

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRENNAN CENTER FOR JUSTICE AT NEW
YORK UNIVERSITY SCHOOL OF LAW,

Plaintiff,

- against -

UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES and
U. S. AGENCY FOR INTERNATIONAL
DEVELOPMENT.

Defendants.

09 Civ. 8756 (VM): ECF CASE

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO THE GOVERNMENT'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

In this FOIA action, the Brennan Center¹ is seeking memoranda that contain the OLC Guidance provided to HHS and USAID regarding the constitutionality of the Funding Restrictions in the Leadership Act and TVPRA. The Government has thus far shielded the OLC Guidance from public view, claiming that FOIA Exemption 5 applies. In response to the Plaintiff's motion for summary judgment, the Government has grudgingly released a few more words previously withheld under Exemption 5. Some of these unredacted words bear directly on our arguments for release of the memoranda. It should not be so painstakingly difficult, or involve such expenditure of judicial resources, to obtain exempt information under FOIA.

Here, the Government concedes that (i) “[a]n agency may be required to disclose a document otherwise entitled to production 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,” (Opp. Br. 10) (citations and internal quotations omitted)) and (ii) “the agencies . . . state that they were relying on the advice of their counsel in determining how to proceed.” (Opp. Br. 1).² In withholding the memoranda, they rely on a narrow reading of *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (“*La Raza*”), misinterpreting it to set a threshold for determining when an otherwise privileged document has been incorporated into a government policy. This reading, however, would thwart the purpose of FOIA: to inform the public of the reasons for an official government policy. And while the Government has provided a declaration by an OLC lawyer opining, in a conclusory fashion, that revelation of the memoranda would dampen communication, *La Raza*

¹ Capitalized terms herein are as defined in the Plaintiff's Memorandum of Law in Support of Summary Judgment (“Pl.’s Summ. J. Mem.”).

² The Government acknowledges that the same disclosure principle applies to documents protected by the attorney-client privilege. (Opp. Br. 10).

and *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (“*NLRB v. Sears*”), make clear that where legal advice is actually implemented and widely known as the basis for official policy, there is no such threat. Moreover, it is impossible to reconcile OLC’s broad, conclusory assertion that revelation of these few memoranda would generally dampen communication when the OLC has publically disclosed scores of memoranda containing legal advice related to national security matters.³ The facts here—repeated references to the OLC Guidance and its reasoning as the basis for HHS’s and USAID’s policy regarding the Funding Restrictions—fall squarely within the scenario that *La Raza* outlined as warranting disclosure of an otherwise protected document.

The Government supports its narrow reading of *La Raza* by citing inapposite cases that concern “yes or no determinations.” But this was not a “yes or no determination.” This was a publically announced policy based on a determination that there were “*constitutional implications of applying [the Pledge Requirement to U.S. organizations]*.” SUF ¶ 25. The Government refuses to disclose what these “constitutional implications” were, no doubt because the agencies have changed their official policy, and are now ignoring these “constitutional implications.” But a change in policy does not justify withholding documents under Exemption 5. (Pl.’s Summ. J. Mem. 19).

RELEVANT FACTS

The relevant facts are undisputed. On February 12, 2004, HHS asked the OLC to provide guidance on “constitutional issues” raised by the Leadership Act and TVPRA before it issued new policy directives. SUF ¶ 12.⁴ On February 17, 2004, in response to HHS’s request,

³ See OLC FOIA Reading Room, available at <http://www.justice.gov/olc/olc-foia1.htm> (last visited March 30, 2011).

⁴ OLC also provided a 30-page memorandum dated July 2, 2004, and a revised version dated

the OLC provided both USAID and HHS with the February Memo. *Id.* ¶ 14. Immediately thereafter, HHS issued a grant notice applying the Pledge Requirement *only* to foreign organizations. *Id.* ¶ 20. USAID also acted on the OLC Guidance. Immediately after receiving the February Memo, USAID publicly issued a revised AAPD setting out its new policy under the Leadership Act. *Id.* ¶ 16. In this policy directive—and in two subsequent directives—USAID acknowledged the basis of its policy was that “[t]he *US Government* has determined that it is appropriate to apply the requirement set forth in Section 301(f) only to foreign organizations.” *Id.* ¶¶ 16-17, 24, 27 (emphasis added). That the OLC Guidance formed the basis of USAID’s policy was further confirmed in additional public statements. For example:

- On July 22, 2004, USAID referenced the OLC Guidance in a formal document sent to agency operating units, stating: “The Office of Legal Counsel, U.S. Department of Justice, in a draft opinion, determined that [the Pledge Requirement] only may be applied to foreign non-governmental organizations and public international organizations *because of the constitutional implications of applying it to U.S. organizations.*” *Id.* ¶ 25 (emphasis added).
- In September 2004, the Acting Assistant Attorney General, Daniel Levin, stated—in a letter that was made public—that the DOJ had given advice that the Funding Restrictions could “under the Constitution, be applied only to foreign organizations acting overseas.” *Id.* ¶ 28.

July 29, 2004 (collectively, the “July OLC Opinion”) to the agencies. The July OLC Opinion regarding “Sex Trafficking, AIDS Act grant restrictions,” discloses in a footnote that it is being provided in response to HHS’s February 12, 2004 request. *Id.* ¶¶ 2, 21. Although Plaintiff is disadvantaged by not knowing the substance of the July OLC Opinion, what is clear is that it was provided to the agencies in response to their request for guidance in implementing the Funding Restrictions and the agencies referred to the Government’s determination in explaining its policies to the public. Therefore, Plaintiff is also entitled to the July OLC Opinion for the reasons provided in Section I below.

ARGUMENT

I. UNDER *NLRB v. SEARS AND LA RAZA*, DEFENDANTS MUST DISCLOSE THE REASONING UNDERLYING THE OLC GUIDANCE BECAUSE IT WAS ADOPTED INTO AGENCY POLICY

The rationale supporting disclosure of the memoranda was announced by the Supreme Court in *NLRB v. Sears*: “the public is vitally concerned with the reasons which did supply the basis for an agency decision actually adopted.” 421 U.S. at 152. There, the Court upheld a district court’s order to disclose certain memoranda because of “the public interest in knowing the reasons for a policy actually adopted by an agency,” holding,

[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exception other than Exemption 5.

A. There is no Bright-Line Test for Satisfying *NLRB v. Sears* or *La Raza*

Cases in this circuit interpreting FOIA and *NLRB v. Sears* make clear that there is no bright-line test for determining when a document has been adopted or incorporated by the government. Rather, as the Second Circuit made clear in *La Raza*, the Court must engage in a facts-and-circumstances analysis:

While the Department [of Justice] urges us to adopt a bright-line test . . . such a test is inappropriate because courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred.

411 F. 3d at 357 n.5 (emphasis added).). Thus, it is not necessary to find some magic language where an agency admits reliance on the reasoning as well as the conclusions of a document.

The Government misreads *La Raza* to require extensive, repeated public descriptions of the contents of otherwise privileged memoranda,⁵ arguing that “the agencies here did nothing

⁵ The Government unfairly tries to gain strategic advantage from our willingness to submit to *in camera* review of the withheld documents by contending that we waived any argument concerning protection of the withheld documents under the deliberative process and attorney-

more than state that they were relying on the advice of their counsel in determining how to proceed” and never described “the reasoning behind that conclusion.” (Opp. Br. 1, 18-19).

La Raza, however, does not require the Government to use any specific language to waive protection of Exemption 5. *Bronx Defenders v. U.S. Dep't of Homeland Sec.*, No. 04-cv-8576, 2005 WL 3462725, at *2 (S.D.N.Y. Dec. 19, 2005), also involving memoranda and emails from the OLC, explains that *La Raza* does not establish a bright-line rule. Judge Baer wrote:

While it is true the facts of *La Raza* showed public and repeated reliance by the Attorney General on a particular OLC memo, it does not follow that anything less than that will fail to abrogate the privilege. The *La Raza* Court acknowledged this when it declined to set a bright line rule for adoption or incorporation. *La Raza*, 411 F.3d at 358.

Id. at *6 (citing *La Raza*).

Trying to limit *La Raza* to its facts, the Government cites cases that rely on the statement, in *dicta*, that: “where an agency, having reviewed a subordinate’s non-binding recommendation, makes a ‘yes or no’ determination, without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate’s report.” (Opp. Br. 19). However, the inter-agency communications at issue here, and public statements by two government agencies, present an entirely different factual scenario. SUF ¶¶ 16-17, 24, 25, 27-28, 37, 40.

client privileges. We have not argued that these privileges do not apply to the redacted text, however, because we have not seen it, and are thus relying on the Court’s analysis for the purposes of this summary judgment motion. Further, the Federal Rules do not support a waiver here. Rule 56 of the Federal Rules of Civil Procedure allows a party to move for summary judgment on any part of a claim or cause of action. Fed. R. Civ. P. 56(a). Moreover, as evidenced by our Notice of Motion, we are seeking only *partial* summary judgment on the limited issue of waiver due to adoption and/or incorporation into government policy. We have not raised—or waived—the issue of privilege with the Court and we are not in a position to oppose the Government’s assertion of privilege without the benefit of reviewing the documents. Thus, we reserve our rights and leave the determination to the Court if that is necessary.

For example, *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), involved recommendations concerning possible excessive profits earned by government contractors. The regional boards or divisions that made the recommendations did not have the authority to make final dispositions. Instead, ultimate decisions were made by a central board, which also received input from other sources. If the central board agreed with the recommended disposition, it took action without any explanation. Thus, “it is not possible to know whether the Board agreed with the reasoning of the Regional Board Report or just its conclusion.” *Id.* at 179. The exact opposite is the case here: an agency stated that its policy was based on the “constitutional implications” raised by the February Memo.

The decision in *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005), turns on the same, inapposite analysis. In *Wood*, a journalist requested a prosecution memorandum relating to a case that the government had declined to prosecute. Quoting the *dicta* from *La Raza*, the Second Circuit held that a brief note on the face of the memorandum (indicating a decision to decline to prosecute) did not indicate that the DOJ adopted the reasoning of the memorandum.⁶ Here, however, as in *La Raza*, the government agencies stated publically that they were relying on the analysis in the memoranda. SUF ¶ 25.⁷

The Government has no support for its argument that something more is required. We

⁶ *Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70 (2d Cir. 2002), is likewise not on point. The document sought in that case was a memorandum by a Deputy U.S. Attorney, Shirah Neiman, outlining the Southern District’s recommendations as to how the Internal Revenue Service should conduct criminal investigations. The plaintiff argued that the government had waived Exemption 5 protection because of a quotation from the memorandum in a report by an independent task force (the “Webster Commission”). The Court found that protection had not been waived because minor references to the S.D.N.Y. memorandum in a report by the Webster Commission did not amount to an “express adoption or incorporation.” 312 F.3d at 81.

⁷ *La Raza*, 411 F.3d at 358 (“the Attorney General . . . made a practice of using the OLC Memorandum to justify . . . to assure the public . . . that the policy was legally sound Thus . . . the Department cannot satisfy its burden of proving [Exemption 5] applies.”).

are aware of no case standing for the proposition that disclosure is required only if the government has already made public the entire analysis in a memorandum. This would make a mockery out of FOIA, as the government could be compelled to produce only public information. *See* Declaration of Paul P. Colborn dated March 11, 2011 (the “Colborn Declaration”) ¶ 9 (“The remainder of the [OLC Guidance], including other legal conclusions and the underlying legal analysis supporting all of the conclusions, has not been disclosed to the public and, accordingly, continues to be withheld.”).

B. HHS’s and USAID’s Policies were the “Working Law” of the Agencies

The Government acknowledges that under *NLRB v. Sears* it must disclose documents that are used to develop policies. (Opp. Br. 22-23). There, the Supreme Court stated that “Exemption 5, properly construed, calls for ‘disclosure of all ‘opinions and interpretations’ which embody the agency’s effective law and policy” 421 U.S. at 153. Therefore, the reasons underlying an agency policy that is “actually adopted” constitute the “working law” of the agency and are outside the protection of Exemption 5. Thus, the “working law” of an agency is comprised of “the general policies, and the interpretations of substantive law which it is supposed to enforce, that an agency applies in dealing with private parties.” *Afshar v. Department of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983) (citations omitted). While there are all kinds of agency “working law,” as indicated by the cases cited by the Government Brief at 22-24, an agency’s interpretation of law is classic “working law,” as defined by *NLRB v. Sears*.

In this case, the agencies adopted policies of not enforcing the Funding Restrictions against U.S. organizations, and, as publicly disclosed, this policy was based on an interpretation of substantive law that it was supposed to enforce. *Id.* ¶ 24 (emphasis added) (issuing a policy and stating that “[t]he *US Government* has determined that it is appropriate to apply the

requirement set forth in Section 301(f) only to foreign organizations.”). It makes no difference that the February Memo was not incorporated into some internal compendium: during the period that the agencies were not enforcing the Funding Requirements against U.S. organizations, their stated reasons were the “constitutional implications” of doing so. *Id.* ¶ 25.

II. THE GOVERNMENT MADE SUFFICIENT PUBLIC STATEMENTS ADOPTING THE RATIONALE IN THE WITHHELD DOCUMENTS TO SATISFY *LA RAZA* AND ITS PROGENY

Statements concerning the February Memo were not “casual” or “minor,” as the Government would have it. (Opp. Br. 11). Casual references do not satisfy *La Raza* because “a casual reference to a privileged document does not necessarily imply that an agency agrees with the reasoning contained in those documents.” *La Raza*, 411 F.3d at 359.

In *La Raza*, the court relied on the fact that the Attorney General stated at a press conference “that the OLC had now—in contrast to the OLC and the Department’s previous position—concluded that states possess the inherent authority to enforce the civil provisions of immigration law.” *La Raza*, 411 F.3d at 357. A similar statement was made here: Randall L. Tobias, the then-U.S. Global AIDS coordinator and USAID administrator stated, “The Office of Legal Counsel in the Department of Justice provided some tentative advice initially that those restrictions should be applied only to foreign organizations.” SUF ¶ 37. Thus, *La Raza* cannot be distinguished on the basis of the number of times the memoranda were mentioned.

The Government tries to whittle the relevant evidence down to one statement by USAID and testimony by the USAID Administrator. Under *La Raza*, these statements alone would be sufficient to demonstrate incorporation into policy for the reasons above. *See supra* Section I. But these are not the only statements that support release of the documents. Without citing any cases, the Government urges the Court to disregard statements by the OLC, on the ground that they were not made by HHS or USAID (Opp. Br. 18) (“[T]he statement in items 3 and 4 were

made by DOJ. . . . [n]either of these DOJ statements can be attributed to the policymaking agencies, HHS and USAID.”). *La Raza*, however, makes clear that statements by those other than decision-makers bear on whether to release otherwise privileged documents. In *La Raza*, the Government urged the court to “disregard any statements made by individuals other than the Attorney General on the grounds that those employees lack the authority to set Department policy.” *La Raza*, at 357 n.6. The Second Circuit rejected this tactic, stating “even assuming *arguendo* that these employees do not themselves have the power to adopt or incorporate the OLC Memorandum, their statements *serve as evidence of the Department’s position on the matter.*” *La Raza*, 411 F.3d at 357 n.6 (emphasis added). Here, just as in *La Raza*, “there is absolutely no suggestion in the record that any of the above-described statements . . . were unauthorized or inaccurate statements of the [Government’s] position.” *Id.*

III. THE DESIGNATION OF THE OLC ADVICE AS TENTATIVE IS IRRELEVANT

The Government improperly seeks to shield the OLC Guidance on the ground that it has been referred to as “tentative” or “draft.” However, as observed in *Lee v. FDIC*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996), “the mere fact that a document is a draft . . . is not a sufficient reason to automatically exempt it from disclosure.” Agencies are not permitted to hide behind a “veil of privilege” because a document is not labeled as “‘formal,’ ‘binding’ or ‘final.’” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

The cases cited by the Government to support an argument that the OLC Guidance is “tentative” bear only on whether the deliberative-process privilege applies.⁸ Most of them are

⁸ For example, the decision in *MacNamara v. City of New York*, 249 F.R.D. 70, 83-84 (S.D.N.Y. 2008), is irrelevant because it does not address whether a privileged document was incorporated into a final policy.

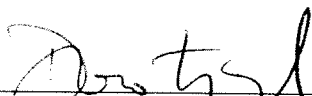
not FOIA decisions and none support the Government's implication that the "tentative" nature of memo impacts whether it was "incorporated" into official agency policy. (Opp. Br. 18).

One rationale for protecting "tentative" materials under Section 5 is that the analysis in them represents the views of a single person (not the agency) and that the agency believes these views to be inaccurate. *See Coastal States Gas Corp.*, 617 F.2d at 866. The Government cannot make that claim here because the OLC provided the advice and the agencies publically followed it.

CONCLUSION

Plaintiff respectfully requests that its Motion for Summary Judgment be granted and the Defendants' cross-motion for summary judgment be denied.

Dated: April 1, 2011
New York, New York

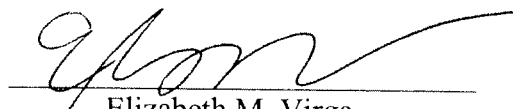


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CERTIFICATE OF SERVICE

I, Elizabeth M. Virga, hereby certify that on April 1, 2011, a true and correct copy of the Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment was served by electronic mail on:

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