giving the public access to nine additional months of non-exempt information about the conduct—and potential misconduct—of agency officials. In contrast, applying the later January 27, 2010 date would contravene the purpose of FOIA: providing the public with access to information about government operations. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1979)

(describing purpose of FOIA as "ensur[ing] an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed"). Moreover, the redacted documents and portions of documents from the timeframe in question are critical to a time sensitive and unfolding public debate. Denial of this motion would serve only to deprive the public of information they urgently need and have a right to access.

Accordingly, Plaintiffs respectfully request that the Court amend the July 11, 2011 Opinion and Order: (1) to identify, at a minimum, April 2, 2009 as the date on which the agency made a clear and unambiguous statement of policy that Secure Communities was voluntary; (2) to find that any discussions of that policy after April 2, 2009 are post-decisional; and, (3) to order Defendants to disclose any documents or portions of documents created after April 2, 2009 that discuss the voluntary policy within 15 days of this Court's amendment of the July 11 Order.

Dated: July 25, 2011
New York, New York

Respectfully submitted,

/s/

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