

Exhibit 41



Protecting Immigrant
Women and Girls
Fleeing Violence

April 20, 2022

Director
Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

**Re: FREEDOM OF INFORMATION ACT APPEAL
FOIA Request for Appellate Immigration Judge Records
FOIA 2022-19761 (reassigned from FOIA 2020-60002) (“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 sufficiently produced records in response to the Request upon remand. A copy of the FOIA Request and the DOJ’s March 1, 2022 response (“Determination Email”) are enclosed as Attachments 1 and 2, respectively.

The DOJ’s response to the Request is incorrect and incomplete for several reasons.

First, the DOJ redacted the documents so heavily that almost no information can be deemed from them. Specifically, of the 48 documents the DOJ produced, virtually every single page is completely redacted, which is inappropriate. This wholesale redaction of documents contravenes FOIA’s mandate of disclosure of government records where exemptions are “explicitly made exclusive and must be narrowly construed.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 565, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) (internal citations and quotation marks omitted). Agencies are not permitted to redact even non-responsive information in an otherwise responsive record unless the information falls within a specific exemption. *See Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) (“[W]e do not see how EOIR’s non-responsive redactions here can be squared with the statute. Those redactions find no home in FOIA’s scheme. Rather, once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption.”); *Yonemoto v. Dep’t of Veterans Affairs*, 686 F.3d

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681, 695 (9th Cir. 2012), *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (noting Exemption 6 redactions should be made on a record-by-record basis, and rejecting “a categorical privacy judgment” approach). Such wholesale redactions also prevent TJC from assessing the adequacy of the DOJ’s search for documents in response to the Request.

Second, federal administrative agencies bear the burden of justifying any exemptions under FOIA, *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1999), and “[c]onclusory and generalized” explanations are “unacceptable as a means of sustaining the burden of nondisclosure.” *National Parks and Conserv. Ass’n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976). The requirement that agencies provide meaningful explanation for withholding records that are presumed disclosable unless fitting within a specific FOIA exemption is critical, as “Congress enacted FOIA to promote a policy of broad disclosure of Government documents” and to “ensure an informed citizenry, vital to the functioning of a democratic society.” *Center for Public Integrity v. Department of Energy*, 191 F. Supp. 2d 187, 189 (D.D.C. 2002) (internal quotations omitted). In keeping with this purpose, “it is well settled that these exemptions [enumerated in FOIA] are to be narrowly construed, and an agency must release any non-exempt information that is contained in the documents.” *Silverberg v. Department of Health and Human Servs.*, 1991 WL 633740, at *2 (D.D.C. June 14, 1991) (citation omitted). The “limited exceptions” in § 552(b) thus “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of” FOIA. *Department of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001). This basic policy “focuses on the citizens’ right to be informed about ‘what their government is up to.’” *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Here, the DOJ claimed that the records it produced were redacted under FOIA Exemptions 5 and 6. But the DOJ failed to provide sufficient justification for redacting documents under these Exemptions (or any others). Indeed, with respect to Exemption 5, the DOJ simply stated that “[p]ortions of the records have been redacted in accordance with FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege, attorney work-product doctrine and/or the attorney-client privilege.” See Determination Email. Additionally, with respect to Exemption 6, the DOJ stated that “[p]ortions of the enclosed records have been redacted in accordance with FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.” *Id.* Such blanket statements are insufficient.

To the extent the DOJ is relying on the deliberative process privilege, it has failed to meet its burden of showing that the Deliberative Process privilege incorporated under 5 U.S.C. § 552(b)(5) is a proper basis for redacting several portions of the documents produced. The DOJ was required to affirmatively “explain how a particular Exemption 5 withholding would harm the agency’s deliberative process”; it is insufficient to “perfunctorily state” that disclosure of the withheld information would “jeopardize” exchange of information between agency officials. *Nat’l Day Laborer Org. Network*, 2020 WL 5518114, at *7 (S.D.N.Y. Sept. 14, 2020). The DOJ’s response does not describe any potential foreseeable harm—it merely states that the DOJ “ha[s] determined that [the documents] may be released with redactions under Exemption 5...,”

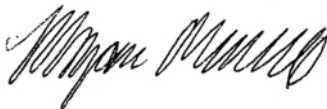
which covers certain inter- and intra-agency communications protected by the deliberative process privilege.” See Determination Letter. This is an insufficient articulation of foreseeable harm under the 2016 amendments.

Further, the DOJ has failed to justify use of FOIA Exemption 2 as a proper basis for redacting information contained in the documents. Within the 48 pages of documents produced by the DOJ, several redactions are marked with FOIA Exemption 2. However, the DOJ completely fails to reference Exemption 2 in the Determination Letter, much less provide any sufficient justification for redacting documents under this Exemption.

Third, to the extent the heavily redacted portions of the documents include names and identifying information of candidates for Appellate Immigration Judge (“AIJ”) positions, such redactions are inappropriate because there is no significant privacy interest in the identity of candidates being considered for a public judicial office. See *Yonemoto*, 686 F.3d at 694 (If “the agency fails to establish that disclosing the contested information would lead to the invasion of a non-trivial personal privacy interest protected by Exemption 6, the FOIA demands disclosure.”). Nor do civil federal employees who are not involved in law enforcement or sensitive occupations generally have an expectation of privacy regarding disclosure of their names, titles, and duty stations as employees or regarding the parts of their employment applications that show their qualifications for the position. See OPM Regulation, 5 C.F.R. § 293.311 (2018) (specifying that certain information contained in federal employee personnel files, including names and position titles, is generally available to public); FOIA Update, Vol. III, No. 4, at 3 (“Further it is the policy of the Department of Justice, in light of prevailing FOIA case law, to release additional items of information in personnel files, particularly pertaining to the professional qualifications of federal employees. . . . The Department of Justice further endorses release of the fact of recommendations for promotions, appointments or reassignments, letters of commendation from professional associates and colleagues; appointment affidavits and oaths of office; and creditable service for leave purposes.”).

For the reasons above, your Office must grant the instant appeal and require the DOJ to process TJC’s FOIA Request and produce all records, unredacted, 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', written in a cursive 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).
- **“Appellate Immigration Judge”**: includes both terminology of Appellate Immigration Judge (AIJ), Board Member, and any other designation for positions commissioned to serve in the capacity of an appellate immigration judge in formal, quasi-judicial proceedings to review the determinations of immigration judges in removal and related proceedings, and of certain officers of the DHS in visa petition proceedings and other matters.

Request for records

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

- Any documents that set out the AIJ hiring process. This includes any memoranda, flow charts, checklists, and other documents generated by EOIR or elsewhere in the Department of Justice that describe, either generally or specifically, the hiring process for AIJs.
- Any documents that list or otherwise identify candidates recommended for an AIJ position at any stage in the hiring process. This includes all lists, memoranda, and interview notes created by the first and second panels of interviewers. This also includes any lists, memoranda, or interview notes sent to, sent from, or created by the Director of EOIR, the Deputy Attorney General, or the Attorney General.
- Any documents that contain selection criteria for the AIJ position that were not listed in the public advertisement for the position, whether generated by EOIR or elsewhere in the DOJ.
- Any documents that discuss deselection criteria for the AIJ position, whether generated by EOIR or elsewhere in the DOJ.

- Any communications between interview panel members, at any stage in the hiring process, regarding the process for selecting candidates and any discussion of the candidates selected.
- Documentation regarding complaints filed/made from 2010 to 2016 or during the pendency of this FOIA request in all forums (including but not limited to State and Federal) regarding alleged misconduct against any of the individuals selected for an AIJ position.
- Documentation showing that any complaints filed/made against any of the individuals selected for an AIJ position was shared with interviewers of the persons selected 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.

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 or call me at 650-270-2101.

Sincerely,



Morgan Weibel
Executive Director
Tahirih Justice Center, San Francisco

From: joseph.r.schaaf@usdoj.gov <joseph.r.schaaf@usdoj.gov>
Sent: Tuesday, March 1, 2022 2:17 PM
To: Morgan Weibel <Morgan@tahirih.org>
Subject: DOJ-EOIR FOIA Request # 2022-19761

Dear Ms. Weibel:

This correspondence is in response to your Freedom of Information Act (FOIA) request dated 07/01/2020 to the Executive Office for Immigration Review (EOIR), remanded by the Office of Information Policy and reassigned FOIA number 2021-19761, in which you seek certain records regarding Appellate Information Judges.

A search was conducted and one or more records responsive to your request were located. We are granting partial access to the responsive record(s).

Portions of the records have been redacted in accordance with FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege, attorney work-product doctrine and/or the attorney-client privilege.

Additionally, portions of the enclosed records have been redacted in accordance with FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. *See* <http://www.justice.gov/oip/foiapost/2012foiapost9.html>.

You may contact the EOIR FOIA Public Liaison by e-mail at EOIR.FOIARequests@USDOJ.GOV or by telephone number (703) 605-1297 for any further assistance and to discuss any aspect of your request. Please reference the FOIA control number. 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; 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 this response to your request. If you submit your appeal by mail, both the correspondence and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Joseph Schaaf
Supervisory Attorney Advisor (FOIA)