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 DEFENDANT UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S MOTION FOR A STAY PENDING APPEAL OF THE COURT'S OCTOBER 24, 2011 OPINION AND ORDER

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PRELIMINARY STATEMENT

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 motion for a stay of the Court's Opinion and Order dated October 24, 2011 [Docket # 140] (the "October 24 Order" or "Order"), pending the resolution of the Government's appeal of that Order.

This Court has recognized that the "ability to appeal a lower court ruling is a substantial and important right" and that appellate review "is the guarantee of accountability in our judicial system." *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 342 (S.D.N.Y. 2007). In cases arising under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, a court order directing an agency to disclose a record threatens the right of appellate review because the agency cannot *both* release the record *and* preserve its appeal. In such situations, a motion for a stay pending appeal "so to speak, is the ball game." *Adelphia*, 361 B.R. at 342. Courts thus routinely grant stays of disclosure orders in FOIA cases.

The Court's October 24 Order directs the Government to release significant portions of a memorandum dated October 2, 2010 (the "October 2 Memorandum" or "Memorandum"). On November 14, 2011, the Government timely filed a notice of appeal of the October 24 Order. Without a stay pending resolution of the appeal, the Government will be compelled to make the required disclosure and thereby moot its appeal. This is quintessential irreparable harm.

In addition, the Government can demonstrate a substantial case on the merits of its appeal. The Court's holding that the agency expressly adopted the Memorandum as its working law is not supported by the record, and impermissibly expands the Second Circuit's adoption analysis in *National Council of La Raza v.DOJ*, 411 F.3d 350 (2d Cir. 2005). The Court also

erred in holding that ICE waived the attorney-client privilege. To the contrary, the record shows that ICE maintained confidentiality over the Memorandum, both with respect to its contents and its recipients. Finally, the Court erred in holding that the deliberative process privilege does not protect the Memorandum, as the record demonstrates that the Memorandum was generated as part of the Government's decisionmaking process.

To the extent plaintiffs can articulate any harm to them arising from a stay, that harm pales in comparison to a loss of appellate rights. And appellate review of the critical issues in the October 24 Order is in the public interest. Exemption 5 reflects Congress' recognition of a public stake in the non-disclosure of materials protected by the deliberative process privilege, which enhances the quality of agency decisions and the administrative process, and the attorney-client privilege, which enhances the quality of legal advice by encouraging full and frank communications between attorneys and clients. The public thus will benefit from the Second Circuit's guidance on the complex factual and legal issues addressed in the October 24 Order.

BACKGROUND

A. The Instant Litigation and the "Opt-Out Records"

This case is well known to the Court, and the Government respectfully refers the Court to the extensive record for a complete factual and procedural history. At issue is a FOIA request dated February 3, 2010, which plaintiffs submitted to each of the defendant agencies, seeking "any and all Records" relating to numerous aspects of an immigration enforcement strategy called Secure Communities. *See* Decl. of Bridget P. Kessler dated Oct. 28, 2010 [Docket # 12], Ex. A (FOIA request dated Feb. 3, 2010). Plaintiffs commenced the instant litigation on April 27, 2010. *See* Compl. dated Apr. 27, 2010 [Docket # 1]. On October 28, 2010, plaintiffs moved for a preliminary injunction requiring defendants to produce records relating to the issue of

whether states and localities may opt-out of participation in Secure Communities (the "opt-out records"). *See* Pls.' Mot. for Prelim. Injunction dated Oct. 28, 2010 [Docket # 10]. The Court subsequently directed defendants to produce opt-out records to plaintiffs by January 17, 2011. Order dated Dec. 17, 2010 [Docket # 25], at ¶ 1.

On January 17, 2011, pursuant to the Court's scheduling order, defendants produced approximately 14,000 pages of opt-out records to plaintiffs. On January 28, 2011, defendants filed a motion for partial summary judgment, along with declarations and *Vaughn* indexes, in support of the FOIA exemptions applied throughout the opt-out production. *See* Defs.' Mot. for Partial Summ. J. on Exemptions Applied to Opt-Out Records dated Jan. 28, 2011 [Docket # 32]. On February 11, 2011, plaintiffs filed a cross-motion for partial summary judgment challenging defendants' applications of Exemptions (b)(5), (b)(6), and (b)(7)(C) to specific opt-out records. *See* Pls.' Cross-Mot. for Partial Summ. J. dated Feb. 11, 2011 [Docket # 47]. On May 26, 2011, the Court ordered defendants to submit for *in camera* review a sample set of 50 records challenged by plaintiffs. *See* Order dated May 26, 2011 [Docket # 94]. The Government provided the Court with redacted and unredacted versions of these documents on June 1, 2011.

B. The July 11 Order and the October 2 Memorandum

On July 11, 2011, the Court issued an Opinion and Order (the "July 11 Order") granting in part and denying in part defendants' and plaintiffs' summary judgment motions on the exemptions applied to the opt-out records. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488 (SAS), 2011 WL 2693655, at *24 (S.D.N.Y. July 11, 2011). The Court ordered defendants to release portions of certain previously withheld records and submit supplemental *Vaughn* indexes in further support of exemptions applied to other records. *See id.*

Much of the July 11 Order addressed defendants' applications of the deliberative process and attorney-client privileges under Exemption (b)(5). With respect to the attorney-client privilege, the Court rejected plaintiffs' argument that defendants had failed to establish that the withheld information constitutes legal advice. *See id.* at *10. The Court ordered, however, that "for each document that defendants seek to withhold under the attorney-client privilege, they must represent that confidentiality has been maintained." *Id.* The Court did not identify any other deficiencies with respect to defendants' applications of the attorney-client privilege. *See id.* With respect to the deliberative process privilege, the Court concluded that "many of the documents that defendants seek to withhold under the deliberative process privilege do not contain agency deliberations about what Secure Communities policies should be, but rather about what message should be delivered to the public about what Secure Communities policies are," and that "[s]uch „messaging' is no more than an explanation of an existing policy, which is not protected by the deliberative process privilege." *Id.* at *8.

Among the records included in ICE's opt-out production were eighteen versions of the October 2 Memorandum, which ICE largely withheld on the grounds that they were protected by the attorney-client and deliberative process privileges. *See id.* at *7 n.99. In its initial *Vaughn* index, ICE described the October 2 Memorandum as containing "[l]egal analysis of the mandatory nature of the 2013 Secure Communities deployment." *See id.* at *17. The Court examined the versions of the October 2 Memorandum during its *in camera* review. *See id.*

In the July 11 Order, the Court acknowledged that the October 2 Memorandum "contains legal analysis, and was written by the Office of the Principal Legal Advisor (OPLA) of ICE, and [was] addressed to . . . the Assistant Deputy Director of ICE." *Id.* at *18. The Court further acknowledged that "[t]he agency has not publicly relied upon the memorandum or

adopted it by reference." *Id.* at *17. However, the Court also held that, with respect to the deliberative process privilege, ICE had thus far failed to meet its "burden to establish the role that the memorandum played in the deliberative process," *id.* at *17, and with respect to the attorney-client privilege, ICE had "failed to establish that the confidentiality of the document was maintained," *id.* at *18. The Court thus denied summary judgment to both parties, and directed ICE to (1) describe in greater detail the role the Memorandum played in the deliberative process, and (2) represent that the confidentiality of the Memorandum had been maintained. *Id.* Finally, the Court ordered that the factual "Background" section of the October 2 Memorandum be released. *Id.* at *19. ICE released that "Background" to plaintiffs on August 15, 2011.

C. ICE's Supplemental *Vaughn* Index and the Law Declarations

On August 8, 2011, pursuant to the July 11 Order, ICE submitted a supplemental *Vaughn* index in further support of its withholding of certain records, including the October 2 Memorandum. Decl. of Christopher Connolly dated Sept. 2, 2011 ("Connolly Declaration"), Ex. A (ICE supplemental *Vaughn* index). The supplemental *Vaughn* index explained that the October 2 Memorandum "was drafted by OPLA as advice to the client in response to a client request for guidance on the mandatory v. voluntary question of participation in [Secure Communities]." *Id.* The supplemental *Vaughn* index further stated that "[c]onfidentiality of the redacted information has been maintained." *See id.* In addition, ICE's Deputy FOIA Officer, Ryan Law, submitted a declaration (the "Law Declaration") in which he affirmed that the confidentiality of the material ICE withheld pursuant to the attorney-client privilege—including within the October 2 Memorandum—had been maintained. *See id.*, Ex. B (Decl. of Ryan Law dated Aug. 8, 2011). Specifically, Mr. Law explained that to reach this conclusion, "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 had been maintained," and "[e]ach of those personnel have responded that confidentiality has in fact been maintained." *Id.* at ¶ 4.

On August 18, 2011, the Court held a conference during which it addressed, *inter alia*, the sufficiency of the Law Declaration. As a threshold 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 Hr'g 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.

The Court also held that ICE's supplemental *Vaughn* index had failed to sustain its burden of proof with respect to the applicability of the deliberative process privilege to the October 2 Memorandum, and ordered the document released on that ground. *See id.* at 26. The Court did not address the applicability of the attorney-client privilege to the Memorandum. On August 22, 2011, however, the Court entered an Order rescinding its oral order compelling production of the October 2 Memorandum. Order dated Aug. 22, 2011 [Docket # 116].

On August 23, 2011, Mr. Law submitted a supplemental declaration explaining in greater detail the steps that ICE took to determine that the confidentiality of the attorney-client information had been maintained. Connolly Decl., Ex. D (Decl. of Ryan Law dated Aug. 23, 2011). First, "Agency Counsel identified the sender and recipient(s) of each withheld document (based on the information reflected on the face of the withheld documents), as well as the ICE

program offices in which each of those individuals is located." *Id.* at ¶ 5. All of the senders and recipients were identified as ICE employees. *Id.* at ¶ 6. Next, ICE counsel sent e-mails to a central point of contact ("POC") in each relevant program office 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 withheld 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. Thereafter, the POCs "advised Agency Counsel that the senders and recipients had all confirmed that they had not disseminated the withheld documents to any non-Agency personnel." *Id.* at ¶ 9. Mr. Law's August 23 Declaration included an exhibit listing by bates range each document that was reviewed for attorney-client confidentiality in this manner. *See id.* at ¶ 8 & Ex. A (list of attorney-client documents reviewed for confidentiality). Among the records reviewed pursuant to this process were the versions of the October 2 Memorandum. *Id.* at ¶ 11.

During a conference held on August 24, 2011, the Court acknowledged that it had not ruled on the applicability of the attorney-client privilege to the October 2 Memorandum, and stated that "it's a complicated issue." *Id.*, Ex. E (Aug. 24, 2011 Hr'g Tr.) at 32. The Court therefore set the matter for full summary judgment briefing. *See id.* at 37.

D. The October 24 Order

On October 24, 2011, the Court issued an Order denying ICE's motion for summary judgment on its withholding of the October 2 Memorandum and granting plaintiffs' cross-motion

for summary judgment. *See* Oct. 24 Order at 36. The Court directed ICE to release, by November 1, 2011, most previously withheld portions of the Memorandum. *Id.*[1]

The Court ordered the October 2 Memorandum released on three grounds. First, it "reaffirm[ed] [its] July 11 ruling that the October 2 Memorandum is not protected by the deliberative process privilege, for the reasons stated in that opinion." *Id.* at 17. The Court also stated that the additional evidence submitted by plaintiffs in support of their most recent cross-motion for summary judgment had made it "even clearer that the document was used to justify an already decided policy, rather than to persuade parties debating a policy shift." *Id.*

Next, the Court found that ICE had waived the attorney-client privilege with respect to the Memorandum by disclosing its contents elsewhere. The Court agreed with ICE that the Memorandum was a communication between an attorney and a client, and that its purpose was to provide legal advice. *Id.* at 18-19. However, the Court found that ICE had failed to maintain confidentiality by publicly disclosing the contents of the Memorandum. *See id.* at 21-25. Additionally, the Court interpreted Ryan Law's August 23 Declaration as indicating that ICE had only inquired as to whether the Memorandum's nominal author and recipient had maintained its confidentiality, rather than also querying employees who had received the memo via electronic mail or in hard copy. *Id.* at 26-27. The Court also found ICE's inquiries insufficient because they only addressed whether the Memorandum had been distributed outside the agency, and not whether it was sent "to an agent or employee who was not authorized to speak on behalf of ICE about the mandatory nature of Secure Communities." *Id.* at 27 (citing *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977)).

[1] The Court held that ICE could (i) continue to withhold "the final paragraph of page 3 and its accompanying footnote" under the deliberative process privilege, and (ii) "redact the names of employees other than agency heads and high-level subordinates that appear in the final Memorandum or the earlier drafts." Oct. 24 Order at 36.

Finally, citing *La Raza*, the Court found that ICE could not assert the attorney-client privilege over the October 2 Memorandum because the agency had "adopted" the memorandum as agency policy. Oct. 24 Order at 31-35. The Court held that ICE had failed to meet its burden of showing lack of adoption, and that plaintiffs had met their burden by producing "significant evidence suggesting that ICE adopted the logic and conclusion of the October 2 Memorandum and used the document in its dealings with the public." *Id.* at 28-35. Specifically, the Court cited facts indicating that (1) ICE officials had requested that the Office of the Principal Legal Advisor compile legal support for the proposition that Secure Communities was mandatory; (2) a high-ranking ICE official told the legal staff to re-write an earlier version of the Memorandum that had reached a different conclusion; (3) DHS's Principal Deputy General Counsel favorably reviewed the memo six days after its creation; (4) four days after the memo was finalized, the DHS Secretary made the first public statement unequivocally confirming that Secure Communities was mandatory; and (5) the agency subsequently reiterated that Secure Communities was mandatory. *Id.* at 29-31. The Court concluded that the foregoing was direct and circumstantial evidence of adoption, and that the Government had not submitted any evidence that the October 2 Memorandum had *not* been adopted. *Id.* at 32-35.

The Court ordered ICE, by November 1, 2011, to release the final version of the October 2 Memorandum, with certain exceptions, *see supra*, at 8 n.1, and those portions of earlier drafts of the memorandum containing information that appears, *inter alia*, in the final version. Oct. 24 Order at 36. The Court subsequently stayed the Order until November 14, 2011. Order dated Oct. 28, 2011 [Dkt. # 146]. On that date, the Government timely filed a notice of appeal. *See* Decl. of Joseph N. Cordaro ("Cordaro Declaration"), dated Nov. 14, 2011, Ex. A.

ARGUMENT

THE COURT SHOULD STAY THE OCTOBER 24 ORDER PENDING APPEAL

A. Legal Standards

A court should consider four factors when determining whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (citation and internal quotation marks omitted); *see also In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). These factors are not prerequisites to be met, but rather are considerations to be balanced. "[T]he degree to which a factor must be present varies with the strength of the other factors, meaning that more of one [factor] excuses less of the other." *World Trade Ctr.*, 503 F.3d at 170 (alteration in original; citation and internal quotation marks omitted).

"A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) ("The necessary „level' or „degree' of probability of success will vary according to the court's assessment of the other [stay] factors."). Where the movant has established substantial irreparable harm and the balance of harms thus weighs heavily in its favor, it need only demonstrate a "substantial case on the merits" to obtain a stay. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994); *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (a stay pending appeal is appropriate where other factors are met and the Government raises "„serious legal questions going to the merits'" (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir.

1977))); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010) (reaffirming the Second Circuit's application of the "serious questions" or "substantial case on the merits" standard).

B. ICE Will Suffer Irreparable Harm Absent a Stay

Compliance with the October 24 Order before the appeal is resolved by the Second Circuit will cause irreparable harm to ICE. The Court has directed ICE to release portions of the October 2 Memorandum that the agency determined are protected from disclosure by the attorney-client and deliberative process privileges. "[O]nce there is disclosure" in a FOIA matter, "the information belongs to the general public." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). ICE thus would suffer an identifiable, concrete, and irreparable harm as a result of the Order: loss of the privileges and the mooting of its appeal.

The irreparable injury standard for obtaining a stay is satisfied "[w]here, as here, the denial of a stay will utterly destroy the status quo . . . but the granting of a stay will cause relatively slight harm to appellee." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Thus, "[p]articularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal." *People for Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *see also HHS v. Alley*, 129 S. Ct. 1667 (2009) (staying district court's order, which directed agency to disclose records, pending final disposition of appeal by court of appeals); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (holding that where the denial of a stay would cause part of a case to become moot, the denial would impose irreparable injury); *La Raza*, 411 F.3d at 355 n.3 (noting that the Second Circuit granted a stay of the district court's disclosure order); *Ferguson v. FBI*, 957 F.2d 1059, 1060 (2d Cir. 1992) (same); *Ctr. for Nat'l Sec. Studies v. Dep't*

of Justice, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting stay of order requiring release of information under FOIA). As the D.C. Circuit has recognized, "[d]isclosure followed by appeal after final judgment is obviously not adequate in such cases—the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Accordingly, a stay will preserve the status quo, and prevent the loss of ICE's appellate rights.

C. On Appeal, ICE Will Present a Substantial Case on the Merits

In light of the strong showing of irreparable harm that will result absent a stay, the Government need not convince the Court that it has a strong likelihood of success on the merits of its appeal. It is sufficient for present purposes merely to demonstrate a substantial case on the merits. *See Network Enters., Inc. v. APBA Offshore Prods., Inc.,* No. 01 Civ. 11765 (CSH), 2007 WL 398276, at *1 (S.D.N.Y. Feb. 5, 2007) ("In determining whether this Court should conclude that [appellant] „is likely to prevail on the merits of his appeal,' it is not necessary for me to confess error and predict a reversal . . . . While I rejected [appellant's] contentions . . . and remain of the opinion that I was right in doing so, it is equally clear that [appellant] has a substantial case to lay before the Court of Appeals."). ICE easily clears that hurdle.

1. Legal Standards

a. Exemption 5 and Applicable Privileges

Exemption 5 of FOIA permits an agency to withhold "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 embraces the civil discovery privileges, *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991), including the attorney-client and deliberative process privileges, *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); Oct. 24 Order at 12.

The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent.*, 566 F.2d at 252; *see In re Grand Jury Investig.*, 399 F.3d 527, 533 (2d Cir. 2005) (Exemption 5 covers materials protected by the attorney-client privilege). It is settled "both that a governmental attorney-client privilege exists generally, and that it may be invoked in the civil context." *In re Grand Jury Investig.*, 399 F.3d at 532. "[I]f anything, the traditional rationale . . . applies with special force in the government context." *Id.* at 534.

The deliberative process privilege protects "predecisional and deliberative" documents "prepared to assist an agency decisionmaker in arriving at his decision." *Grand Cent. P'ship*, 166 F.3d at 482 (citations and internal quotation marks omitted). The purpose of the privilege is to enhance "the quality of agency decisions" by protecting open and frank discussions between those who make them. *Sears*, 421 U.S. at 151; *Grand Cent. P'ship*, 166 F.3d at 481. It thus "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 Cent. P'ship*, 166 F.3d at 482 (citations and internal quotation marks omitted).

b. Express Adoption of Privileged Documents as Agency Policy

A document otherwise protected under Exemption 5 nevertheless may lose its protected status under certain narrow circumstances. The Second Circuit has held that "[a]n agency may be required to disclose a document otherwise subject to protection under the deliberative process privilege if the agency has chosen „expressly to adopt or incorporate by reference [a] . . . memorandum previously covered by Exemption 5 in what would otherwise be a final opinion.'" *La Raza*, 411 F.3d at 356 (quoting *Sears*, 421 U.S. at 161 (alterations in original)). The Second Circuit found that the same rule applies to a document covered by the attorney-client privilege.

Id. at 360. Nevertheless, *La Raza* "cautioned that . . . „[m]ere 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) (quoting *La Raza*, 411 F.3d at 358). The Second Circuit has explained that "[w]hen an agency simply 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" of the initial document. *La Raza*, 411 F.3d at 359 (internal quotation marks omitted); *accord Wood*, 432 F.3d at 84. "Rather, 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.

2. The Court Incorrectly Found That ICE Expressly Adopted the October 2 Memorandum as Agency Policy

ICE can raise a substantial case that the Court erred in finding that ICE expressly adopted the October 2 Memorandum, thereby depriving the document of any Exemption 5 protection. Indeed, as the Court has noted, this issue is "complicated," Connolly Decl., Ex. E (Aug. 24, 2011 Hr'g Tr.) at 32, as "[t]here is no bright-line test to determine adoption," Oct. 24 Order at 31. Here, the record indicates that ICE (at most) adopted the legal conclusions of the October 2 Memorandum, not the analysis therein. This is the kind of "yes or no" determination that the Second Circuit cautioned would *not* constitute express adoption. *See La Raza*, 411 F.3d at 395. This Court nevertheless found that the agency "has continually relied upon and repeated in public *the arguments* made in the Memorandum." Oct. 24 Order at 33 (emphasis added). But the record does not bear out this conclusion; accordingly, ICE will have a strong likelihood of success on the merits on the *La Raza* issue or, at the very least, a substantial case on appeal.

The Court's citations to the record do not support its finding of adoption. *First,* the Court cited emails tasking agency lawyers with "gathering the legal support for the „mandatory' nature

of [Secure Communities]" and directing agency counsel to "rewrite" an earlier version of the memorandum to argue for mandatory participation by 2013. *See* Oct. 24 Order at 30 & nn.93, 95-96. However, those emails indicate, at most, that ICE adopted the Memorandum's ultimate conclusions, not its analysis. They are silent on the legal analysis in the memorandum. Indeed, the emails predate the October 2 Memorandum.

Second, the Court took note of ICE Assistant Deputy Director Beth Gibson's email of September 29, 2010, which "instructed her legal department to make specific arguments in the Memorandum." *Id.* at 32. But this email simply relays Gibson's view that mandatory participation "flows from the CJIS agreement." *See* Declaration of Sonia Lin, dated Sept. 12, 2011 ("Lin Decl.") [Docket # 129], Ex. N. It provided no explanation for how that bare-bones statement relates to any of the legal analysis in the October 2 Memorandum. The Court also observed that Gibson was given a copy of the October 2 Memorandum on October 4, 2010, and that the nominal author was changed so that the memo came from higher authority, and the nominal recipient was changed from ICE's Principal Legal Advisor to Gibson. Oct. 24 Order at 30. This fact though does not provide evidence that any ICE official with final policy responsibility expressly adopted the memorandum's analysis.

Third, the Court observed that on October 6, 2010, DHS Secretary Janet Napolitano "made the first unequivocal public statement confirming the mandatory nature of Secure Communities." *Id.* at 31 (citing Vedantam, *U.S. Deportations Reach Record High*, Washington Post, Oct. 7, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232_pf.html). But the *Post* article simply quoted the Secretary as saying that "we do not see [Secure Communities] as an opt-in, out-out program." There is no indication of the legal basis for the Secretary's conclusion, or even any *mention* of the October 2

Memorandum. The article therefore cannot establish adoption. *See Wood*, 432 F.3d at 84 (explaining that adoption of a document's conclusions does not prove adoption of its analysis).

Fourth, the Court found that over the next year, ICE officials "repeatedly explained to members of Congress, local law enforcement agencies, and the public, that participation in the program is mandatory and required by federal law." Oct. 24 Order at 31 (citing pages 8-9 of plaintiffs' memorandum of law "and the evidence cited therein"). But the Court's Order does not specify where in those explanations ICE officials expressly adopted the analysis in the October 2 Memorandum, or even mentioned the October 2 Memorandum, and the record is devoid of either. And even if ICE officials stated that the mandatory nature of Secure Communities is consistent with federal law or a particular statute (which may have been among the authorities mentioned in the October 2 Memorandum), that is a far cry from *La Raza*, where the agency publicly made explicit references to the memorandum at issue and its analysis. *See La Raza*, 411 F.3d at 353-55.

The Court also cites other evidence, such as an email stating that ICE's Principal Deputy General Counsel was complimentary of the October 2 Memorandum. Oct. 24 Order at 32-33. But again, this does not indicate an express adoption, and the record does not indicate that the Deputy General Counsel was a policymaking official with authority to adopt the memo.

Nor did the agency expressly adopt the constitutional analysis in the October 2 Memorandum. In analyzing whether ICE had waived the attorney-client privilege, *see* Oct. 24 Order at 24, the Court found that an "Opt-Out Background" document's discussion of Secure Communities, in light of the Tenth Amendment and *Printz v. United States*, 521 U.S. 898 (1997), was "similar" to the analysis found on pages 6, 7, and 8 of the October 2 Memorandum. *Id.* This is incorrect. The Background document contains one paragraph of discussion concerning

the Tenth Amendment and *Printz*, not three pages. Moreover, the constitutional analysis concluded that a court could find that ICE "cannot compel" mandatory participation in Secure Communities, Cordaro Decl., Ex. B (ICE FOIA 10-2674.0002927 (cited in Oct. 24 Order at 24 n.79)), a *different* conclusion from the October 2 Memorandum.

In light of the foregoing, in finding express adoption of the October 2 Memorandum, the Court reached well beyond the type of explicit references to a legal memorandum that formed the basis of the Second Circuit's holding in *La Raza*, and found that adoption had occurred without a *single* agency decision-maker referring to the legal analysis of the memo as the basis for taking a particular action. The Government thus will be able to present a substantial case on appeal that the Court's ruling improperly expanded the holding of *La Raza,* and that ICE did not expressly adopt the October 2 Memorandum.

3. The Court Erred in Finding that ICE Waived the Attorney-Client Privilege

a. ICE Did Not Disclose the Contents of the Memorandum

ICE also can demonstrate a substantial case that the October 2 Memorandum is protected by the attorney-client privilege. An agency only waives an otherwise valid privilege where "the withheld information has already been specifically revealed to the public and [the disclosed information] appears to duplicate that being withheld." *Bronx Defenders v. DHS*, No. 04 Civ. 8576 (HB), 2005 WL 3462725, at *3 (S.D.N.Y. Dec. 19, 2005) (citation and internal quotation marks omitted); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (previous disclosures did not constitute waiver because they "did not precisely track the records sought to be released"). "„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. DOJ*, 880 F. Supp. 145, 151 (S.D.N.Y. 1995)). Accordingly, for plaintiffs to establish that ICE waived its right to withhold the attorney-client information, they must show that ICE previously "disclosed the exact information at issue." *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 965 (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"); Restatement (Third) of the Law Governing Lawyers § 79, cmt. H (explaining that attorney-client privilege is waived "only when a nonprivileged person learns the *substance* of a privileged communication," and disclosing the "general subject matter" of a privileged communication does not result in waiver (emphasis added)). Plaintiffs "‚bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.'" Oct. 24 Order at 21 (quoting *Ashfar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

Here, the Court incorrectly found that ICE's "discuss[ions] [regarding] the legal justification for making Secure Communities mandatory with elected officials, immigrant advocates, and other law enforcement agencies . . . during 2010 and 2011" were "specific" enough to effect a waiver. Oct. 24 Order at 22. For example, the Court cites an email from the Washington, D.C. police department to an immigration activist which recounts a conversation during which unnamed people at DHS and ICE informed the D.C. police that the federal mandate was "grounded" in certain statutes, executive orders, a Federal Register notice, and a congressional conference report. *See id.*; Lin Decl., Ex. GG. The Court believed that the email was authored on March 30, 2011, *see* Oct. 24 Order at 22 n.75, subsequent to the October 2 Memorandum. But the face of the document shows that the e-mail was sent on March 30, *2010*—more than six months before the October 2 Memorandum was written. Lin Decl., Ex.

GG. Moreover, the email provides no legal analysis other than the list of authorities, as opposed to the substantive analysis of those authorities in the Memorandum, not to mention that the e-mail hardly can be said to be disclosing the specific contents of a document that had not yet been authored.

Similarly, the "Opt-Out Background" document discussed *supra* at pages 16-17 contained a much shorter constitutional analysis that came to a different conclusion than the Memorandum. The Background document's discussion of various statutes and cases also was substantially more abbreviated than that found in the Memorandum. *See* Cordaro Decl., Ex. B. For example, the Background contains a single sentence citing 28 U.S.C. § 534 for the proposition that the FBI may share fingerprint submission information with DHS/ICE. *Id*. The Memorandum contains a detailed explanation on that point that is not found in the Background. In addition, the Background contains a two-sentence discussion on *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), and how it affects 8 U.S.C. §§ 1373 and 1644. *Id.* By contrast, the discussion in the October 2 Memorandum is contained in a much more detailed paragraph, with commentary not found in the Background.

The Court also cites an August 5, 2011 telephone conference, finding that it provided a summary of the argument on pages 4 to 6 of the Memorandum. *See* Oct. 24 Order at 22-23. To the contrary, the record shows that on the conference call, a DHS official told advocacy groups only that "8 U.S.C. § 1722 provided the authority for the implementation of mandatory participation in the Secure Communities program" and that the statute "mandates the sharing of criminal history information between the FBI and ICE because criminal history information is relevant to a person's deportability." Decl. of Sarahi Uribe, dated Sept. 12, 2011 [Docket # 130],

¶ 21. These two statements are far too general to waive the privilege that attaches to three pages of legal analysis in the Memorandum.

Much of the information that the Court found had been revealed was the *factual* information contained within the second and third pages of the October 2 Memorandum. *See* Oct. 24 Order at 23-24. But those pages already had been produced to plaintiffs before the Court issued the October 24 Order, and thus do not bear on ICE's claims of privilege. To the extent the Court found a disclosure of "legal" materials, those materials were either the legal conclusion that Secure Communities was "mandatory" or that a given statute or statutes was a "source" of authority for the mandatory nature of Secure Communities. *See id.* at 22 n.75 (citing "Bromeland Email"); 23 n.76 (citing declarations). Those materials do not reveal the agency's legal analysis and reasoning concerning those statutes, let alone the October 2 Memorandum's legal analysis about other authorities that were not mentioned in the evidence cited by the Court.

b. The Confidentiality of the Memorandum Was Maintained

Even if plaintiffs met their burden of production—which they did not—the Government also will raise a substantial case on appeal with respect to the Court's determination that ICE failed to establish that the October 2 Memorandum had been kept confidential by Agency personnel. That determination rests in large part on an erroneous reading of a declaration submitted by ICE on this issue. In short, the Court found that ICE had queried only the nominal author and nominal recipient of the Memorandum, and not individuals who had received the Memorandum via e-mail or in hard copy. *See* Oct. 24 Order at 26-27. The Court also found that ICE failed to ascertain whether the nominal author and recipient had shared the Memorandum with Agency personnel not authorized to speak on behalf of ICE about the mandatory nature of Secure Communities. *Id.* at 27. Based on these findings, the Court found that ICE had waived

the attorney-client privilege. But the Court's factual findings in support of this conclusion are erroneous, and overlook an important legal principle.

First, the Court misinterpreted the Declaration of Ryan Law, dated August 23, 2011 ("Law Decl."), to indicate that only the one sender and one recipient who are named on the face of the October 2 Memorandum were asked whether they had disseminated it outside of DHS and its component agencies. *Id.* at 26. The Court noted the existence of emails indicating that at least ten other ICE employees received the final version of the Memorandum, and concluded that those individuals were not queried about confidentiality. *Id.* In fact, they were. The Law Declaration states that the sender and recipient(s) of each "withheld document" were queried about confidentiality. Law Decl. ¶¶ 5-9. In using the term "withheld document," Mr. Law was referring to the entire withheld document—that is, the parent document and any child attachments. *See* Declaration of Ryan Law, dated Nov. 14, 2011 ("Supplemental Law Decl."), ¶ 6. Therefore, whenever the October 2 Memorandum was attached to an e-mail, the sender and recipient(s) of the email were also queried about confidentiality. *See id.* at ¶ 8.

Exhibit A to the Law Declaration — in which ICE identified the "Withheld Attorney-Client Documents Reviewed for Confidentiality" — confirms that the senders and recipients of the cover e-mails attaching the October 2 Memorandum were also queried. *See* Law Decl., Ex. A. Indeed, the withheld documents identified in Exhibit A include cover e-mails attaching the Memorandum. Supplemental Law Decl. ¶ 6 ("Exhibit A identifies the bates range for each withheld document, and includes in that bates range, when applicable, „parent' cover emails and „child' attachments."). The fact that ICE queried more than just the one sender and one recipient identified on the face of the October 2 Memorandum is further evidenced by paragraph 11 of the Law Declaration, in which Mr. Law states that "neither the senders [plural] nor the recipients

[plural] of the October 2, 2010 Memorandum disseminated it to any non-Agency personnel." Law Decl. at ¶ 11.

Notably, plaintiffs previously interpreted the Law Declaration (correctly) to indicate that the sender and recipient(s) of the relevant e-mails were also queried as to confidentiality. *See* Aug. 24 Hr'g Tr. at 29 (statement from plaintiffs' counsel in which he reads the declaration to mean that ICE "asked question[s] of people who showed up on e-mails in this limited production"). Furthermore, even if the Court determined that the declaration was ambiguous, the Court should not have resolved that ambiguity in favor of plaintiffs by granting them summary judgment. *See Terry v. Ashcroft,* 336 F.3d 128, 137 (2d Cir. 2003) (courts deciding summary judgment motions must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought" (citation and internal quotation marks omitted)).

In a supplemental declaration submitted with this stay motion, Mr. Law confirms that Agency Counsel's inquiry extended beyond the nominal sender and recipient of the Memorandum, and in fact went to all individuals identified on cover e-mails attaching the Memorandum. *See* Supplemental Law Decl., ¶¶ 6-8. Accordingly, the agency made sufficient inquiries to determine whether confidentiality had been maintained and can raise a substantial case on appeal that the Court misread the previous Law Declaration. In addition, with respect to the Court's finding that ICE failed to query all potential recipients of hard copies of the Memorandum, there is no evidence that the document had been transmitted in hard copy to anyone, and plaintiffs have the burden of production to show waiver.

Second, the Court erred in finding that ICE failed to meet its burden of showing that the October 2 Memorandum was circulated only to DHS personnel authorized to speak for the

agency on the mandatory nature of Secure Communities. *See* Oct. 24 Order at 27. That finding is contrary to the presumption of regularity that ordinarily attaches to agency behavior. *See, e.g., U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); *Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008). Here, plaintiffs have not pointed to any evidence of impropriety, or any evidence that the Memorandum was given to someone at DHS who was not authorized to view it. And even they had, that would not automatically waive the privilege. *See* Restatement § 79, cmt. H (attorney-client privilege not waived through inadvertent disclosure to non-privileged persons so long as "the client or other disclosing person took precautions reasonable under the circumstances to guard against disclosure"); *In re Grand Jury Investig.*, 399 F.3d at 532 (finding the Restatement persuasive authority in identifying the contours of the attorney-client privilege). Here ICE took reasonable precautions with respect to October 2 Memorandum, as indicated by the language on its first page: "INTERNAL GOVERNMENT USE ONLY" and "contains confidential attorney-client communications relating to legal matter for which the client has sought professional advice." Moreover, as the Court noted at the August 18, 2011 conference, it was "unnecessary" for ICE to "trac[e] the history of every movement of every document through every person in [the] agency." Aug. 18, 2011 Hr'g Tr. at 28.

4. The Court Erred in Finding That the October 2 Memorandum Is Not Protected by the Deliberative Process Privilege

Finally, although it is sufficient for the purposes of this motion for ICE to show a substantial case for appeal with respect to adoption and the attorney-client privilege, ICE also will present a substantial case for appeal with respect to the Court's re-affirmance of its July 11, 2011 ruling that the October 2 Memorandum is not protected by the deliberative process privilege. *See* Oct. 24 Order at 17.

The Supreme Court has long recognized 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." *Sears*, 421 U.S. at 153 n.18. This Court's holding appears to suggest that legal advice is not part of the decision-making process when it opines that an already formulated policy is consistent with existing law. But this approach does not take into account the "continuing process" by which agencies examine and re-examine policies. For example, an August 2, 2010 e-mail from an ICE official noted that as Secure Communities "continue[s] to . . . refine our implementation strategy," others in the agency have "asked us to look into "a legal mandate, provision, law, etc. that would allow ICE/DHS" to get fingerprint information from the FBI whether or not "states and locals can opt in or out." Connolly Decl., Ex. F, Attachment E. The Memorandum reinforces the applicability of the privilege: it contains legal advice on whether making Secure Communities mandatory is consistent with statutory and constitutional law. Seeking such advice is a core part of an agency's decision-making process.

For the foregoing reasons, the Government has demonstrated that it will raise on appeal a substantial case on merits. In light of the serious irreparable harm that ICE will suffer absent a stay, nothing more is required to satisfy the "success on the merits" prong of the stay analysis. *See LaRouche*, 20 F.3d at 72-73. As discussed below, the other two factors of the analysis also tip heavily in favor of granting a stay pending appeal of the October 24 Order.

D. Issuance of a Stay Will Not Substantially Injure Plaintiffs and Would Serve the Public Interest

The harm caused to plaintiffs by the granting of a stay is minimal. The only possible prejudice to plaintiffs arising from a stay is the passage of time; that is easily outweighed by the harm to the Government resulting from release. *See Providence Journal Co.*, 595 F.2d at 890

("[T]he granting of a stay will be detrimental to the [*Providence*] *Journal* (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the *Journal* prevails by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay." (granting stay pending appeal in FOIA case)).

In addition, there is a public interest in the nondisclosure of documents subject to the privileges asserted by ICE over the October 2 Memorandum. The deliberative process privilege "is designed to promote the quality of agency decisions by preserving and encouraging candid discussion among officials," *La Raza*, 411 F.3d at 356, and "protects the integrity of the administrative process," *In re World Trade Center Disaster Site Litig.*, No. 21 MC 100 (AKH), 2009 WL 4722250, at *3 (S.D.N.Y. Dec. 9, 2009). The attorney-client privilege "foster[s] open communication between attorneys and their clients, so that fully informed legal advice may be obtained." *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997). In light of the importance of those privileges, and the complexity of the issues addressed in the October 24 Order, *see* Connolly Decl., Ex. E (Aug. 24, 2011 Hr'g Tr.) at 32 (noting that *La Raza* issue is "complicated"), the public will benefit from the Second Circuit's guidance on these issues.

CONCLUSION

For the foregoing reasons, the Court should grant ICE's motion for a stay pending appeal of the Court's October 24 Order. In the alternative, if the Court were to deny ICE's motion, the Government respectfully requests an interim stay of the October 24 Order pending the Government's motion for a stay pending appeal to the United States Court of Appeals for the Second Circuit pursuant to Federal Rule of Appellate Procedure 8(a)(2).

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Respectfully submitted,

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