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)

[Rel. 10-CV-2705]

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

BRIDGET P. KESSLER
PETER L. MARKOWITZ
JAMES HORTON*
HANNAH WEINSTEIN*
CAROLINE E. GLICKLER*
Kathryn O. Greenberg Immigration Justice Clinic
Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
**Law student intern*

Attorneys for Immigration Justice Clinic and National Day Laborer Organizing Network

SUNITA PATEL
DARIUS CHARNEY
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

Attorneys for Center for Constitutional Rights and National Day Laborer Organizing Network

PAULA A. TUFFIN
ANTHONY J. DIANA
NORMAN R. CERULLO
LISA R. PLUSH
JEREMY D. SCHILDCROUT
Mayer Brown LLP
1675 Broadway
New York, New York 10019

Attorneys for National Day Laborer Organizing Network

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively "Plaintiffs") hereby move this Court for an order denying Defendants'[1] partial motion for summary judgment on exemptions applied to Opt-Out Records (hereinafter "Defendants' Motion"), and granting Plaintiffs' cross-motion for partial summary judgment on exemptions as applied to Opt-Out Records (hereinafter the "Cross-Motion"). Plaintiffs respectfully request that the Court either (1) conduct an *in camera* review of a random sample of the records containing challenged exemptions pursuant to 5 U.S.C. § 552(a)(4)(B), or, in the alternative, (2) compel Defendants' disclosure of redacted portions of the Opt-Out Records.[2]

PRELIMINARY STATEMENT

Secure Communities is a federal immigration enforcement program that requires unprecedented wide-scale involvement of states and localities in the enforcement of federal immigration law. Since the program's inception in 2008, the Defendants have repeatedly and purposefully obscured many aspects of it from public view, including the federal government's true position regarding the mandatory or voluntary nature of the program. Defendants now publicly admit their position that states and localities are required to participate. However, the legal basis for this position and critical details about the program's operation remain unclear. Failing to release the most basic information, Defendants have relied upon secret law and policy to justify the programs' nationwide deployment.

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[1] U.S. Immigration and Customs Enforcement ("ICE"), U.S. Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), and Office of Legal Counsel's ("OLC") collectively referred to in this memorandum as the "Agencies" or "Defendants."

[2] Plaintiffs are concurrently challenging the search cut-off dates applied by Defendants in a separate motion, filed on February 9, 2011. Further, Plaintiffs will challenge the adequacy of Defendants' search in a separate Motion, as directed by this Court.

In October 2010, when the government disavowed an earlier public policy that Secure Communities was voluntary, Plaintiffs moved this Court for a preliminary injunction ordering disclosure of the Opt-Out Records to uncover the truth about the mandatory or voluntary nature of Secure Communities. Pursuant to this Court's December 17, 2010 Order, Defendants produced over 14,000 pages of such Opt-Out Records on January 17, 2011, claiming redactions throughout the production based on Exemptions 2, 7(E), 5, 6 and 7(C) of the Freedom of Information Act ("FOIA").[3]

Defendants have failed to meet the burden for partial summary judgment because their severely deficient *Vaughn* indexes (or "*Vaughns*") do not justify these claimed exemptions. Defendants have had ample opportunity to remedy the *Vaughns'* deficiencies and have not done so. Defendants' repeated failure to satisfy the most basic requirements of a *Vaughn* puts Plaintiffs and the Court in an untenable position. Without specific descriptions of the redacted records, it is impossible to test the claimed exemptions, or to reliably identify which documents are of public interest.

While the inadequate *Vaughns* cannot be fully tested, patterns of inappropriate withholdings are apparent throughout the production. First, with respect to Exemption 5, Defendants' withholding of several key legal memoranda implicates the existence of concealed governmental positions regarding the voluntary or mandatory nature of the Secure Communities program. Second, with regard to the frequent claims of deliberative process privilege, Defendants fail to demonstrate that the redacted material is pre-decisional and deliberative in nature, and similarly fail to identify the decision-making process to which the document relates.

[3] Solely in the interest of efficiency, Plaintiffs do not challenge Defendants' claimed Exemptions 2 and 7(E). Plaintiffs do not concede that Defendants' *Vaughn* indexes and declarations satisfy the burden to justify these redactions.

With regard to the claims of attorney-client privilege, the *Vaughns* repeatedly fail to allege facts showing that the redacted information consists of legal advice, was confidential at the time it was initially expressed, or that it continued to be confidential up until the date of the Opt-Out Production. Finally, Defendants have failed to articulate a legitimate privacy interest to justify categorical redactions of select names and titles of federal and state government employees pursuant to Exemption 6 throughout the production.

Plaintiffs challenge Defendants' claims of Exemptions 5 and 6 solely with respect to the documents enumerated in Exhibits A-D and F of the Declaration of James Horton ("Horton Decl.")[4], dated February 11, 2011. Plaintiff therefore respectfully request that this Court: (a) conduct *in camera* review of: (1) thirty (30) documents likely of particular import to the public discourse,[5] enumerated in Horton Decl. Ex. A and B, and, (2) a random sample of documents which may be of vital import to the public discourse, including:

- A sample of 10 documents from those enumerated in Horton Decl. Ex. C for which Defendants failed to justify "deliberative process" under FOIA Exemption 5;
- A sample of 10 documents from those enumerated in Horton Decl. Ex. D for which Defendants failed to justify the stated "attorney-client privilege" under FOIA Exemption 5;
- A sample of 5 documents enumerated in Horton Decl. Ex. F for which Defendants have failed to justify that Defendants have released segregable information.

In the alternative, Plaintiffs respectfully request that this Court order release of the redacted material in the documents enumerated in Horton Decl. Exs. A-D, because, in their

[4] Upon request, Plaintiffs will provide any Opt-Out Records referred to in this Memorandum but not attached hereto.

[5] Of the thirty (30) documents, fifteen (15) appear to be various versions of the same fully redacted document.

Vaughn indexes, Defendants have not met their burden to justify withholding and, despite their agreement to do so, have not made a good faith effort to remedy such inadequacies.[6]

BACKGROUND

A. Procedural History

On February 3, 2010, Plaintiffs submitted identical FOIA requests (hereinafter "the Request") to the Defendant agencies. (Ex. A. of the Declaration of Bridget P. Kessler, dated October 28, 2010 (hereinafter "Kessler Decl."). After Defendants failed to respond to the Request, on April 27, 2010 Plaintiffs initiated this action, filing a complaint pursuant to 5 U.S.C. § 552 (the "Complaint" or "Compl.") to compel disclosure of the withheld records. The purpose of the Request is to obtain information for the public about Secure Communities, a new ICE immigration enforcement program that requires the automatic transmission of fingerprints to federal immigration databases upon arrest by local police. ICE uses the information to target individuals for civil immigration detention and removal. ICE launched Secure Communities in March 2008 and intends to expand the program nationwide.

In June 2010, the parties agreed that Defendants would produce certain priority records responsive to the Request and enumerated in the Plaintiffs' Rapid Production List ("RPL") by July 30, 2010. (*See* Kessler Decl., Ex H, Letter from Christopher Connolly to Bridget P. Kessler,

[6] The Court may also order Defendants to produce a third set of revised *Vaughn* indexes. However, Defendants made no meaningful effort to correct their indexes from the first to the second version. The critical issue in this case has been the Government's obstruction and delay; allowing Defendants' the opportunity to revise their *Vaughns* would only permit further delay. However, if the Court is inclined to order Defendants to produce new *Vaughns*, Plaintiffs request an opportunity to submit a proposed order to identify the requirements for an adequate index. *See Halpern v. FBI*, 181 F.3d 279, 295 (2d. Cir. 1999) (finding that in cases where *Vaughn* affidavits are insufficient "[the District Court] may require supplemental *Vaughn* affidavits" to garner further detail for the government).

dated June 9, 2010.) Despite their agreement, Defendants failed to produce the vast majority of the records responsive to the RPL, and, in particular, failed to produce nearly *any* records responsive to Plaintiffs' request for records relating to the opt-out issue. (*See id*. ¶ 16). On October 28, 2010, Plaintiffs moved this Court for a preliminary injunction to compel Defendants to produce Opt-Out Records responsive to the Request. *See* Plaintiffs' Motion for a Preliminary Injunction. By an Order dated December 17, 2010, (Docket #25), this Court ordered Defendants to produce the Opt-Out Records by January 17, 2011, as well as documents identified on Plaintiffs' RPL by February 25, 2011. (*Id*.)

Defendants' Opt-Out Production contains over 14,000 pages consisting primarily of email correspondence, memoranda, and public relations materials. The production also contains voluminous sections of redacted, responsive material, citing various exemptions under FOIA, including 5 U.S.C. §§ 552(b)(2), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Plaintiffs first raised concerns regarding inadequacies of the *Vaughn* indexes with Defendants and subsequently with the Court. (*See* Horton Decl., Ex. J.) Defendants represented that they would remedy the inadequacies in new *Vaughns* produced by January 28, 2011. (Hr'g Tr. 5 (Jan. 20, 2011)). On January 28, 2011, Defendants filed a motion for partial summary judgment, claiming that no genuine issue of material fact exists as to the validity of their claimed exemptions in the Opt-Out production. (*See* Defendants' Motion for Partial Summary Judgment). Notwithstanding their agreement to remedy the deficient *Vaughns*, Defendants filed and served a second set of *Vaughn* indexes on January 28 which are nearly identical to those originally produced. [7]

[7] *See* Pavlik-Keenan Third Decl., Ex. A; Hardy Third Decl., Ex. A; Louis Second Decl., Ex. A; Souza Third Decl., Ex. A; *see also* Horton Decl., Ex. D (providing comparison of the two ICE *Vaughn* indexes demonstrating that only minimal, non-substantive changes made to approximately 20 out of approximately 600 entries).

B. History of Secure Communities Opt-Out Policy

Since March of 2008, the federal government has publicly taken two distinct (and contradictory) positions on the ability of states and localities to decline to participate in the program. For nearly its first two years of operation, ICE publicly indicated that Secure Communities was a "*voluntary*" program—*i.e.*, states, localities and possibly law enforcement agencies could choose not to participate.[8] In the summer of 2010, ICE publicly affirmed the voluntary nature of the program by outlining a procedure for localities to opt-out.[9] Based on this information, many states and localities took steps to initiate opt-out procedures.[10] On October 6, 2010, however, the Secretary of the Department of Homeland Security, Janet Napolitano, reversed the agency's position and stated in a press conference that DHS "does not view [Secure Communities] as an opt-in, opt-out program."[11] Since October, the government has maintained the position that there is no meaningful procedure for localities to opt-out of Secure

[8] Secure Communities MOA Template, U.S. Immigration and Customs Enforcement, available at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf (last visited Feb. 10, 2011); Secure Communities Frequently Asked Questions, U.S. Immigration Customs Enforcement, (January 27, 2010) ICE FOIA 10-2674.001976–83 ("ICE does not require any entity to participate in the information sharing technology at the state or local level.")

[9] *See, e.g.*, ICE, *Secure Communities: Setting the Record Straight*, Aug. 17, 2010, *available at* https://crocodoc.com/b7hu8; Kessler Decl., Ex. N (Letter from Janet Napolitano, United States Secretary of Homeland Security to Congresswoman Zoe Lofgren, Sept. 7 2010); Kessler Decl., Ex. O (Letter from Secure Communities Assistant Director David Venturella to Miguel Marguez, County Counsel, Santa Clara County, California, Sept. 27, 2010).

[10] *See, e.g.*, Kessler Decl., Ex. K (Letter from Richard S. Gordon, President, San Mateo County Board of Supervisors, to John Morton, Assistant Secretary, ICE, Jul. 21, 2010, Letter from Richard S. Gordon, President, San Mateo County Board of Supervisors, to Edmund G. Brown, Jr., Secretary General, State of California, Jul. 21, 2010); Kessler Decl., Ex. M (Letter from Miguel Marguez, County Counsel, Santa Clara County California to Secure Communities Assistant Director David Venturella, Aug. 16, 2010).

[11] Shankar Vedantam, U.S. Deportations Reach Record High, WASHINGTON POST, Oct. 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html

Communities,[12] and that the program will be mandatory nationwide for both states and localities in 2013.[13] While publicly DHS first began to consistently affirm that Secure Communities would be mandatory in October 2010, this was not the first time that DHS took this position with state and local officials. As early as March 2010, during non-public negotiations with officials in at least one location (Washington D.C.), ICE and the FBI represented that Secure Communities would be mandatory in 2013 and cited a number of laws and regulations in support of this proposition.[14]

Over the past two years, ICE has shielded its plans for implementation of Secure Communities from public view. It has repeatedly refused to disclose or explain the justification for policies relating to the ability of states and localities to opt-out. In the absence of a governing statute, regulations, or even official statements of policy, Plaintiffs, the public and government officials are forced to rely on haphazard and often conflicting statements in order to try to piece together an understanding of the reasoning behind basic issues, including: (1) the legal basis for the purported mandatory nature of Secure Communities, and (2) the technological capacity of ICE, DHS, the FBI or states to facilitate opt-out or other limitations to the program. This lack of

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[12] *See, e.g.*, Shankar Vedantam, Local Jurisdictions Find They Can't Opt Out of Federal Immigration Enforcement Program, WASHINGTON POST, Sept. 30, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html; Kessler Decl., Ex. Q (Memorandum from Barbara M. Donnellan, County Manager, Arlington County, Virginia to Arlington County Board Members, Nov. 5, 2010).

[13] *See, e.g.*, Gene Davis, Unsure on Secure Communities? Opposition Heats Up to Policy that Would Crack Down on Illegal Immigration, Sept. 7, 2010, http://thedenverdailynews.com/article.php?aID=9849.

[14] *See, e.g.*, Horton Decl., Ex. H (Email from Amy Loudermilk to Matthew Bromeland, Washington D.C. Metropolitan Police Dep't, Follow-up re: DV SCOMM Meeting, Mar. 24, 2010); Horton Decl., Ex. I (Email from Matthew Bromeland, Washington D.C. Metropolitan Police Dep't, to Amy Loudermilk, Mar. 30, 2010); Kessler Decl., Ex. P (Letter from Cathy Lanier, Chief of Police, D.C. Metropolitan Police Department, to Phil Mendelson, Chairman, Committee of Public Safety and the Judiciary, Council of the District of Columbia, July 22, 2010).

transparency has made it difficult for Plaintiffs, advocates, elected officials and the public to understand the scope of the program and lobby for changes in the federal government's deployment plans.[15]

ARGUMENT

I. Legal Standards

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and affidavits show that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807 (2d Cir. 1994).

"[FOIA] seeks 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' As the Act is structured virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (citations omitted; quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). The FOIA exemptions are "exclusive" and "must be narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks and citation omitted); *see also Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 145, 147 (2d Cir. 2010) (stating that FOIA exemptions are consistently given a narrow compass and all doubts are resolved in the favor of disclosure).

When an agency's decision to withhold information is challenged, the burden rests on the agency to demonstrate the applicability of the statutory exemptions to the withheld documents. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *see Coastal States Gas*

[15] Kessler Decl., Ex. U, Declaration of Sarahi Uribe, dated Oct. 27, 2010 (hereinafter "Uribe Decl.").

Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) ("We remind the agencies, once again, that the burden is on them to establish their right to withhold information from the public and they must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct."). In short, "an agency's judgment regarding the applicability of a FOIA exemption is accorded no particular deference." *Bloomberg*, 601 F.3d at 147.

Agencies may satisfy the burden of justifying claimed exemptions by submitting affidavits with "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. Dep't of Justice*, 19 F.3d at 812 (citations omitted). Typically, agencies submit *Vaughn* indexes and declarations to satisfy this burden. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). A *Vaughn* index is an itemized index of the non-disclosed records, which describes each record and portion withheld, and provides a detailed justification of the agency's ground for withholding, correlating a specific FOIA exemption with the portion of the record to which it purportedly applies. *Id.* at 826-28; *see also Halpern v. FBI*, 181 F.3d 279, 292-94 (2d Cir. 1999).

The purpose of a *Vaughn* index is to "(a) [] permit [an opposing party] to contest the affidavit in adversarial fashion," and to "(b) [] permit a reviewing court to engage in effective *de novo* review of the [government's] redactions." *Halpern*, 181 F.3d at 293. Specificity is required because the FOIA requester and the court must rely on the agency's explanations to assess the claimed exemptions. *King v. Dep't of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987) (noting that the specificity avoids placing the burden on the court to "wade through pages of material" to understand the government's redactions).

II. Defendants' Repeated Failure to Produce Adequate Vaughn Indexes Empowers the Court to Order *In Camera* Review or Disclosure.

Defendants provided Plaintiffs with *Vaughn* indexes on January 17, 2011. Due to the pervasive deficiencies of the first *Vaughn* index, (*see* Horton Decl. Ex. J, Plaintiffs' Jan. 20, 2011 Letter to Court),[16] Defendants agreed to produce to Plaintiffs revised *Vaughn* indexes by January 24, 2011. (Hr'g Tr. at 5 (Jan. 20, 2011)). However, the "revised" *Vaughns* were virtually identical to the originals. For example, the revised ICE *Vaughn* made minimal, non-substantive changes to approximately ***20*** out of approximately ***600*** total entries (*See* Horton Decl., Ex. D. at ¶ G). Moreover, over 100 documents with redacted pages from the ICE Opt-Out Production still had ***no*** corresponding entry in ICE's *Vaughn* index. *Id.*, Ex. G.

Defendants have effectively frustrated both purposes of a *Vaughn* index. The first purpose of a *Vaughn* is to permit Plaintiffs to subject Defendants' claimed exemptions to adversarial testing. *King*, 830 F.2d at 219. In this case, Defendants' repeated refusal to provide adequate descriptions of the documents and the nexus between the non-disclosed documents and the claimed exemptions makes it impossible to reliably identify inappropriately claimed exemptions. Nevertheless, Plaintiffs have attempted to limit the inquiry to the extent possible and to categorize the most important repeated failures of the Defendants to justify withholdings. (*See* discussion *supra* at 3). The second purpose of the *Vaughn* is to ensure that Defendants do not impose an undue burden on the courts, *id*. at 219, vitiating the need for courts to sift through thousands of pages of documents and make independent assessments of exemptions without the aid of focused briefing. Defendants have achieved precisely what *Vaughn* sought to avoid; they

[16] Plaintiffs challenged the adequacy of the ICE, DHS and FBI *Vaughn* indexes, but not that of OLC.

have left this Court with no meaningful way to evaluate claimed exemptions without reviewing the documents themselves.

When the agency affidavits do not provide sufficient information, *in camera* review is an option for the Court to review the legality of the exemptions. While *in camera* review is generally "the exception, not the rule," *Halpern*, 181 F.3d at 295 (quoting *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988)),[17] it may be appropriate when (1) "the agency's affidavits are insufficiently detailed to permit meaningful review of exemption claims," (2) there is evidence of bad faith on the part of the agency, (3) when the number of withheld documents is relatively small, or (4) when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents. *Spirko v. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (citations omitted).

Here, the Court may address Defendants' deficient *Vaughns* by ordering *in camera* review of the small number of critical documents enumerated in Horton Decl. Exs. A and B and a sample of the contested documents in Horton Decl. Exs. C and D. *See generally Spirko v. Postal Serv.*, 147 F.3d at 996 ("Congress amended FOIA to authorize district courts to 'examine the contents of' requested records '*in camera* to determine whether such records or any part thereof shall be withheld.'" (citing 5 U.S.C. 552(a)(4)(B)); *Campaign for Reasonable Transplantation v. FDA*, 180 F. Supp. 2d 29, 34 (D.D.C. 2001) ("[I]t is within the trial judge's discretion to choose random or representative sampling [for *in camera review*], as the specific case may require."); *Halpern*, 181 F.3d at 295 (holding that district courts may review agency records *in camera* to determine the validity of claimed exemptions). *In camera* review of a random sample of documents would allow this Court to determine whether Defendants have

[17] *See supra* note 6.

properly applied exemptions. Moreover, because Defendants have failed to satisfy their burden of justifying their claimed exemptions, the Court may order the exempted portions of the contested documents released in full.[18] *See Coastal States*, 617 F.2d at 870 (because "defendant . . . has failed to carry its burden of establishing that the documents involved in this appeal were properly withheld. . . [t]he decision . . . ordering release of the documents is therefore affirmed."); *In Def. of Animals v. Nat'l Inst. of Health*, 543 F. Supp. 2d 83, 107 (D.D.C., 2008) (order release of records under FOIA on plaintiff's cross-motion for summary judgment "based on Defendants' failure to sustain its burden in applying Exemptions 4 and 5.").

III. Defendants Fail to Satisfy Their Burden Under Exemptions 5, 6, 7(c) and Principles of Segregability by Providing Deficient *Vaughn* Indexes

Defendants have not met their burden to justify claims of Exemptions 5 and 6, 7(c) or that all reasonably segregable material has been redacted. *First*, Exemption 5 protects "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)). This exemption permits the nondisclosure of information that is "normally privileged in the civil discovery context." *Sears*, 421 U.S. at 149. *Second*, Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy." (5 U.S.C. § 552(b)(6)) (emphasis added). *Finally* agencies must disclose "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Thus, an agency "cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). This segregability requirement applies to all documents and all exemptions in the FOIA. *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C.

[18] The contested documents are enumerated in Horton Decl., Exs. A, B, C, D, F and G.

Cir. 1984). If an agency asserts that certain non-exempt material is not segregable it "should also describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead*, 566 F.2d at 261. Before approving an agency's assertion of a FOIA exemption, "the district court must make specific findings of segregability regarding the documents to be withheld." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007).

A. Defendants Fail to Satisfy Their Burden Under Exemption 5

1. Defendants' Withholdings Create an Impermissible Body of "Secret Law" Governing the Deployment of Secure Communities

Exemption 5 protects certain internal agency communications from disclosure, but does not permit the federal government to shield a secret body of law from public view. Agency records qualify as "secret law" when they are "used by [the agency] 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*, 617 F.2d at 867. Withholding such agency positions would undermine the central purpose of FOIA, which is to promote a "profound national commitment to ensuring an open Government."[19] In the Opt-Out Production, Defendants repeatedly assert Exemption 5, the attorney-client privilege, to justify the non-disclosure of the legal position of the agency with regard to the voluntary or mandatory nature of Secure Communities. *See Coastal States*, 617 F.2d at 867 (finding that agencies may not use Exemption 5 to withhold documents that "discuss *established* policies and decisions."); *Afshar v. Dep't of State*, 702 F.2d 1125, 1142-43 (D.C. Cir. 1983) (holding that a recommendation of no precedential value and applicable only to an individual is nevertheless non-exempt *if adopted as the basis for a final decision*); *Evans v. OPM*, 276 F. Supp. 2d 34, 40

[19] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

(D.D.C. 2003) (holding that an OPM General Counsel memorandum containing *a "clear statement" of the agency's position* on adoption of government hiring policy is not exempt under the deliberative process production). These withholdings create a secret body of law and deprive states and localities of information regarding their legal options to limit participation in the Program.

Several critical documents withheld by Defendants, which include legal memoranda and other exchanges, signal the existence of a body of secret law governing the imposition of Secure Communities on the nation. In the Opt-Out Production, ICE invoked the attorney-client and/or deliberative process privileges to conceal at least twenty draft legal memoranda and communications[20] which apparently explain the legal basis for the two policy positions that the federal government has publicly taken on the mandatory or voluntary nature of Secure Communities.[21] Defendants have failed to meet their burden to justify the withholding of these secret agency memoranda. Thus, these memoranda must be disclosed under the secret law doctrine.

For example, the Opt-Out Production contains a legal memorandum from ICE's Deputy Principal Legal Advisor, entitled "Secure Communities—Mandatory in 2013" and dated October 2, 2010. (Horton Decl., Ex. B, Doc. # 1-13.)[22] The memorandum is marked "DRAFT" and

[20] Defendants' insufficient *Vaughns* make it impossible to know whether this list is complete.

[21] *See* Horton Decl., Ex. E, Docs. 18-19, (listing legal memorandum and drafts allegedly providing justification for "opt-out," "voluntary" and other ICE policy positions); Horton Decl., Ex. E, Docs. 1-15 (listing nine draft legal memoranda redacted in full and dated September 30, 2010-October 8, 2010, allegedly providing justification for position that Secure Communities is mandatory and accompanying email exchanges specifically discussing how these legal memoranda will impact public messaging surrounding Secure Communities and opt-out).

[22] The apparently earlier drafts and the emails accompanying some of those drafts, make up a large portion of the documents enumerated in Horton Decl., Ex. 1-9. We included all drafts because we could not be certain which was last in time.

redacted in full.[23] However, four days after the date of this memorandum, on October 6, 2010, Secretary Napolitano publicly reversed the agency's prior position on the voluntary nature of the program, stating that the program would be mandatory.[24] The production contains an email chain dated October 8, 2010, two days after the announcement of the agency's mandatory position, to which the "Mandatory in 2013" memorandum is attached, with emails from ICE's Principal Legal Advisor and the Section Chief of ICE's Office to the memorandum's author conveying the complements of the Principal Deputy General Counsel to DHS on the "excellent SC paper you put together." (Horton Decl. Ex. B, Doc. 1). Plaintiffs could not identify a version of this memorandum marked "final."

The version cited above appears to be the latest version in the production. The position that nothing in the memorandum formed the basis for the agency's position announced by the DHS Secretary is not credible.[25] If the memorandum ever was privileged,[26] it lost its privilege when it became the basis for the agency's final decision that Secure Communities will be mandatory in 2013.[27] The direct evidence that the "Mandatory in 2013" memorandum formed the justification for DHS's policy change from voluntary to mandatory may lie in DHS' production of over 100 fully-redacted pages of an "email exchange" between "CRCL" and "ICE

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[23] *See infra* III.B.1., regarding the insufficiency of a "DRAFT" label in meeting the burden for a deliberative process exemption.

[24] Shankar Vedantam, U.S. Deportations Reach Record High, WASHINGTON POST, Oct. 7, 2010, http://www.washingtonpost.coe m/wp-dyn/content/article/2010/10/06/AR2010100607232.html

[25] Defendants should be ordered to produce any more recent versions of the memorandum.

[26] Indeed, there are indications in the record that ICE decided Secure Communities would be mandatory as early as March 2010. *See* discussion *supra* at 8. Accordingly, it appears this memoranda was a mere explanation of a policy decision already made and accordingly was never privileged. *See generally Sears*, 421 U.S. at 153-54.

[27] *See* David Sherfinski, *ICE Plans Expansion of Immigration Database Program*, WASHINGTON EXAMINER, Jan. 28, 2010, http://washingtonexaminer.com/local/ice-plans-expansion-immigration-database-program#ixzz0ePOriSz2.

Personnel" from September 20 to October 5, 2010. (Horton Decl., Ex. B, Doc. 10.) The only description of the exchange DHS provides to justify withholding is that it contains a: "[p]re-decisional and deliberative conversation via Email on Implementation of Policy and how to respond to inquiries about said Policy." (*Id*.)

In addition to the memoranda addressing the mandatory in 2013 issue, there are several legal memoranda purportedly providing justification for the original decision that Secure Communities was "voluntary" and that states and localities could "opt-out", a position previously taken by the agency.[28] (*See supra* discussion, at 6.) The earlier memorandum identifying justification for the "voluntary" nature of Secure Communities, or the "opt-out" issue, should be disclosed so that the public can know the justifications for these policies, even though the agency has since changed its position. (Horton Decl., Ex. B). Plaintiffs believe that Defendants represented that Secure Communities is a voluntary program at least as early as January 2009 through September 2010.[29]

Because Secure Communities operates with no direct legal authority, nor has the agency promulgated regulations, the legal memorandum sought herein (Horton Decl., Ex. B), are the only source of "law" or agency positions that could explain or justify the scope and operation of the Program. The Defendants cannot operate the Program pursuant to secret legal justifications.

2. Defendants Improperly Assert Deliberative Process Exemption/ Defendants Fail to Meet their Burden to Establish that Nondisclosed Documents are Predecisional and Deliberative

Many of Defendants' most critical, improperly claimed exemptions fall under Exemption 5's deliberative process privilege. (*See* Horton Decl., Ex. B) (outlining potentially critical deliberative process exemptions, which Defendants fail to justify). The (b)(5) deliberative

[28] *See* discussion *supra* at 6-8.

[29] *See* discussion *supra* at 6-8.

process privilege only applies to records that are both "predecisional" and "deliberative." *Tigue v. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). Documents are predecisional when they are "prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made." *New York Times Co. v. Dep't of Defense*, 499 F. Supp. 2d 501, 514 (S.D.N.Y. 2007) (internal quotation marks and citations omitted). To invoke the deliberative process privilege, the agency must either "pinpoint an agency decision or policy to which the document contributed, or identify a decisionmaking process to which a document contributed." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d, 252, 259 (D.D.C. 2004) (internal quotation marks and citations omitted).

"To determine whether a document is deliberative, courts have looked to factors such as whether the document formed an essential link in a specified consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and if released, would inaccurately reflect or prematurely disclose the views of the agency." *New York Times Co. v. Dep't of Defense* 499 F. Supp. 2d at 514 (internal quotation marks omitted) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d at 482)). To satisfy their burden to justify Exemption 5 withholdings, agencies should also identify the individuals involved in a decision and their relative positions; because higher ranked officials have more decision-making authority, thus, messages sent from superior to inferior staff are less likely to be deliberative and more likely to contain explanations of previously made decisions. *Senate of the Commonwealth of Puerto Rico*, 823 F.2d 574, 586 (D.C. Cir. 1987).

ICE repeatedly asserted the deliberative process privilege without providing the requisite specific justification, failing to specify the policy or decision to which the nondisclosed

document pertains.[30] Instead, Defendants recycle boilerplate language or merely restate the statutory standard.[31] These types of "general and conclusory statements" do not provide this Court or Plaintiffs with the information needed for an Exemption 5 analysis, for example, the issue or policy that is the subject of deliberation or the relative positions of agency officials involved. *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1464 (D.C. Cir. 1984) (stating general and conclusory statements cannot justify nondisclosure).[32]

Moreover, in order for a document to be shielded by Exemption 5 it must be a direct part of a predecisional and deliberative process and, thus, must have been created before the decision. *Vaughn*, 523 F.2d at 1144. On a large number of potentially critical documents, Defendants have failed to carry their burden of a claimed deliberative process exemption because they have not established the document was created prior to the decision.[33] Moreover, if an agency "chooses expressly to adopt or incorporate by reference" a once-predecisional recommendation,

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[30] *See, e.g.*, Horton Decl., Ex. C, Docs. 4-10, 13, 14, 16, 19, 23, 26, 27, 28, 30, 33, 40, 41, 43-46, 50, 52, 61, 69, 72, 86, 92, 99, 103, 112, 124, 125, 124-30, 166, 168.

[31] *See, e.g.*, Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.0002308 – 10; 2311 – 21; 2335 – 46; 2347 - 49 (all stating "[d]eleted portions of a draft response to a report's questions about SC. The language is neither reflective of a final agency action or position nor responsive."); *see also* Pavlik-Keenan Decl., Ex. A at ICE FOIA 10-2674.0002418 – 21 ("Draft proposal and comments regarding possible modifications to SC deployment strategy. The contents are not reflective of a final agency action or decision.").

[32] For example, Defendants cite to Pavlik-Keenan Third Decl., Ex. A, ICE FOIA 10-2674.0003393 to .0003395 to demonstrate that Defendants properly applied the deliberative process privilege to nondisclosed information because it is "clearly privileged." *See* Def. Br. at 12. However, the *Vaughn* index's corresponding entry merely states "predecisional discussion of issues by SC staff elements regarding SC program." The *Vaughn*'s description fails to state with any meaningful specificity the policy or decision to which the nondisclosed information relates. Defendants' *Vaughn* indexes are replete with similar deficiencies. *See e.g.,* ICE FOIA 10-2674.0002378-82 ("Deliberations regarding predecisional interagency discussions and proposed deployment strategy"); ICE FOIA 10-2674.0002426-30 ("Internal deliberations regarding inter-governmental discussions and policy proposal based thereon"),

[33] *See, e.g.*, Horton Decl., Ex. C, #s 25, 38, 42, 63, 64, 71, 81, 114-16, 119, 144, 148, 155-65, 169-73, 177-83, 185.

that document is no longer "predecisional," and accordingly, it loses protection under Exemption 5. *Sears*, 421 U.S. at 161.

Defendants improperly have claimed exemptions as predecisional for any document marked "DRAFT". While the demarcation of a document as a draft may make it likely to contain deliberative and exempt information, a draft or other similar label in itself is not sufficient to satisfy the Exemption 5 analysis. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (citing *Coastal States*, 617 F.2d at 866); *see also Hansen* v. *U.S. Dep't of the Air Force*, 817 F. Supp. 123, 124-25 (D.D.C. 1992) (ordering disclosure of a draft used as a final product).[34]

Documents 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. (*See* Horton Decl., Ex. C, #s 38, 42, 63, 64, 71, 169-73). Finally, any documents about the mandatory nature of the program, or documents created after March 2010 and providing justification for the position that Secure Communities would be mandatory in 2013 are post-decisional. (*See* Horton Decl., Ex. C, #s 25, 81, 114-16, 119, 144, 148, 155-65, 176-83, 185).

[34] For example, a document that is marked "draft" loses Exemption 5's protection if the agency "chooses expressly to adopt or incorporate by reference" the position advanced in the document because that document is no longer "predecisional." *Sears*, 421 U.S. at 16; *see also Nat'l Council de la Raza v. Dep't of Justice*, 411 F.3d 350, 361 (2d Cir. 2005) (holding that OLC memorandum regarding the legal authority of states and localities to enforce federal immigration law had been "expressly incorporated by reference" in agency public statements and was therefore non-exempt). It does not matter whether the adoption of a previously deliberative position is formal or informal – either will destroy the privilege. *See Coastal States*, 617 F.3d at 866.

3. Defendants Improperly Assert Attorney-Client Privilege

Many of Defendants' critical redactions are purportedly justified under Exemption 5's attorney-client privilege component. (*See* Horton Decl., Ex. D) (enumerating critical legal documents, most of which are redactions based, in part, on attorney-client privilege); (Horton Decl., Ex. D) (enumerating potentially critical documents withheld under the attorney-client privilege, which Defendants fail to justify). The attorney-client privilege under Exemption 5 "is narrowly construed and is limited to those situations in which its purpose will be served." *Coastal States*, 617 F.2d at 862. "To invoke the privilege, an agency must demonstrate that the document it seeks to withhold (1) involves 'confidential communications between an attorney and his client' and (2) relates to 'a legal matter for which the client has sought professional advice.'" *Judicial Watch*, 297 F. Supp. 2d at 267 (quoting *Mead*, 566 F.2d at 252). The court in *Judicial Watch* held:

> The privilege does not allow an agency to withhold a document merely because it is a communication between the agency and its lawyers. The agency bears the burden of showing that the information exchanged was confidential. That is, the agency must show that it supplied information to its lawyers 'with the expectation of secrecy and was not known by or disclosed to any third party.'

297 F. Supp. 2d at 267 (quoting *Mead*, 566 F.2d at 254) (citations omitted). The attorney-client privilege does not apply to a communication that is based on information that was obtained from and known by a third party. *See Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997). In addition, "confidentiality both at the time of the communication and maintained since" is a prerequisite for the application of the privilege. *Coastal States*, 617 F.2d at 863; *Mead*, 566 F.2d at 254. Where the "client" is an organization, the confidential communication must be "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.'" *Id.*

(quoting *Mead*, 566 F.2d at 253 n.24); *accord Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 17 (D.D.C. 2004).

The documents enumerated in Horton Decl. Exhibit D are potentially critical documents containing attorney-client privilege redactions, which the Defendants fail to justify. Defendants' *Vaughns* do not contain sufficient detail for Plaintiffs or the Court to determine whether the documents in Exhibit D contain advice which is "legal" in nature, rather than nonlegal, policy-related or public relations discussions. Several of the *Vaughn* entries do not even assert that the documents contain legal advice. (*See, e.g.*, Horton Decl., Ex. D # 8, 18, 20, 22, 28-37, 71-72, 74-76).[35] Indeed, many of the entries may pertain to factual inquiries or messaging advice in preparation for conversations with reporters, congressional representatives, or other local authorities. (*See, e.g.*, Horton Decl., Ex. D, # 1) (email containing "Proposed language for response to Representative Eshoo on a jurisdiction's options if it does not wish to participate in SC."), 5 ("Email string between SC PMO staff and legal office preparing Draft response to media inquiry."), 8 ("Draft response letter to Congressional inquiry."), 79 ("Draft letter to county manager regarding locality's possible participation in SC.")).

Defendants also fail to even assert, let alone demonstrate, that the confidentiality of the redacted communications has been maintained in most of the challenged attorney-client privilege redactions. (*See* Horton Decl., Ex. D). Entries related to media, state and local government, and congressional communications imply that the advice was to be shared with people external to the agency – thus that confidentiality was not maintained. Indeed, an email originating from the Washington Police Department, which was *not* produced by Defendants, demonstrates that the

[35] Other *Vaughn* entries assert that legal advice was involved using boilerplate language that allows the Plaintiffs and the Court no mechanism to test this assertion. (*See, e.g.*, Horton Decl., Ex. D, # 7, 9-17, 19, 60-62).

Defendants have shared their legal analysis on the core issue of the legal justification for their position that Secure Communities will be mandatory in 2013.[36] This email is sufficient to raise the inference that, at least some of the legal analysis in the critical legal documents (*see, e.g.*, Horton Decl., Ex. B) has been shared with people outside the agency and is thus no longer privileged.

B. Defendants Fail to Satisfy Their Burden Under Exemption 6 and 7(c)

1. Defendants Fail to Justify Categorical Withholdings of the Names and Titles of Government Officials, including Federal Employees, Consultants, and Local and State Officials under 5 USC Sec. 552(B)(6)

For an Exemption 6 analysis, the Court must decide whether disclosure "compromise[s] substantial privacy interests." *Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If disclosure compromises substantial privacy interests the inquiry ends. *Aguierre*, 551 F. Supp. 2d at 53. If, however, no substantial privacy interest is established, the court must employ a balancing test, weighing "the potential harm to privacy interests" against "the public interest in disclosure of the requested information." *Ripskis*, 746 F.2d at 3. Information that "merely identifies the names of government officials who authored documents and received documents" does not generally fall within Exemption 6. *Aguierre v. S.E.C.*, 551 F. Supp. 2d 33, 53 (D.D.C., 2008) (citation omitted). Defendants have failed to meet their burden of justifying the categorical withholding of the names and titles of government officials, including those

[36] *See* Horton Decl., Ex. I (Email from Amy Loudermilk to Matthew Bromeland, Subject: Follow-up re: DV SCOMM Meeting, March 24, 2010 ("I wanted to check in to see if you could send the information you'd indicated about the various federal mandates (legislation, Executive Orders, Obama's budget statement, etc.) that exist with respect to the Secure Communities program going nationwide by 2013.")); (Email from Matthew Bromeland, Metropolitan Police Department, Washington D.C., to Amy Loudermilk, Mar. 30, 2010 (". . . according to ICE and the FBI, there is no one specific mandate, but rather it is grounded in a multitude of information sharing initiatives. They shared with us the main ones listed below).

federal employees, consultants, and local and state officials, referenced in the "to" and "from" fields of emails, and in the email body.

2. Defendants Fail to Establish that Disclosure of Personnel Names Would Constitute a "Clearly Unwarranted Invasion of Personal Privacy"

Rather than pinpoint individual circumstances in which Defendants redacted names, Defendant ICE's *Vaughn* index and declaration attempt to justify its redactions as simply, "Names . . . of federal and state employees and other third parties appearing in agency records" without offering any explanation of the "*clearly unwarranted* invasion of privacy" the release of such names would trigger. *See Aguierre*, 551 F. Supp. 2d at 54 (citation omitted).[37]

Accordingly, Defendants fail to meet their burden to establish that the "potential harm to privacy interests" against the "the public interest in disclosure of the requested information." *See Aguierre*, 551 F. Supp. 2d at 53. The "clearly unwarranted" language of Exemption 6 weighs the scales in favor of disclosure. *EPA v. Mink*, 410 U.S. 73 (1973). Here, Plaintiffs need for disclosure of officials' names outweighs any minimal privacy interest these government employees might have. However, because of redactions of names and titles, Plaintiffs are unable to ascertain to which person, and occasionally to which agency, the statements can be credited.

3. Defendants' Blanket Application of Section 6 and 7(C) Exemptions Hinder Plaintiffs' Ability to Challenge Other Exemptions

Defendants' blanket use of unjustified (b)(6) and (b)(7)(C) redactions throughout the entirety of their production hinders Plaintiffs ability to meaningfully challenge other redactions, *e.g.*, those claimed under the deliberative process privilege. The deliberative process privilege only protects disclosure of documents which are exchanged "inter-agency or intra-agency," and

[37] *See* Pavlik-Keenan Third Decl., ¶¶ 21-24; *see also* Lewis Second Decl., ¶¶ 14-17; Hardy Third Decl., ¶¶ 17-18.

the attorney client privilege protects documents that are confidential. Defendants' redactions of names, places of work, or professional titles, preclude Plaintiffs' potential challenges where certain documents may have been shared with third parties outside of the agency or agencies. Moreover, Defendants' blanket redaction of names and titles hinders the inquiry into whether messages have been sent from superior to inferior staff are less likely to be deliberative and more likely to contain explanations of previously made decisions. (*See supra* III.B.1).

C. Defendants Also Fail to Meet their Burden to Justify the Redaction of Reasonably Segregable Portions of the Redacted Documents

Defendants have failed to meet their segregability obligations concerning the Opt-Out Production. (Pavlik-Keenan Third Decl., Ex. A) (stating only that "[a]ny portion of a document that is reasonably segregable from the information subject to an exemption has been released."). The declaration in support of the ICE production offers only two paragraphs on the issue of segregability. (Pavlik-Keenan Third Decl., ¶¶ 25-26).[38] ICE's obligation to itemize and index exemption claims for each document applies equally to claims of what portions of documents are and are not reasonably segregable. *See Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) ("*Vaughn* itself requires agencies to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.' A submission that does not do that does not even qualify as a '*Vaughn* index."). Accordingly, ICE's one-sentence statement regarding segregability and the conclusory statements in the Pavlik-Keenan declaration do not meet the burden imposed by the FOIA. *See Hopkins v. HUD*, 929 F.2d 81, 85 (2d Cir. 1991) (remanding to district court for *in camera* inspection where agency "offered no details as to the contents of

[38] The memorandum of law in support of Defendants' motion for partial summary judgment fails to address segregability at all.

specific reports, but only asserted in a conclusory fashion that any factual observations contained in the reports are 'inextricably intertwined' with the privileged opinions and recommendations").

Defendants' *Vaughn* Indexes provide virtually no individualized explanation to satisfy the Court that any segregable non-exempt information has been disclosed. For example, in a "[d]raft memorandum from OPLA attorneys," ICE justifies its claim to the exemption 5 attorney-client privilege by noting the memorandum was "prepared to discuss issues related to the mandatory nature of SC in 2013." (Pavlik-Keenan Third Decl., Ex. A at ICE FOIA 10-2674.0003740-48). The email message transmitting the memorandum, however, indicates that non-exempt factual information is likely reasonably segregable from the exempt portions. The message states that the memorandum contains "background info," "legislative history," "add'l stat authority," and "a regulatory cite," all of which should be considered non-exempt factual information. *See Elec. Privacy Info. Ctr.*, No. 03-1846, 2006 U.S. Dist. LEXIS 12989, at *11 (D.D.C. Mar. 12, 2006) (noting that factual information eventually released to the plaintiffs included "a listing of laws" and other text related to the plaintiff's request). Such a description plainly fails to meet the basic segregability standard that agencies "provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead*, 566 F.2d at 261.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request the Court to deny Defendants ICE, DHS, FBI, and EOIR's Motion for Partial Summary Judgment, to conduct *in camera* review of the documents enumerated in Exhibits A-B, and to conduct an *in camera* review of a random sample of documents enumerated in Exhibits C-D and F. Alternatively, Plaintiffs request this Court to order production of the nondisclosed records challenged by Plaintiffs at Exhibits A-E.

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Respectfully submitted,

/s/

BRIDGET P. KESSLER
PETER L. MARKOWITZ
JAMES HORTON*
HANNAH WEINSTEIN*
CAROLINE E. GLICKLER*
Kathryn O. Greenberg Immigration Justice Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
Tel: 212-790-0213
Fax: 212-790-0256
bkessle1@yu.edu
pmarkowi@yu.edu
**Law student intern*

Attorneys for IJC and NDLON

/s/

SUNITA PATEL
DARIUS CHARNEY
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
Tel: 212-614-6439
Fax: 212-614-6499
SPatel@ccrjustice.org
DCharney@ccrjustice.org

Attorneys for CCR and NDLON

/s/

PAULA A. TUFFIN
ANTHONY J. DIANA
NORMAN R. CERULLO
LISA R. PLUSH
JEREMY D. SCHILDCROUT
Mayer Brown LLP
1675 Broadway
New York, New York 10019
Tel: 212-506-2500
Fax: 212-262-1910
ptuffin@mayerbrown.com
adiana@mayerbrown.com
ncerullo@mayerbrown.com
lplush@mayerbrown.com
jschildcrout@mayerbrown.com

Attorneys for NDLON