UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Plaintiff, v. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, *et al.*, Defendants.	Civil Action No. 13-cv-00840 Judge Christopher R. Cooper

MOTION TO ENFORCE OR, IN THE ALTERNATIVE,
TO CLARIFY THE COURT'S DECEMBER 24, 2014, ORDER AND OPINION

More than four months after this Court's order and opinion, the government continues to withhold as "non-responsive" portions of more than 60 pages of records released in response to the Freedom of Information Act (FOIA) request at issue in this case. Because the government has failed to comply with this Court's decrees and FOIA, plaintiff American Immigration Lawyers Association (AILA) moves this Court to enforce or, in the alternative, to clarify its December 24, 2014, order and opinion. Specifically, it asks the Court to direct defendants to release within ten days of the Court's order all information initially redacted as "non-responsive" from records released in this case.

Pursuant to Local Rule 7(m), AILA sought defendants' views on this motion. Defendants oppose.

BACKGROUND

In its cross-motion for partial summary judgment, AILA challenged the government's withholding of information marked as "non-responsive" in responsive records released to AILA. AILA explained that its FOIA request sought "complaints" against immigration judges and a variety of "records" relating to those complaints. Doc. 16-1, Rodrigues Decl., Ex. A (FOIA Request), at 1. Accordingly, AILA was "entitled to responsive documents in their entirety," even if those documents contained material not directly related to complaints, except insofar as portions of those records fell within one of FOIA's nine exclusive exemptions. Doc. 20, Pl.'s Summ. J. Memo. at 28-29.

The government, which had not briefed the issue in its motion for summary judgment, then introduced a supplemental *Vaughn* index of redactions for purportedly non-responsive information. *See* Doc. 24-3, *Vaughn* Index. In its opposition, the government justified these redactions on the broad ground that it was entitled to withhold all information that it deemed non-responsive, describing the redactions as containing (1) "information concerning matters unrelated to AILA's FOIA request, such as other work-related matters," or (2) information "unrelated to th[e] particular complaint [in a complaint file] but concerning other complaints." Doc. 24, Defs.' Opp. at 11-12. The government further justified this second category of redactions on the ground that the withholdings made the complaint files easier to understand. AILA's reply took issue with the government's broad position that it could withhold purportedly "non-responsive" information. In addition, it explained why the information in each of the two categories identified by the government was in fact at least partially responsive (to the extent that the notion of "responsive" and "non-responsive" portions makes any sense in the context of a

request for "records"), and thus had to be disclosed even under the government's view of its legal obligations. *See* Doc. 28, Pl.'s Reply at 12-17.

In its December 24 opinion, this Court granted defendants' summary judgment motion as it related to the redaction under FOIA Exemption 6 of immigration judges' personal identifying information, Doc. 30, Memo. Op. at 2, but it granted summary judgment to AILA "with respect to [the government's] redaction of other information in the complaint files." *Id.* The Court's accompanying order used somewhat narrower language to describe its holding in AILA's favor—granting summary judgment to AILA "as it relates to the redaction as non-responsive of other information in the complaint files on the basis that withholding non-responsive information about other complaints made it easier to understand the subject complaint file." Doc. 31, Order. However, neither the order nor the opinion granted summary judgment to the government for other types of "non-responsive" redactions.

On March 2, 2015, in response to the Court's order, the government released some information that it had initially redacted as "non-responsive." However, it continued to make redactions from more than 90 entries in the government's previous *Vaughn* index for purportedly "non-responsive" material. Declaration of Julie A. Murray (Murray Decl.) ¶ 3, attached to this motion. For the first time, the government also contended that it was entitled to withhold under Exemption 6 certain information previously redacted only as being "non-responsive." The government provided no legal authority for doing so, nor did it provide AILA with a new *Vaughn* index or declaration attesting to these redactions.

In a letter dated March 11, 2015, AILA responded that the release did not comply with the Court's order because it failed to disclose all information previously redacted as "non-responsive" and because the Court's order did not permit the government to raise new grounds

for withholding information that the Court had ordered released. *See* Murray Decl., Ex. A, attached to this motion.

On April 21, 2015, the government made an additional release of some information previously redacted as "non-responsive," stating that it was releasing all information that "could be construed as within the scope of and responsive to" AILA's FOIA request. *Id.*, Ex. B. It produced to plaintiff a new *Vaughn* index of redactions for material initially redacted as "non-responsive" that the government had either released or continued to withhold. *See id.*, Ex. C. That index made clear that the government continued to withhold as non-responsive portions of at least 60 pages of records. The government again withheld some information initially redacted only as "non-responsive" on the ground that it was protected from disclosure by FOIA Exemption 6.

ARGUMENT

I. The Government Has Not Complied with This Court's Opinion and Order.

As discussed above, this Court granted summary judgment to AILA on all information redacted from complaint files other than immigration judges' personal identifying information withheld before summary judgment pursuant to Exemption 6. The government's failure to disclose all information originally redacted as "non-responsive" from responsive records is at odds with the plain language of the Court's opinion in this respect.

In correspondence with plaintiff's counsel, the government contended that it had no obligation to disclose all information redacted as "non-responsive" because the Court's order accompanying the opinion was drawn more narrowly than the opinion. That is, as AILA understands the government's position, the government believes the Court granted summary judgment to AILA only with respect to redactions marked as "non-responsive" that concern

"information about other complaints," the omission of which, in the government's view, "made it easier to understand the subject complaint file." Doc. 31, Order.

That position is untenable. Although the language of the order standing alone is ambiguous, the summary language of the opinion is clear: The government may withhold Exemption 6 material addressed in the summary judgment papers but it must disclose the "other information in the complaint files." Doc. 30, Memo. Op. at 2. In addition, the Court recognized that AILA asserted a broad claim seeking "disclosure of material that EOIR redacted from complaint files as non-responsive to AILA's request." *Id.* at 4-5; *see also id.* at 11 (citing portions of AILA's motion for summary judgment that asserted that AILA was entitled to all "non-responsive" information in otherwise responsive records). Yet neither the order nor the opinion granted summary judgment to the government for certain types of "non-responsive" redactions but not others. It is thus clear that the Court intended to rule on AILA's claim based on "non-responsive" redactions—which the Court recognized in its broadest form—by granting summary judgment in AILA's favor.

The government has failed to comply with this Court's order and opinion for the separate reason that it has raised FOIA exemptions to withhold information previously redacted only as "non-responsive." Certainly at this late stage in the proceedings, after the parties have completed summary judgment briefing and the Court has ruled, the government cannot assert new rationales for withholding information that it has been ordered to release. *See, e.g.*, *Judicial Watch v. U.S. Dep't of Energy*, 319 F. Supp. 2d 32, 35 (D.D.C. 2004) (denying government's motion for reconsideration in a FOIA case based on the government's belated assertion of the presidential communications privilege). Nothing in the Court's order or opinion indicates otherwise.

II. If This Court Determines That Its Earlier Rulings Are Unclear with Respect to the Government's Obligations, It Should Clarify Its Earlier Opinion and Order in AILA's Favor.

If this Court determines that its earlier rulings did not clearly resolve the question whether the government must release all information redacted as "non-responsive" from responsive records, the Court should clarify its order and opinion in AILA's favor. AILA's FOIA request sought "complaints" against immigration judges and a variety of "records" relating to those complaints. Doc. 16-1, Rodrigues Decl., Ex. A (FOIA Request), at 1; *see also* Doc. 20, Pl.'s Summ. J. Memo. at 28-29; Doc. 28, AILA Reply at 12-17. Under the plain language of its FOIA request, AILA is therefore entitled to responsive documents in their entirety, unless portions of those records fall within one of FOIA's nine exclusive exemptions. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Moreover, although AILA believes the Court need not look beyond the face of the FOIA request to determine that the so-called "non-responsive" withholdings here are improper, it bears emphasis that the government's withholdings are also impermissible under guidance on FOIA processing issued by defendant Department of Justice, of which defendant Executive Office for Immigration Review (EOIR) is a part. DOJ's Office of Information Policy (OIP), which advises all federal agencies on FOIA implementation, has stated that agencies may redact non-responsive information from responsive documents, but should not do so "on less than a page-by-page basis." DOJ, OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update, Vol. XVI, No. 3 (1995), *available at* http://www.justice.gov/oip/foia_updates/Vol_XVI_3/page3.htm. In addition, even with respect to whole pages of so-called "non-responsive" material, OIP has cautioned that an "agency must have a firm basis for reaching the conclusion that the document pages in question deal with a subject that is *clearly* beyond the scope of the requester's evident

interest in the request." *Id.* (emphasis added). And where a requester disagrees with an agency's decision to deem pages of a document non-responsive, "the document pages involved should be included *without question* by the agency." *Id.* (emphasis added). Here the government made redactions for purportedly non-responsive material on less than a page-by-page basis, and it continues to withhold information as non-responsive even after AILA raised concerns about these redactions during the production period and in its summary judgment motion. *See* Doc. 28-1, Supplemental Murray Decl. ¶ 10. Accordingly, even under defendant DOJ's own guidance for FOIA processing, the government cannot justify its redactions here.

Importantly, the documents released in response to this Court's order confirm that the government has used the "non-responsive" characterization to withhold information that was plainly responsive to AILA's FOIA request, not just because the information was found in otherwise responsive records, but because it related—under any reasonable interpretation of the FOIA request—to AILA's interest in analyzing how the government resolves complaints against immigration judges. That the government has engaged in these shenanigans underscores why AILA's FOIA request should be interpreted as drafted.

For example, the government initially released an e-mail from an Assistant Chief Immigration Judge entitled "[(b)(6) training]," and it provided AILA with the first sentence of that e-mail, which stated "Judge Weil and I have completed IJ [(b)(6)] remedial training." Murray Decl., Ex. D, attached to this motion (Complaint File 623, Bates 9357-58, original release). The government redacted the remainder of that e-mail as "non-responsive" because it purportedly included "[i]nformation concerning a matter unrelated to the complaint and its resolution." Doc. 24-3 at 10, *Vaughn* Index of Non-Responsive Records at 5. The newly released version of that document shows that the government originally redacted an in-depth description

of the training that took place and the trainer's stated concern after the training that the immigration judge's "lack of mastery of the most basic skills of an IJ is jeopardizing the cases [(b)(6)] is completing." Murray Decl., Ex. E, attached to this motion (Complaint File 623, Bates 9357-58, April 2015 release).

Similarly, in multiple complaint files for an immigration judge, the government redacted as non-responsive a large portion of an e-mail chain that appeared in each of the files, though the information redacted varied by file. *See, e.g., id.*, Ex. F (Complaint File 73, Bates 7669-7671, original release). The newly released version of that e-mail chain includes an Assistant Chief Immigration Judge's complete list of cases before the Board of Immigration Appeals in which the immigration judge at issue had engaged in inappropriate behavior on the bench—complete with quotes of the most outrageous and offensive statements by the immigration judge. *Id.*, Ex. G (Complaint File 73, Bates 7669-7671, April 2015 release). Before the most recent release, AILA would have had to piece together copies of the same document in nine different complaint files to see the complete list. The government also redacted a sentence in each of the complaint files which, as is now apparent, another Assistant Chief Immigration Judge confirmed in response to that list that certain of the cases were never referred to DOJ's Office of Professional Responsibility. *Id.* The government thus used the "non-responsive" rationale to keep from public view a complete compilation of information about repeated abuses by a judge and evidence about EOIR's response to cumulative wrongdoing.

In another responsive record, the government initially redacted as non-responsive a portion of a line from an otherwise responsive e-mail from an Assistant Chief Immigration Judge discussing the need for training to deal with an immigration judge's behavior on the bench. A portion of the e-mail as originally released stated: "[NON-RESPONSIVE] We may have a lot

more work/training then [sic] I previously thought, I did not realize that some of [(b)(6)] remarks were this bad . . . . All based on nothing that is contained in the record!!" *Id.*, Ex. H (Complaint File 644, Bates 3743, original release). As it turns out, in the portion initially redacted, the government official states, "Oooouuucchh!"—suggesting that the official was pained by the behavior of the immigration judge. *See id.*, Ex. I (Complaint File 644, Bates 3743, April 2015 release). And in another file, the government redacted as "non-responsive" a portion of a memorandum detailing an Assistant Chief Immigration Judge's findings regarding a complaint about an immigration judge's statements to a litigant. The redacted lines followed the sentence, "There is no indication that any relevant conversation occurred off the record." *Id.*, Ex. J (Complaint File 552, Bates 3618, original release). As is clear from the version eventually released in response to this Court's order, the material redacted indicates that the factfinder could not locate without assistance—and therefore did not review—the record of proceedings (ROPs) in the case before making findings. *Id.*, Ex. K (Complaint File 552, Bates 3618, April 2015 release). That limitation on the government's investigation is important because the ROP could potentially contain key evidence and—as the same page of the record makes clear—the factfinder in fact consulted the ROP for other allegations at issue in the complaint. *See id.*

These examples cast serious doubt on the credibility of the government's previous submissions in this case with respect to the basis for redacting information as "non-responsive." For this reason as well, to the extent clarification is needed, this Court should reject the government's withholding of information marked as "non-responsive" as inconsistent with AILA's FOIA request and with FOIA. Allowing the agency unilaterally to narrow AILA's

request would condone the agency's use of the "non-responsive" classification as a de facto "withhold-what-you-want" exemption under FOIA.[1]

CONCLUSION

For the foregoing reasons, this Court should order defendants to comply with the December 24, 2014, order and opinion and to release all information redacted as "non-responsive." In the alternative, the Court should clarify its order to make plain that summary judgment was granted to plaintiff with respect to all redactions marked as "non-responsive."

Respectfully submitted,

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[1] Should this Court determine that its earlier order and opinion did not dispose of AILA's entire claim regarding the redaction of information marked as "non-responsive," it should issue an order granting summary judgment to AILA on that claim for the reasons stated above and in AILA's summary judgment briefing.