

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**REPLY IN SUPPORT OF PLAINTIFF’S MOTION TO ENFORCE
OR, IN THE ALTERNATIVE, TO CLARIFY THE COURT’S
DECEMBER 24, 2014, ORDER AND OPINION**

The government’s response to AILA’s motion to enforce or to clarify this Court’s December 24, 2014, order and opinion falls short in three primary ways. First, the government asserts that this Court’s earlier decision “implicitly” held in the government’s favor, but the decision itself refutes this claim. Second, the government cannot reconcile its continued insistence on withholding non-exempt information from responsive records with either the language of FOIA or the language of the FOIA request at issue here. Third, although the government contends that its new Exemption 6 redactions are appropriate, they are made in violation of this Court’s order, which commands “release” of the information marked “non-responsive.” Doc. 31, Order at 2.

ARGUMENT

I. **This Court Awarded Summary Judgment to AILA for Redactions Marked as “Non-Responsive.”**

The parties agree that, at summary judgment, AILA sought all redactions marked as “non-responsive” in records released in response to AILA’s FOIA request. *See* Doc. 38, Opp. at 3. The parties also agree that the government continues to withhold portions of more than 60 unique pages of those records on the ground that the information is purportedly “non-responsive.” *Id.* at 6. The parties disagree, however, on whether this Court’s existing order and opinion address the government’s obligation to release the withheld information and, if so, what the order and opinion say about it. As AILA has explained, although the Court’s order is ambiguous, its opinion is clear: The government may withhold Exemption 6 material redacted before summary judgment briefing, but it must disclose the “other information in the complaint files.” Doc. 30, Memo. Op. at 2.

In the government’s view, the Court granted summary judgment to the government with respect to all information redacted as “non-responsive,” except for information related to other complaints. *See* Opp. at 4. Significantly, the government cannot point to any statement in either the order or opinion that states such a holding. Indeed, at times the government’s brief concedes that the issue is unclear. *See id.* at 2 (contending that “the Court implicitly rejected Plaintiff’s argument that any information unrelated to complaints . . . was either required or appropriate”); *id.* at 4 (stating that “silence in the Order [with respect to non-responsive information unrelated to other complaints]. . . appears to reflect the Court’s rejection of Plaintiff’s argument”).¹

¹ The government contends that AILA’s motion is misleading in that it does not state that the “Court only granted [AILA’s] cross-motion for summary judgment in part and also denied it in part.” Opp. at 10. In fact, however, AILA’s motion twice recognized that the Court had granted summary judgment to the government in part because it permitted the withholding of

The government is thus left to contend that “the Court neither determined that EOIR’s separate basis for withholding information non-responsive to the subject of the FOIA request was improper nor directed any release of information wholly unresponsive to the subject of the FOIA request.” *Id.* If *that* is the case, then the Court neither granted nor denied *either* of the parties’ motions for summary judgment on this issue and should do so now.

II. The Government’s Withholding of Information Deemed “Non-Responsive” Is at Odds with the Plain Language of the FOIA Request and with FOIA.

If the Court determines that it needs to clarify its order and opinion as to redactions marked “non-responsive” (or perhaps rule for the first time on this issue with respect to the pending summary judgment motions), it should make clear that the government must disclose all purportedly “non-responsive” redactions. The chief point of contention between the parties is this: AILA believes that all records that contain responsive information are themselves responsive in their entirety to AILA’s FOIA request because the request sought “complaints” and various “records” related to complaints, not “information” in complaints or in documents related to complaints. In the government’s view, agencies may pick and choose which specific words and sentences of a responsive record are “responsive” to a request and thus subject to release, even when the request seeks “records” in their entirety. *See id.* at 8 (“When non-responsive material appears in a document containing responsive information, agencies must treat the record as responsive but FOIA does not require agencies to release non-responsive information or to process it by applying a FOIA Exemption.”).

Exemption 6 redactions at issue at that time. *See* Doc. 35, Mot. to Enforce at 3, 5. Under these circumstances, and where both parties cross-moved for summary judgment on both sets of redactions, it should go without saying that AILA’s cross-motion for summary judgment was, therefore, denied in part.

The government is wrong. First, it has never responded to AILA's argument regarding the plain language of the FOIA request. Instead, it mischaracterizes AILA's position to be "that agencies must process information unrelated to the subject of the FOIA request merely because it coincidentally appears in a record that does contain responsive information." *Id.* at 9. In reality, the redacted information at issue is related to the subject of the FOIA because the request sought "records," not "portions of records," and the redacted information is non-exempt information contained in responsive records. The government's position also ignores the well-established principle that an agency "has a duty to construe a FOIA request liberally . . . and is bound to read it as drafted[,] not as agency officials . . . might wish it was drafted." *Nat'l Security Counselors v. CIA*, 960 F. Supp. 2d 101, 183 (D.D.C. 2013) (holding that agency must disclose records wrongfully withheld as "non-responsive"). Were the government to properly do so here, it would release all redactions currently withheld as "non-responsive."

The government's string cite of district court cases litigated in large part by pro se plaintiffs does not require a different result. *See Opp.* at 8-9. First, *Citizens for Responsibility & Ethics in Washington v. DOJ*, 48 F. Supp. 3d 40, 51-52 (D.D.C. 2014), and *Competitive Enterprise Institute v. EPA*, 12 F. Supp. 3d 100, 113-15 (D.D.C. 2014), hold that documents that are non-responsive *in their entirety* may be withheld without justification. Neither case provides the government license to withhold non-exempt information from responsive records.

Second, if the other cited district court cases in this circuit stand for the proposition for which the government cites them, they are wrongly decided. But these cases, too, are distinguishable. The redactions at issue in *Judicial Watch, Inc. v. Department of the Navy*, involved the withholding of headers that were "added to the documents during processing in response to plaintiff's FOIA request." 971 F. Supp. 2d 1, 4 (D.D.C. 2013). Under those unique

circumstances not present here, the Court concluded that “[b]ecause the[] headings post-date[d] the Navy’s search for documents in response to plaintiff’s FOIA request, they [we]re by definition nonresponsive.” *Id.* In the other cases, either the plaintiffs did not make the arguments AILA makes here or the decisions addressed the issue only in dicta. For example, in *Freedom Watch, Inc. v. National Security Agency*, this Court approved of the redaction of “non-responsive” information from released records, but the plaintiff did not argue that the documents released to the requester were responsive in their entirety on the ground that the request sought “records,” not information within records. *See* 49 F. Supp. 3d 1, 7 (D.D.C. 2014), *aff’d on other grounds*, No. 14-5174, 2015 WL 1873141 (D.C. Cir. Apr. 24, 2015); *see also id.*, Doc. 13, Pl.’s Opp. to Dep’t of State Mot. for Summ. J. at 8-9 (filed May 20, 2013). Likewise, although *Wilson v. Department of Transportation* contains language indicating that “non-responsive” redactions from an agency log sought by a requester might be permissible, that language was dicta, as the Court had earlier held that the log itself was non-responsive. *See* 730 F. Supp. 2d 140, 156 (D.D.C. 2010). And the D.C. Circuit affirmed on the alternative ground that the pro se plaintiff had “forfeited any argument concerning the agency’s redactions” from the log. *Wilson v. Dep’t of Transp.*, No. 10-5295, 2010 WL 5479580, at *1 (D.C. Cir. Dec. 30, 2010).

The government’s other contentions are irrelevant. The government emphasizes that the remaining pages with purportedly “non-responsive” but non-exempt redactions represent “0.4% of the 16,000 records released to AILA, and less than ten percent of the records originally marked as non-responsive.” Opp. at 7. But redactions to more than 60 pages of records are not de minimis, and, moreover, FOIA does not have an exception for redactions deemed by an agency to be small in comparison to the universe of documents covered by a request.

The government also faults AILA for not responding specifically to the justifications in the government's new *Vaughn* index that purport to explain why the redacted material is unrelated to the complaints. The government suggests that AILA has thus "acknowledge[d]" that none of the remaining redactions for purportedly "non-responsive" information are actually responsive. *Id.* at 12; *see also id.* (accusing AILA of speculating that "additional responsive information exists that relates to the subject of the FOIA request"). The government is again wrong as its argument based on the *Vaughn* index misses the point. The question is not whether the redactions are related to the complaints, but whether the records redacted were sought in their entirety by the FOIA request. The answer to the latter question is "yes," and because the redacted information does not fall within one of FOIA's exemptions, FOIA requires its disclosure.

In any event, the government's earlier submissions to this Court and to AILA, in conjunction with what we now know about the substance of information the government previously withheld as "non-responsive," cast doubt on the credibility of the government's justifications.² It is remarkable that the government makes no attempt to explain its previous actions other than to say it was working under a tight deadline and had not understood the breadth of AILA's FOIA request. *Id.* at 10. Some of the redactions discussed in AILA's motion to enforce cannot be the product of time pressure. There is no other reasonable way to explain them except as attempts to omit information deemed embarrassing to the agency. The

² If the withheld information is, as the government contends, non-responsive and, as the government concedes, not otherwise exempt from disclosure, the government's position here is difficult to understand. Despite the "tight deadline" of which the government complains, the government has paid its staff to repeatedly review records for the purpose of redacting bits and pieces as "non-responsive." It has paid to litigate this issue on summary judgment and in response to the pending motion to enforce or clarify this Court's order. And all this has been done with respect to information that AILA or another FOIA requester could seek tomorrow by submitting a FOIA request specifically asking for this redacted, non-exempt information.

government also cannot seriously contend that it was news to the government that AILA intended to receive all documents—in their entirety—that were responsive to its request. AILA objected during the production phase to the withholding of all information redacted as “non-responsive.” *See* Doc. 28-1, Supp. Murray Decl. ¶ 10. And in litigation it made clear that it believed it was “entitled to responsive documents in their entirety,” regardless of whether the government considered portions of those documents “non-responsive.” Doc. 20, Pl.’s Summ. J. Memo. at 28.

Moreover, as evidence of its good faith, the government points to “discretionary” releases and a “voluntar[y] change[]” in its position. That characterization does not reflect what has transpired. *Opp.* at 10. This Court entered an order forcing the government to release records, and AILA followed up with a demand letter asserting that the government had failed to comply with that order. It was in this context that the government reviewed its redactions and made releases to AILA. For the same reason, the government’s invocation, *see id.*, of Federal Rule of Evidence 408 governing the use of settlement negotiations in evidence is misplaced.

III. The Government Cannot Take New Exemption 6 Redactions.

The government concedes that it has now redacted pursuant to Exemption 6 information previously redacted only as “non-responsive.” *Opp.* at 6-7. It explains that this Court’s order required the government “to process the information previously marked ‘non-responsive’ concerning complaints against immigration judges [in] the same manner that the Court approved at summary judgment for similar records.” *Id.* at 11. But this Court’s order stated that the government “*shall release* any material withheld from complaint records on the basis that withholding non-responsive information about other complaints made it easier to understand the subject complaint file.” Doc. 31, Order at 2 (emphasis added). It said nothing about reprocessing

with the opportunity to assert Exemption 6 for information never before purported to be covered by that exemption, and the government has, in fact, missed its window for raising such exemptions. *See, e.g., Maydak v. DOJ*, 218 F.3d 760, 764 (D.C. Cir. 2000) (“As we have observed in the past, the delay caused by permitting the government to raise its FOIA exemption claims one at a time interferes both with the statutory goals of efficient, *prompt*, and full disclosure of information, and with interests of judicial finality and economy.” (internal quotation marks and citation omitted)); *Judicial Watch, Inc. v. Dep’t of Energy*, 319 F. Supp. 2d 32, 35 (D.D.C. 2004) (refusing to permit an agency to raise in a motion for reconsideration a new privilege asserted to apply under FOIA Exemption 5). Accordingly, the Court should not allow the government now to avoid disclosure of information earlier marked as “non-responsive” on the basis of a newly claimed exemption.

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 state that summary judgment was granted to plaintiff with respect to all redactions marked as “non-responsive.”

Respectfully submitted,

/s/ Julie A. Murray
Julie A. Murray
D.C. Bar No. 1003807
Allison M. Zieve
D.C. Bar No. 424786
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Melissa Crow
D.C. Bar No. 453487
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW
Washington, DC 20005
(202) 507-7523

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Counsel for Plaintiff