

## Exhibit 5

Director  
Office of Information Policy  
United States Department of Justice  
441 G Street, NW, 6<sup>th</sup> Floor  
Washington, D.C. 20530

January 13, 2021

**Re: FREEDOM OF INFORMATION ACT APPEAL**

**FOIA Request for Appellate Immigration Judge Records**

**FOIA 2020-60001 (“Request”)**

Dear Madam or Sir:

This letter constitutes the appeal of Tahirih Justice Center (“TJC”) to the determination in response to its above-referenced request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), in which the U.S. Department of Justice (“DOJ”) purports to have administratively closed the Request without any indication of the statutory grounds for doing so. A copy of the FOIA Request and the DOJ’s October 13, 2020 response (“Determination Letter”) are enclosed as Attachments 1 and 2, respectively.

The DOJ’s Determination Letter is incorrect and incomplete, for multiple reasons.

**First**, DOJ improperly closed the Request while the parties were engaged in ongoing dialogue around the scope of this and other FOIA Requests. DOJ requested and TJC provided DOJ with clarifying information on September 3, 2020 during a phone call with DOJ regarding this Request and two other Requests. During the call, DOJ asked TJC to consider reducing the scope of this Request, and understood that TJC would need to consult pro bono legal counsel in order to respond to DOJ’s request to narrow the scope. Approximately one month later, while those discussions were occurring between TJC and counsel, DOJ unilaterally closed the file. This closure prematurely cut off ongoing discussions regarding the scope of the Request. Contrary to DOJ’s assertion, TJC remains interested in the requested records.

**Second**, the Request is not overbroad or unreasonably burdensome. “[E]ach agency, upon any request for records which (i) *reasonably describes* such record and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A) (emphasis added). DOJ has argued that a FOIA request would fail to reasonably describe records and therefore be overly burdensome if it lacked “for example, names [or] organizations” for the records requested. *White v. Dep’t of Justice*, 460 F. Supp. 3d 725, 747 (S.D. Ill. 2020), *reconsideration denied in part*, No. 16-CV-948-JPG, 2020 WL 5016799 (S.D. Ill. Aug. 25, 2020). But here the Request seeks communications about a single stated topic, “the AIJ hiring process,” by or between seven specifically identified people: James McHenry, Sirce Owen, Marlene Wahowiak,

Kate Sheehey, Lisa Ward, Lee Loftus, Michael Allen. It also lists for clarity the specific custodian positions within EOIR associated with these individuals, including EOIR Director, Acting Deputy Director, Assistant Director, Chief of Staff, General Counsel, Deputy Assistant Attorney General, and Chief of Employee Labor Relations. The seven custodians identified are narrowly tailored to those involved in the identified AIJ hiring process. Thus the records sought were reasonably described in the Request and it was apparent to the agency what records were being requested. The Request is not overbroad or unduly burdensome, as the scope of the Request is limited to a small set of custodians on a single topic. DOJ provides no information as to how such limited request is unduly burdensome. That the Request seeks “any and all” records regarding the specific AIJ hiring process does not make the Request per se overbroad or unduly burdensome, as the Determination Letter attempts to suggest.

**Third**, the Request seeks records which are not protected by the attorney-client privilege. The face of the Request demonstrates it seeks communications to or from at least five persons who are not identified as attorneys. And while General Counsel and a Deputy Assistant Attorney General are among the seven custodians designated for the search of responsive records under the Request, not every record retained, sent, or received by an attorney is per se privileged. The attorney-client privilege applies only if a communication is for the purpose of securing *primarily* either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding. *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007). Determinations of the applicability of attorney-client privilege are made on a case-by-case basis review of the record in question, and communications to or from General Counsel or a Deputy Assistant Attorney General may not be privileged if they do not pertain primarily to the provision of a legal opinion, legal services, or assistance with a legal proceeding. *See Nat’l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 194 (D.D.C. 2013) (denying summary judgment to CIA in FOIA case, noting “the repeated and carefully circumscribed statement that communications “relate to matters for which attorneys provide legal advice . . . does not necessarily support the conclusion that such communications are privileged. For example, if an attorney provided legal advice about a certain matter at a given point in time, and a staff member separately communicated about that matter at a later point in time, that latter communication is not privileged simply because it is “relate[d] to” the matter for which advice was previously given. Rather, to be privileged, the later communication must be made for the primary purpose of *seeking legal advice* on that matter.”). The Determination Letter concedes this possibility, as it notes “the majority of” requested records – i.e., fewer than all records requested – “may” be privileged.

**Finally**, the Determination Letter purports to find the Request deficient because it “seeks records – assuming any exist – in which another DOJ component JMD has equities and would have to be [sic] referred to that component for a release determination and direct a response to you.” This is not a basis for failing to disclose requested records under FOIA. At best, it provides a potential explanation for the time needed for DOJ to process records for production under the Request. 5 U.S.C. § 552 (a)(6)(B)(i) and (iii)(III).

TJC remains interested in the requested records, and was engaged in the deliberative process DOJ requested regarding the scope of the Request at the time DOJ unilaterally closed the Request. The DOJ’s determination that the Request is overbroad and unduly burdensome or contains exclusively attorney-client privileged material is inaccurate. And DOJ’s determination that another DOJ component may need to issue a release determination is not a basis for denying

the Request. For the reasons above, your Office must grant the instant appeal and require the DOJ to process TJC's FOIA Request and produce the records to which it is statutorily entitled. We will look forward to your response within twenty (20) working days from the date you receive this appeal, as required by 5 U.S.C. § 552(a)(6)(A)(ii). Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Morgan Weibel". The signature is written in a cursive, flowing style.

Morgan Weibel, Esq.  
Executive Director San Francisco Bay Area  
Tahirih Justice Center

July 1, 2020

Via email to EOIR.FOIARequests@usdoj.gov

U.S. Department of Justice  
Executive Office for Immigration Review  
Office of General Counsel - FOIA Service Center FOIA/Privacy Act Requests  
5107 Leesburg Pike, Suite 1903  
Falls Church, Virginia 22041

Dear FOIA Officer:

This is a request for information under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The following terms have the following meanings in this request:

- **“communications”**: any written document in your possession, including transmittals, letters, emails, memoranda, reports, instructions and summaries (such as to or from agency staff, contractors, or other providers), and the like, dated between August 21, 2018, and April 2, 2020;
- **“communications between”**: any communications, as defined above, from one listed party to another listed party, including communications also sent to one or more third parties; excluding any “all EOIR” messages; and
- **“record” or “records”**: any written records dated between August 21, 2018, and April 2, 2020, which set out or reflect approved policies, guidelines, or procedures, or any data (including Excel spreadsheets).

### **Request for records**

We request the following records and communications in the custody and control of the Executive Office for Immigration Review (EOIR):

- Any and all communications between any agency staff in the EOIR Director's Office and any agency staff in the EOIR Office of Administration regarding the hiring process for Appellate Immigration Judges (AIJs) or the hiring of specific persons for an AIJ position. This includes communications between any combination of the following EOIR personnel: Director James McHenry; former Acting Deputy Director and current ACIJ Sirce Owen (both during and after her assignment as Acting Deputy Director); current Acting Deputy Director and former Chief of Employee Labor Relations Marlene Wahowiak; Chief of Staff Kate Sheehey; Assistant Director Lisa Ward; and/or other staff in those offices.
- Any and all communications between any agency staff in the EOIR Director's Office and any agency staff in the EOIR Office of General Counsel regarding the hiring process for AIJs or the hiring of specific persons for an AIJ position. This includes communications between any combination of the following EOIR personnel: Director James McHenry; former General Counsel Jean King; Chief of Employee Labor Relations in the Office of General Counsel; and/or other staff in those offices.

- Any and all communications between anyone in the EOIR Office of Administration and the Department of Justice (DOJ) Justice Management Division regarding the hiring process for AIJs or the hiring of specific person for an AIJ position and, if that conduct complaint information was shared with interviewers, the documentation that was shared and the precise interviewers with whom it was shared. This includes communications with EOIR Assistant Director Lisa Ward, Assistant Attorney General Lee Loftus, Deputy Assistant Attorney General Michael Allen, and/or other staff in those offices.

The above requests do not include any portions of records specifically identifying a particular individual, such that would be covered under the Privacy Act or other privacy protections.

Please construe this as an ongoing FOIA request, so that any records or communications that come within the possession of the agency prior to your final response to this FOIA request should also be considered within the scope of the request.

If EOIR does not have custody or control over certain requested and responsive records or communications but knows or believes that another department, agency, private entity, or another subject to FOIA does, such as DOJ or another operational or support component therein, please forward this FOIA request to the appropriate person and inform the undersigned that you have done so.

Electronic versions of the requested documents on compact discs are preferred. Please produce with the records any metadata and load files, so that the records can be accessed, searched, and displayed in a manner comparable to an EOIR or DOJ user, as applicable. If codes are employed, please also produce any documents in your possession explaining the codes employed, and what they signify.

If all or any part of this request is denied, please specify the exemption(s) claimed for withholding each record. If some portion(s) of the requested records are determined to be exempt, please provide the remaining non-exempt portions. 5 U.S.C. § 552(b). To the extent that materials are excised, please “black out” these materials, rather than “whiting out” or “cutting out” these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. 5 U.S.C. § 552(a)(6)(A)(i).

### **Request for Fee Waiver**

We hereby request a fee waiver under FOIA to the fullest extent permitted by law. Under 28 C.F.R. § 16.10(k), a fee waiver must be granted if the requested information “is not primarily in the commercial interest of the requester” and “disclosure of the requested information is likely to contribute significantly to public understanding of the activities and operations of the government.” 28 C.F.R. § 16.10(k)(2); *accord* 5 U.S.C. § 552(a)(4)(A)(iii). These factors are to be “liberally construed in favor of waivers of noncommercial requesters.” *Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal quotation marks omitted). Both factors are present here.

The regulations make clear that information cannot be primarily in the commercial interest of the requester if the requester has no “commercial interest”—which is to say, “commercial, trade, or profit interest”—that “would be furthered by the requested disclosure.” 28 C.F.R. § 16.10(k)(2)(iii)(A). Here, requester Tahirih Justice Center (“Tahirih”) lacks any such interest. Tahirih is a non-profit entity under Section 501(c)(3) of the Internal Revenue Code that is dedicated to ensuring human rights protections and access to justice for courageous immigrant survivors of gender-based violence. To that end, Tahirih

provides free legal services to individual clients and advocates for these populations through policy reform, impact litigation, and public education. Tahirih accordingly has no commercial, trade, or profit interest in the requested information.

As to public understanding, the regulations make clear that a waiver must be granted if “[d]isclosure of the requested records” would be “meaningfully informative about government operations or activities” and will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 28 C.F.R. § 16.10(k)(2)(ii)(A)-(B). Under the regulations, disclosure is not meaningfully informative if the information “is already in the public domain, in either the same or a substantially identical form.” *Id.* § 16.10(k)(2)(ii)(A). The question of whether information will reach a “reasonably broad audience,” meanwhile, turns on the “requester’s expertise in the subject area” and its “ability and intention to effectively convey information to the public.” *Id.* § 16.10(k)(2)(ii)(B).

This request satisfies the regulatory standards. Tahirih seeks emails showing the process and reasoning behind recent changes in EOIR policy and procedure. That information is, with very few exceptions, not in the public record at all. And there can be no question that information concerning the development of EOIR policy will meaningfully inform the public about EOIR’s operations and activities.

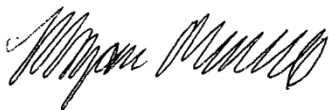
Furthermore, Tahirih has accumulated over 20 years of experience with the immigration court system and has worked closely with EOIR for much of that time. In addition, Tahirih has unique insight into the workings of EOIR because its Chief of Programs, Rená Cutlip-Mason, served as Counsel to the Director of EOIR from 2015 to 2017. Tahirih therefore has more than sufficient expertise to understand the requested information.

Finally, Tahirih also has the intention and capacity to disseminate the requested information to a reasonably broad audience. Tahirih intends to post information received on its public website. It also routinely communicates with numerous other immigration lawyers and immigration service organizations and will highlight the information in group calls, listserv postings, and individual emails. And Tahirih has a robust communications department whose relationships with media will allow the requested information to reach an even broader audience.

For these reasons, all of the elements of a fee waiver are unquestionably satisfied here. If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before fulfilling this request. 28 C.F.R. § 16.10(e).

Please reply to this request within twenty (20) working days, or as required by statute. 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions regarding this request, please feel free to email me at [morgan@tahirih.org](mailto:morgan@tahirih.org) or call me at 650-270-2101.

Sincerely,



Morgan Weibel  
Executive Director  
Tahirih Justice Center, San Francisco



**U.S. Department of Justice**  
Executive Office for Immigration Review  
*Office of the General Counsel*

5107 Leesburg Pike, Suite 2150  
Falls Church, Virginia 22041

October 13, 2020

*Via E-mail at morgan@tahirih.org*

Morgan Weibel  
Tahirih Justice Center  
881 Sneath Lane, Suite  
115 San Bruno, CA 94066

Re: FOIA 2020-60001

Dear Ms. Weibel:

This letter is in response to your Freedom of Information Act (FOIA) request dated July 1, 2020, received July 2, 2020, to the Executive Office for Immigration Review (EOIR) in which you seek the following:

1. Any and all communications to/from EOIR personnel Director James McHenry, former Acting Deputy Director Sirce Owen, Acting Deputy Director Marlene Wahowiak, Chief of Staff Kate Sheehey, and Assistant Director Lisa Ward regarding the AIJ hiring process
2. Any and all communications to/from EOIR personnel the General Counsel, the Chief of Employee Labor Relations and Director James McHenry regarding the AIJ hiring process
3. Any and all communications to/from EOIR or JMD personnel Assistant Director Lisa Ward, Assistant Attorney General Lee Loftus, Deputy Assistant Attorney General Michael Allen regarding the AIJ hiring process

As you are aware, your request required clarification and was put hold on by letter dated July 9, 2020. We discussed the deficiencies of this request during a phone conversation on September 3, 2020 and again requested that you clarify your request. Specifically, we discussed that the request as filed is: (1) overbroad and unreasonably burdensome, e.g., the language “any and all”; (2) seeks records – assuming any exist – all or the majority of which may be protected by the attorney-client privileged; and (3) seeks records – assuming any exist – in which another DOJ component JMD has equities and would have to referred to that component for a release determination and direct response to you.

Since we have not heard back from you, we assume that you are no longer interested and your request has been administratively closed.



Letter to Morgan Weibel  
Subject: 2020-60001

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You may contact the EOIR FOIA Public Liaison at (703) 605-1297 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at (202) 741-5770; toll free at (877) 684-6448; or facsimile at (202) 741-5769.

If you are not satisfied with the Executive Office for Immigration Review's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

**SHELLEY O'HARA**

Digitally signed by SHELLEY  
O'HARA  
Date: 2020.10.13 15:58:48 -04'00'

Shelley M. O'Hara  
Attorney Advisor (FOIA)