Kip Evan Steinberg (SBN 096084)
Eric W. Rathhaus (SBN 172991)
LAW OFFICES OF KIP EVAN STEINBERG
Courthouse Square
1000 Fourth Street, Suite 600
San Rafael, CA 94901
Telephone: 415-453-2855
Facsimile: 415-456-1921
kip@steinberg-immigration-law.com

Attorneys for Plaintiffs MIRSAD HAJRO and JAMES R. MAYOCK

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MIRSAD HAJRO, JAMES R. MAYOCK Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, T. DIANE CEJKA, Director USCIS National Records Center, ROSEMARY MELVILLE, USCIS District Director of San Francisco, JANET NAPOLITANO, Secretary Department of Homeland Security, ERIC HOLDER, Attorney General Department of Justice Defendants	**Case No. CV 08 1350 PSG** **PLAINTIFFS' SECOND SUPPLEMENTAL BRIEF**

Pursuant to the Court's April 12, 2011 ORDER Soliciting Supplemental Briefing In Light Of Recent Decisions, Plaintiffs submit this Supplemental Brief addressing the significance of the Supreme Court's recent opinion in *Milner v. Dept. of the Navy*, 131 S.Ct. 1259 (2011) and the Ninth Circuit's March 2, 2011 order denying the government's petition for rehearing in *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) to the pending cross-motions for summary judgment.

INTRODUCTION

Milner and *Dent* are significant to the pending cross-motions for summary judgment because they are both relevant to the issue of disclosure of evidence to an alien's defense in an immigration proceeding.

The central issue in this case is the government's failure to abide by its legal obligations under both the Due Process Clause and the Mayock Settlement Agreement in providing a basis for expedited processing of FOIA requests upon a demonstrated showing of a loss of substantial due process rights. *Dent* is relevant to this issue because the decision supports Plaintiffs' position that the fundamental fairness guarantee of the Constitution requires timely disclosure of evidence in possession of the government that is necessary to an alien to defend or make his case.

One of the narrow issues in this case is the government's interpretation of FOIA Exemption 5 to Plaintiff Hajro's FOIA appeal seeking documents relevant to the denial of his application for naturalization. Although it concerned a different FOIA exemption, *Milner* is relevant because it is the Supreme Court's most recent reiteration that FOIA's goal is broad disclosure and FOIA exemptions must be narrowly construed. *Milner* is therefore instructive in the appropriate way to interpret FOIA exemptions in general.

ARGUMENT

1. MILNER

Plaintiff Mirsad Hajro was originally denied citizenship based on an unsubstantiated claim by the government that he had intentionally misrepresented the fact that he had served in the military in Bosnia[1] when he was interviewed on his application for permanent residence on November 13, 2000. Plaintiff Hajro disputes this. In order to defend himself on appeal, he filed

[1]Plaintiff Hajro is a Bosnian Moslem and briefly served in the Bosnian military in a non-combat role as a clerk typist. His active duty was brief, lasting only a few months, because he contracted hepatitis. He was never assigned a weapon and never participated in any combat.

a FOIA request to see the evidence relied upon by the government to support its decision. To this day, the government has never produced this evidence. Although the government did provide some documents from his alien registration file, none of those documents established the government's claim. *See* Plaintiffs' First Amended Complaint, "FAC" (Doct 11), ¶¶51 and 52. The only document(s) that possibly might contain this "evidence" are the contemporaneous notes of the officer that interviewed the Plaintiff.[2] However, the government claims that these notes are exempt from disclosure under 5 U.S.C § 552 (b) (5), "Exemption 5", the government's deliberative process privilege.[3]

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, generally requires federal agencies to disclose government records subject to nine exemptions, 5 U.S.C. § 552(b). *Milner* concerned the scope of Exemption 2, which protects from disclosure material that is "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The Supreme Court ruled that the government's interpretation of Exemption 2 was too broad and reaffirmed the proposition that FOIA exemptions should be construed narrowly to promote disclosure. *Milner* at 1262, 1265-66.

Though Exemption 5 is a different exemption than the one at issue in *Milner*, the government's interpretation of Exemption 5 is likewise incorrect because, as was the case in *Milner*, it "violates the rule favoring narrow construction of FOIA exemptions." *Milner* at 1271. This issue has previously been addressed in Plaintiffs' Memo Of Points And Authorities (Doct 51, pp. 23-25). For ease of reference, an excerpt from that argument is presented here:

"The deliberative process privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government. *NLRB v Sears Roebuck & Co.*, 421 U.S. 132, 150-154 (1975). The ultimate purpose of this

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[2]Plaintiff Hajro does not seek disclosure of all the notes. *See* Plaintiffs' FAC (Doct 11), ¶ 52. In the alternative, Plaintiffs will accept a certification from the government that no such evidence exists without having to produce the records themselves. *See* 8 U.S.C. § 1360 (d).

[3]*See* Vaughn Index, p.18 (Doct 47-1)

privilege is to prevent injury to the quality of agency decisions. *NLRB*, at 151. Its particular purposes are (1) to encourage open, frank discussions on policy matters between subordinate and chief; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion by disclosure of reasons and rationales that were not in fact the actual reasons for the agency's actions. *Coastal States Gas Corp. V. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

In construing the deliberative process privilege, the Supreme Court has recognized a distinction between "materials reflecting deliberative or policy-making processed on the one hand, and purely factual, investigative matters on the other. *EPA v. Mink*, 410 U.S. 73, 89 (1973). Thus, even if a document is predecisional, "the privilege applies only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document." *Coastal States*, at 867. See also *ITT World Comm. Inc. V. FCC*, 699 F.2d 1219, 1236 (D.C. Cir. 1983), *rev'd and remanded on other grounds*, 466 U.S.463 (1984).; *Playboy Enters.Inc. v. DOJ*, 677 F.2d 931,935 (D.C. Cir. 1982).

Generally, facts in a predecisional document must be segregated and disclosed unless they are "inextricably intertwined" with exempt portions. *Ryan v. Dep't of Justice*, 617 F. 2d 781, 790-91 (D.C. Cir. 1980).[4] This procedure was codified by Congress in 1974 in the final paragraph of 5 U.S.C. §552(b).

Since none of the documents released thus far contain any pre-existing evidence that Mr. Hajro was actually read or asked Question Part 3C in its entirety at the interview or was specifically and actually asked about foreign military service, it is logical to assume that this proof, if it exists, would be found in the officer's contemporaneous notes of the interview. Mr. Hajro does not insist on the release of all of the officer's handwritten notes. He is only seeking any contemporaneous evidence that Defendants might have that prove that he was asked about his foreign military service at the interview in 2000. This is a "fact" that is "reasonably

[4] [*See also,Pacific Fisheries Inc. V. USA*, 539 F.3d 1143, 1148 (9th Cir. 2008)]

segregable" from the rest of the notes[5].

It is difficult to perceive how the disclosure of such discrete purely factual information would result in a chilling effect upon the open and frank exchange of opinions within the agency, reveal the mental process of decision makers, or expose an agency's decision making process in such a way as to undermine the agency's ability to perform its functions."

Plaintiff Hajro does not remember being asked about foreign military service at his interview for permanent residence. The government claims he was. He has been trying to see the government's alleged evidence against him since 2007 when he filed his appeal of the denial of his first application for naturalization. The government has steadfastly refused to disclose this evidence, shielding from release even a reasonably segregable portion related to a discrete fact, i.e. whether or not a specific question was actually asked at an interview and, if so, the answer given.[6] The government's position on the officer's notes is all encompassing, but there is no *per se* rule regarding notes. See, *Brown v. E.P.A.*, 2009 WL 273411 (N.D. Cal. 2009) *8 (information in handwritten notes "may or may not" be exempt depending on whether or not "facts would expose the deliberative process.")

Faced with a broad interpretation of Exemption 2, the Court in *Milner* noted that "this odd reading would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than a 'withholding statute'. *Milner* at 1270, citing *EPA v. Mink*, 410 U.S. 73, 79 (1973). The government's application of Exemption 5 in this case is similarly incorrect because it ignores the Supreme Court's distinction between "materials reflecting deliberative or policy-making processed on the one hand, and purely factual, investigative matters on the other. *EPA v. Mink*, 410 U.S. 73, 89 (1973). This distinction appropriately narrows the scope of the exemption and is consistent with Congress' goal of broad disclosure. See, *Milner* at 1270, fn. 9

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[5]If Defendants claim they are withholding factual material because such material is inextricably intertwined with exempt deliberative material, then Plaintiffs request that this Court conduct an *in camera* inspection of the officer's notes. 5 U.S.C. § 552(a)(4)(B)

[6]The interview was apparently not videotaped.

Finally, in their Supplemental Brief (Doct 74) p.3, Defendants note "that the discovery of relevant agency documents is available" in Plaintiff's appeal of the denial of his application for naturalization in a separate case pending before Magistrate Judge James. However, the FOIA statute does not require exhaustion of all possible alternative methods or sources for documents the government refuses to disclose. Defendants cite to no authority that FOIA applicants must demonstrate that FOIA is the only possible way to obtain a document. This would add a requirement to the statute that does not exist. Furthermore, Defendants would surely invoke this same privilege in a discovery proceeding. See, *NLRB v. Sears, Roebuck & Co.*, 421 US 132, 149 (Exemption 5 exempts "those documents, and only those documents, that are normally privileged in the civil discovery context.") The reference that this document, or even a portion of the document, is somehow "available" through discovery in the pending naturalization appeal is therefore somewhat illusory.

Plaintiffs respectfully request a ruling on this Exemption 5 issue because Plaintiff Hajro's naturalization appeal under 8 U.S.C. § 1421 (c) remains pending (No. C 10-01772 MEJ) and this evidence is important to Plaintiff Hajro's case. A hearing on cross motions for summary judgment is scheduled before Magistrate Judge James on June 2, 2011.

2. DENT

Plaintiffs have previously briefed the significance of the Ninth Circuit's opinion in *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) to the pending cross-motions for summary judgment.(Doct 69). Subsequent to the filing of Plaintiffs' brief, the Ninth Circuit denied the government's petition for rehearing.

The *Dent* decision, and the denial of the government's petition for rehearing, underscores the Ninth Circuit's concern that "it would indeed be unconstitutional" if evidence is not made available in removal proceedings "until it was too late to use it". *Dent* at 374. Plaintiffs submit the same rationale applies to citizenship proceedings where the government denies citizenship based on the supposed existence of evidence in the applicant's file. The applicant should not be

forced "to take the government's word for it." Due process requires that the applicant be allowed to see that evidence, inculpatory or exculpatory, early enough in the proceedings to be of benefit to the applicant. [7] Plaintiff concedes that *Dent* is distinguishable because its holding is limited to removal proceedings. However, the constitutional underpinnings of *Dent* are relevant to considering the fundamental fairness of other immigration proceedings where timely access to evidence in the sole possession of the government is at issue. The case is therefore persuasive, though not controlling on this point.

Plaintiffs have already demonstrated a pattern and practice that the government regularly violates the twenty day statutory response time in FOIA. *See* Plaintiffs' Memo of Points and Authorities, pp 3-5 (Doct 51); FAC Exhibit M (Doct11); and Attachment 7 In Support Of Plaintiffs' Motion For Summary Judgment (Parts One to Five)(Docts 52-56). In some cases, this delay can lead to the loss of substantial due process rights. For example, because delay is prevalent in FOIA cases filed by aliens to obtain copies of their files, a citizenship applicant whose case has been denied should be granted expedited processing in order to have access to this evidence in a timely manner. The alien or his attorney must see this evidence before his appeal brief is due and the appeal hearing is held because delaying that evidence could affect the outcome of the appeal.

As previously argued in Plaintiffs' Opposition To Motion To Dismiss, pp.1-8 (Doct 35) and Plaintiffs' Memo of Points and Authorities, pp 5-8 (Doct 51), expedited processing of a FOIA request is required where the requestor can demonstrate a loss of substantial due process rights under both the Mayock Settlement Agreement and the fundamental fairness guarantee of Due Process. While the holding of *Dent* only applies to persons in removal proceedings, there is an underlying fundamental fairness component of *Dent* which supports Plaintiffs' arguments

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[7] In the context of removal proceedings, the Board of Immigration Appeals has recognized that a person "should be given access to the records maintained about himself by the Immigration and Naturalization Service." *Matter of Duran*, 20 I & N Dec. 1 (BIA, 1989) The Constitution requires that the rule should be no different in other immigration proceedings such as applications for citizenship.

regarding timely access to evidence in a government file which is necessary to make or defend an alien's case in a proceeding before the government.

There is no mandatory access statute such as 8 U.S.C. § 1229a(c)(2)(B) (discussed in *Dent*) in non-removal contexts. In the non-removal context, aliens seeking records about themselves must file FOIA requests. 8 C.F.R. § 103.21; 6 C.F.R. § 5.1 et seq. However the processing of those requests cannot be allowed to violate the Constitution. This would occur if FOIA entitled an alien access to his file but the agency delayed this access until it was too late to to be of any benefit. Therefore, even assuming *arguendo* that the Mayock Settlement Agreement is no longer valid, the Constitution requires that agency regulations which provide for expediting FOIA requests must include as one of its criteria, a showing of the loss of substantial due process rights. This is necessary to safeguard the fundamental fairness guarantee of the Fifth Amendment.

The Department of State and the Department of Justice have recognized this and include this criteria in their regulations. See 22 C.F.R. § 171.12(b)(1) and 28 C.F.R. § 16.5(d)(iii). As recently as March 21, 2011, the Department of Justice proposed revisions to the Department's FOIA regulations . Notably, the Department of Justice retained "The loss of substantial due process rights" as one of the bases for a grant of expedited processing. See *Federal Register*/Vol.76, No.54 at p.15239 attached as Exhibit A. The Department of Homeland Security regulations (6 C.F.R. § 5.5(d)) do not include this criteria. This failure of the Department of Homeland Security "DHS" regulations is at the crux of this case.

In *Dent*, the Ninth Circuit recognized that untimely access to the A file for an alien in immigration proceedings fails to comply with Due Process. Citing the "doctrine of constitutional avoidance", the Court determined that to comply with Due Process the "shall have access" statute (8 U.S.C. § 1229a(c)(2)(B)) must be construed to mean that access must be expedited when it could possibly affect the outcome of the removal proceeding. *Dent* at 374. To do otherwise, invites error. In the non-removal context, this constitutional guarantee must be found in an agency's regulations implementing expedited processing under FOIA. The DHS regulations (6

C.F.R. § 5.5(d)) fail this test because they do not allow for expedited processing upon a showing of the loss of substantial due process rights.

Plaintiffs respectfully submit there are three options available to the government:

1. Process FOIA cases in a timely manner in accordance with the 20 day rule. 5 U.S.C. § 552(a)(6)(A) and 6 C.F.R. § 5.6(b). This would provide timely access and eliminate the need for expedited processing in most cases.

2. Continue hearings or extend the time to file a brief or motion until the alien file is provided to the alien. However, continuances and extensions are discretionary.

3. Amend the DHS regulations which govern expedited processing of FOIA cases and expand Track Three to allow for expedited processing in non-removal contexts upon a demonstrated showing of the loss of substantial due process rights. Two other agencies of the government already do this, i.e. DOJ and DOS. This is required not only by the Mayock Settlement Agreement but also by the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

Milner supports the Plaintiffs' position that Exemption 5 should be narrowly construed.. *Dent* supports the Plaintiffs' position that fundamental fairness requires that access to evidence must be expedited when it could possibly affect the outcome of an immigration proceeding.

Dated: May 2, 2011

Respectfully submitted,

_____/s/_____
KIP EVAN STEINBERG
Attorney for Plaintiffs