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 OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S OPINION AND ORDER DATED JULY 11, 2011

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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") (collectively, "defendants" or the "Government"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to plaintiffs' motion for partial reconsideration of the Court's Opinion and Order dated July 11, 2011 [Docket # 99] (the "July 11 Order" or "Order").[1]

In the July 11 Order, the Court granted in part and denied in part the parties' cross-motions for summary judgment on the Freedom of Information Act ("FOIA") exemptions applied to "opt-out records" produced to plaintiffs on January 17, 2011. Among other things, the Court made a factual finding that any documents post-dating January 27, 2010 and discussing the voluntary nature of state and local participation in Secure Communities were postdecisional and must be released unless covered by a FOIA exemption other than Exemption 5. Plaintiffs now ask the Court to reconsider this finding and amend the July 11 Order to find that any discussions of the voluntary nature of Secure Communities after April 2, 2009 are postdecisional and subject to release.

Plaintiffs' motion for reconsideration is an improper attempt to relitigate an issue already decided by the Court. The motion relies on materials that are not in the record to argue that the Court "overlooked" facts that bear on the rulings in the July 11 Order. Furthermore, the ruling plaintiffs ask the Court to amend—that all discussions of the voluntary or mandatory nature of

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[1] The fifth defendant in this matter, the Office of Legal Counsel ("OLC"), did not produce any documents subject to the July 11 Order and, consequently, is not implicated by plaintiffs' motion for reconsideration.

Secure Communities after certain dates are inherently postdecisional—is incorrect as a matter of law. Plaintiffs' requested amendment would only compound this error. Plaintiffs' motion for reconsideration should therefore be denied.

BACKGROUND

A. Plaintiffs' Cross-Motion for Partial Summary Judgment on Exemptions and Subsequent Submissions

In their memorandum of law in support of their cross-motion for partial summary judgment dated February 11, 2011, plaintiffs argued, *inter alia*, 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 (particularly documents created after the first known statement that Secure Communities was voluntary in January 2009) should be post-decisional." Pls.' Mem. of Law in Support of Cross-Motion for Partial Summ. Judg. on Exemptions dated Feb. 11, 2011 [Docket # 49] ("Pls.' Exemptions Br.") at 19. In support of this argument, plaintiffs cited twelve documents, none of which were submitted to the Court for review. *See id.* at 3 n. 4, 6 n. 8, 19. One of these documents—an ICE document entitled "Secure Communities Frequently Asked Questions"—was dated January 27, 2010, a year after the date proposed by plaintiffs. *See id.* at 6 n. 8. Plaintiffs provided no information regarding the contents of the remaining 11 documents, and failed to explain how those documents would support a finding that all discussions of Secure Communities' voluntary nature after January 2009 were post-decisional. *See id.* at 19.

On June 2, 2011, plaintiffs submitted to the Court a letter purporting to "update the Court of [*sic*] relevant developments since the parties briefed our respective cross-motions for summary judgment on the application of FOIA exemptions to the „Opt-Out Production.'" Pls.' Ltr. dated June 2, 2011, at 1. Attached to plaintiffs' letter was a letter from Congresswoman Zoe

Lofgren to DHS and ICE officials dated April 28, 2011. *See id.* Ex. E (the "Lofgren Letter"). Among other things, the Lofgren Letter referred to a statement by an ICE official to Congress indicating that "ICE does not require any entity to participate in the information sharing technology at the state or local level." *Id.* at 2. The Lofgren Letter did not specify the date on which this statement was made, but merely indicated that it was "more than two years ago." *Id.* No transcripts of Congressional testimony were provided to the Court along with the June 2, 2011 letter.

B. The July 11 Order

On July 11, 2011, the Court issued its opinion and order granting in part and denying in part the parties' cross-motions for summary judgment on the exemptions applied to opt-out records. In discussing defendants' application of Exemption 5 and the deliberative process privilege, the Court found "that any discussions of the voluntary nature of the program after January 27, 2010, when the agency publicly stated that it was voluntary, and any discussions of the mandatory nature of the program after March 2010, when there is evidence that ICE and the FBI discussed its mandatory nature with Washington, D.C. local law enforcement officials, are postdecisional." July 11 Order at 33-34. The Court indicated that it was "difficult . . . to ascertain what is predecisional or postdecisional," but stated that it "base[d] [its] decision on the dates that clear and unambiguous statements of agency policy were made." *Id.* at 33. With respect to the January 27, 2010 date, the Court relied on the "Secure Communities Frequently Asked Questions" document dated January 27, 2010 and cited in plaintiffs' brief. *See id.* at 34 n. 110.

C. Plaintiffs' Motion for Partial Reconsideration

On July 25, 2011, plaintiffs moved for partial reconsideration of the July 11 Order. Plaintiffs ask the Court to amend the Order to "hold that the earliest date that Defendants made a clear and unambiguous statement of policy [regarding the voluntary nature of Secure Communities] was April 2, 2009, based on submissions for the Congressional Record from [ICE] in connection with the House Appropriations Committee hearing held on April 2, 2009." Pls.' Mem. of Law in Support of Motion for Partial Reconsideration dated July 25, 2011 [Docket # 103] ("Pls.' Reconsideration Br.") at 2. The primary basis for plaintiffs' motion for reconsideration is the Lofgren Letter. While acknowledging that "[t]he Lofgren Letter does not cite the exact date of the question for the record [*i.e.*, the date on which the ICE official's statement was made]," *id.* at 4, plaintiffs nonetheless argue that "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," *id.* at 7.

Plaintiffs further seek reconsideration on the ground that "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 id.* at 8. These documents were not provided to the Court or discussed in any detail in plaintiffs' summary judgment brief.

ARGUMENT

A. Legal Standard Applicable to Motions for Reconsideration

Motions for reconsideration are "generally not favored and [are] properly granted only upon a showing of exceptional circumstances." *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004). Local Rule 6.3 requires a litigant moving for reconsideration to "set[] forth

concisely the matters or controlling decisions which counsel believes the Court has overlooked." Local Rule 6.3. The Local Rule is "narrowly construed and strictly applied in order to avoid repetitive arguments already considered by the Court." *Brown v. Barnhart*, No. 04 Civ. 2450 (SAS), 2005 WL 1423241, at *1 (S.D.N.Y. June 16, 2005) (citation omitted); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (motions for reconsideration "should not be granted where the moving party seeks solely to relitigate an issue already decided").

Thus, a motion for reconsideration "shall be granted only if the court has overlooked controlling decisions or *factual matters that were put before it on the underlying motion* . . . and which, had they been considered, might have reasonably altered the result before the court." *Mikol v. Barnhart*, 554 F. Supp. 2d 498, 500 (S.D.N.Y. 2008) (citation omitted; emphasis added). "Where the movant fails to show that any controlling authority or facts have actually been overlooked, and merely offers substantively the same arguments he offered on the original motion or *attempts to advance new facts*, the motion for reconsideration must be denied." *Id.* (citations omitted; emphasis added).

B. Plaintiffs Fail to Identify Factual Matters in the Record That the Court Overlooked

Plaintiffs base their motion for reconsideration on materials that are not in the record in this case. Thus, plaintiffs cannot show that the Court "overlooked" these materials. Motions for reconsideration "are not vehicles for taking a second bite at the apple," *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998), "and [the court] [should] not consider facts not in the record to be facts that [it] overlooked," *Spa 77 G L.P. v. Motiva Enters. LLC*, --- F. Supp. 2d ---, 2011 WL 743581, at *16 (E.D.N.Y. Feb. 22, 2011) (citation and internal quotation marks omitted; alterations in original).

Plaintiffs' June 2, 2011 letter, which attached the Lofgren Letter, was submitted months after summary judgment briefing on exemptions had concluded, and was purportedly in response to a letter from defendants addressing an issue that is unrelated to the question of whether or when the defendant agencies promulgated final decisions on the voluntary or mandatory nature of Secure Communities. *See* Pls.' June 2, 2011 Ltr. at 1 (indicating that the letter responds to "Defendants' May 27th letter regarding the material withheld under the . . . High 2 exemption"). The letter emphasized that the "new information" it provided underscored "the urgent need for disclosure of the legal basis of the federal government's opt-out policy." *Id.* at 2. Yet nowhere in the June 2, 2011 letter did plaintiffs argue, as they do now for the first time, that the Lofgren Letter supports a finding that documents post-dating April 2, 2009 discussing the voluntary nature of Secure Communities are postdecisional.

Moreover, by plaintiffs' own admission, the Lofgren Letter makes no reference to the April 2, 2009 date plaintiffs now urge the Court to adopt, but only indicates that the ICE official's statement was made "more than two years ago." Pls.' Reconsideration Br. at 5; Lofgren Letter at 2. In support of their April 2, 2009 date, plaintiffs improperly go beyond the Lofgren Letter, citing to the record of a House Appropriations Committee hearing that is not in the record in this case. *See* Pls.' Reconsideration Br. at 5.

Likewise, plaintiffs cannot rely on the 11 documents that they cited in their summary judgment brief, but never submitted to the Court, to support their motion for reconsideration. *See* Pls.' Reconsideration Br. at 8; Pls.' Exemptions Br. at 3 n. 4. These documents were not part of the record that the Court considered in deciding the parties' cross-motions for summary judgment on exemptions, nor did plaintiffs provide any further detail regarding these documents. Because these documents were not "put before [the Court] on the underlying motion," the Court

did not "overlook" them, and there is no basis for the Court to amend the July 11 Order in the manner requested by plaintiffs. *Mikol*, 554 F. Supp. 2d at 500.

Because plaintiffs rely on materials that they failed to put in the record, their motion for reconsideration should be denied. *See Pension Comm. of U. of Montreal Pension Plan v. Banc of Am. Secs.*, 617 F. Supp. 2d 216, 217 (S.D.N.Y. 2009) (Scheindlin, J.) ("A motion for reconsideration is not an ‚opportunity for making new arguments that could have been previously advanced.'") (quoting *Associated Press v. United States Dep't of Defense*, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005)).

C. The Court's Bright-Line Ruling That All Discussions of the Voluntary or Mandatory Nature of Secure Communities After Certain Dates Are Postdecisional Is Incorrect as a Matter of Law

Additionally, plaintiffs' motion for reconsideration should be denied because the bright-line ruling that plaintiffs ask the Court to amend, *i.e.*, that all discussions of the voluntary or mandatory nature of Secure Communities after certain dates are postdecisional, is incorrect as a matter of law. Amendment of the July 11 Order as plaintiffs request would only compound this error.

The Court's bright-line ruling is inconsistent with the Supreme Court's recognition that "[a]gencies 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." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n. 18 (1975). *See also Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (recognizing that smaller policy decisions make up larger policy decisions); *Judicial Watch, Inc. v. Reno*, No. Civ. A 00-0723 (JR), 2001 WL 1902811, at *3 (D.D.C. Mar. 30, 2001) (rejecting plaintiff's claim that all documents after a certain date are

postdecisional because the agency action in question "involved multiple agency decisions," including "how to handle press inquiries and other public relations issues"). As one court in this district has recognized, the implementation of policy decisions can involve numerous and varied independent deliberations. *See Fox News Network, LLC v. Dep't of the Treasury*, 739 F. Supp. 2d 515, 542-46 (S.D.N.Y. 2010). *See also Sierra Club v. Dep't of the Interior*, 384 F. Supp. 2d 1, 22 (D.D.C. 2004) (finding that the deliberative process privilege protects deliberations "whereby a major policy may be shaped, modified, reduced, enhanced, or ultimately rejected after internal expert consultations within the affected department[s]"); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008) (recognizing that "deliberations about public relations policy are deliberations about policy"); *Judicial Watch, Inc. v. Dep't of Justice*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004) (briefing materials prepared in anticipation of Congressional testimony are covered by the deliberative process privilege).

Moreover, the Court's ruling contradicts the purposes of the deliberative process privilege. The privilege is "designed to safeguard and promote agency decisionmaking processes in at least three ways:" (1) by "assur[ing] that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations;" (2) by "protect[ing] against premature disclosure of proposed policies before they have been finally formulated or adopted;" and (3) by "protect[ing] against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 557 (1st Cir. 1992) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)); *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999). A bright-line rule requiring disclosure of documents after a certain

date would have a chilling effect on subsequent agency deliberations that, while potentially related to a prior agency decision, are nonetheless predecisional insofar as they reexamine the prior decision or bear on new policies that have not been finalized or adopted.

In the July 11 Order, the Court appeared to recognize that documents discussing the voluntary or mandatory nature of Secure Communities post-dating the dates identified by the Court as the dates of final agency decisions may still be protected by the deliberative process privilege. The Court held that any discussions of the mandatory nature of Secure Communities after March 2010 were postdecisional and subject to release. July 11 Order at 34. Nonetheless, in analyzing the documents submitted to the Court for *in camera* review, the Court denied summary judgment without prejudice to both parties with respect to numerous documents post-dating March 2010, and directed defendants to provide additional information concerning the role those documents played in the deliberative process. *See* July 11 Order at 50-51, 58-64, 73-78. This document-specific approach to assessing the applicability of the deliberative process privilege, rather than the bright-line rule articulated by the Court, is consistent with the relevant case law and the purposes of the deliberative process privilege. *See, e.g., Sears,* 421 U.S. at 153 n. 18; *Access Reports*, 926 F.2d at 1196; *Judicial Watch*, 2001 WL 1902811, at *3.

Indeed, the fact that the Court identified separate dates for final agency decisions regarding the voluntary and mandatory nature of Secure Communities demonstrates that any bright-line approach is flawed. Under the Court's reasoning, the agency made a final decision that Secure Communities was voluntary by January 27, 2010 and made another final decision that Secure Communities was mandatory by March 2010. Even if the Court's analysis were correct, it would only show that the agency reexamined an earlier decision, and its deliberations

in that reexamination process should be protected by Exemption 5 and the deliberative process privilege.

Accordingly, if the Court is inclined to amend this portion of the July 11 Order, it should do so not by adopting plaintiffs' proposed April 2, 2009 date—which, like the Court's January 27, 2010 date, is inconsistent with the case law—but rather by withdrawing any mention of bright-line dates and instead clarifying that the applicability of the deliberative process privilege must be determined on a document-by-document basis.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for partial reconsideration of the July 11 Order should be denied.

Dated: New York, New York
August 3, 2011

Respectfully submitted,

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