

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

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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.	)	
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**REPLY IN SUPPORT OF  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In its motion for summary judgment, plaintiff American Immigration Lawyers Association (AILA) challenged the government's withholding of immigration judges' names and other identifying information under Freedom of Information Act (FOIA) Exemption 6 and the redaction of information deemed "non-responsive" from otherwise responsive records. AILA also contended that the government had violated FOIA, 5 U.S.C. § 552(a)(2)(A), by failing to publish electronically all resolutions of complaints against immigration judges because these documents constitute "orders" and "final opinions" subject to FOIA's affirmative disclosure provision.

In its response, the government fails to demonstrate that release of immigration judges' names and identifying information would constitute a clearly unwarranted invasion of the judges' personal privacy, such that Exemption 6 would permit withholding of the information. The government's assertion that immigration judges are simply rank-and-file federal employees is belied by the weighty decisions that immigration judges make as adjudicators and the judges' critical role in our civil justice system. The government also fails to rebut the numerous ways identified by AILA in which disclosure of the withheld information would serve the public interest and outweigh any privacy interests at stake. And the government has no response to the fact that some of the information withheld under Exemption 6—the gender of immigration judges and all locational information, no matter the size of the location—does not identify an immigration judge and should therefore be released.

The government similarly fails to justify its redaction of purportedly non-responsive information from otherwise responsive records. It ignores AILA's argument that the plain language of the FOIA request—which sought whole documents by referring to "complaints" and

other “records”—precludes the redaction of portions of responsive documents unless one of FOIA’s exclusive exemptions applies. Moreover, based on the government’s own evidence and the released records, it is clear that the information deemed non-responsive by the government is at least partially responsive to AILA’s FOIA request.

Finally, although the government argues that complaint resolutions are not orders or final opinions subject to FOIA’s affirmative disclosure provision, 5 U.S.C. § 552(a)(2)(A), its argument hinges on a characterization of the resolutions that is at odds with the underlying facts and on a misreading of case law. The government insists that if § 552(a)(2)(A) covered complaint resolutions, it would render superfluous Exemption 6 protections for immigration judges, but the government’s position rests on a fundamental misunderstanding of FOIA’s structure, which expressly harmonizes the public’s right to access final opinions and orders with privacy interests threatened by disclosure.

## **ARGUMENT**

### **I. The Requested Records Are Not Covered by FOIA Exemption 6.**

The public interest in disclosure of immigration judges’ names and other identifying information outweighs any privacy interest held by the judges in that same information. *See* Doc. 20, Pl.’s S.J. Memo. at 16-28. Accordingly, the information is not exempt from disclosure under FOIA Exemption 6, which permits withholding of this information only if the information’s disclosure “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The government’s contrary assessment of the public and personal privacy interests at issue in this case is flawed, and its assertion that Exemption 6 applies is erroneous.

**A. The Government Overstates the Privacy Interest at Stake.**

Immigration judges have only a minimal privacy interest in the requested complaints and related documents. Pl.’s S.J. Memo. at 16-18. Much of the government’s original privacy justification was based only on conjectural predictions of threats, harassment, and other harms, some of which had nothing to do with an individual’s personal privacy. *See id.* at 17-18. In addition, some withheld information—such as news articles or court decisions that identify immigration judges by name—has already been released to the public, rendering an immigration judge’s privacy interest in this same information de minimis or nonexistent. *See id.* at 16-17.

In its response, the government no longer asserts a privacy interest based on the possibility that disclosure could “cause immigration judges to lose the ability to command respect from parties appearing before them,” or “could cause immigration judges to be less willing to cooperate with [Executive Office for Immigration Review (EOIR)] management” in the investigation of complaints. Doc. 16-1, Rodrigues Decl. ¶ 60 & n.14 (cited at Doc. 16, Defs.’ S.J. Memo. at 18-19); *see* Pl.’s S.J. Memo. at 18 (explaining why these justifications are insufficient under Exemption 6). Rather, the government’s privacy justification now rests exclusively on the possibility of threats or harassment toward immigration judges and the general embarrassment that may accompany revelations of alleged misconduct. *See* Doc. 24, Defs.’ Opp’n at 5-6. The government’s argument again falls short of demonstrating the strong personal privacy interest that the government asserts.

Although the government speculates that disclosure might subject immigration judges to threats or harassment, it provides no evidence supporting this assertion. The single instance to which the government points involved a non-citizen in removal proceedings who sent confrontational e-mails to an immigration judge presiding over his case and filed complaints

with EOIR about the immigration judge's actions. *See id.* at 5. There is no evidence that the individual's conduct escalated as a result of disclosures regarding his or her complaints with EOIR. Indeed, the information sought by AILA—the immigration judge's name and other identifying information—was already known to the complainant, as was the manner in which EOIR resolved the complaint. *See* Doc. 24-4, at 9 (Complaint 407 Excerpt). In short, the government has not demonstrated that individuals who might be inclined to resort to threats or harassment (that is, disgruntled litigants) would be affected by any new information disclosed as a result of AILA's FOIA request. If anything, one might expect that providing complainants with a more transparent picture of EOIR's complaint resolution process would help them to accept the results of that process.

In addition, although immigration judges may have some privacy interest in non-public documents regarding allegations of misconduct (albeit outweighed by the strong public interest in disclosure), the government fails to explain why these judges would have a privacy interest in the *very same* documents already released to the public, such as news articles and circuit court cases, which identify judges by name alongside criticism of the judges' conduct. The government concedes that some of the complaints that it investigates come to its attention from media reports and court of appeals decisions. *See* Doc. 16-2, Keller Decl. ¶ 25. Yet the government has withheld these documents in full on the ground that disclosure would constitute a clearly unwarranted invasion of immigration judges' personal privacy. *See* Supplemental Murray Decl. ¶ 3 & Ex. A (demonstrating that complaints 32, 33, and 34 were based on allegations contained at least in part in court of appeals decisions and/or media reports); Doc. 16-3, at 75-76 (*Vaughn* Index) (indicating that EOIR withheld circuit court decisions from complaint files 33 and 34); Doc. 16-4, at 20 (*Vaughn* Index (cont.)) (indicating that EOIR

withheld media reports and circuit court decisions from complaint file 32). The government attempts to justify its position that this information can be withheld by relying on several D.C. Circuit and district court cases, *see* Defs.' Opp'n at 4, but none of these cases involved withholding documents that were publicly available in full.

**B. The Public Interest in Disclosure Is Strong and Outweighs Any Personal Privacy Interest of Immigration Judges.**

Disclosure of the withheld information would serve a strong public interest: It would shed light on particular immigration judges' conduct; encourage reporting of complaints by private attorneys and litigants who might otherwise fear retaliation, thus informing EOIR and the public more fully about judges' conduct; and facilitate a more detailed evaluation by the public of EOIR's processing and resolution of complaints. *See* Pl.'s S.J. Memo. at 19-24. The public interest in disclosure of information about these judges easily surpasses any personal privacy interests at stake. In particular, immigration judges' critical role as officials with quasi-judicial responsibilities who exercise independent judgment and make life-or-death decisions on the fate of individuals appearing before them weighs in favor of disclosure, as does the serious and repeated nature of many allegations in the complaints. *Id.* at 19-22, 24. The government's contrary arguments lack merit.

1. The government first insinuates that AILA has improperly recharacterized in litigation the nature of the public interest at issue. Defs.' Opp'n at 6-7. AILA has done no such thing. AILA has consistently focused on what disclosure of the withheld information would reveal "about what the[] government is up to"—the relevant public interest for Exemption 6 purposes. *Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) (internal quotation marks omitted). To the extent that AILA has tailored its public interest discussion to disclosure of information that remains redacted, its argument is an appropriate response to the government's about-face in

litigation. At the time AILA filed its FOIA request (and its administrative appeal), there was virtually no publicly-available information—with or without immigration judges’ names and identifying information—about how EOIR resolved complaints. Only after litigation ensued did the government begin producing records with redactions and indicate that it thought Exemption 6 applied only to a small portion of those records.

2. The government argues that disclosure of immigration judges’ names and other identifying information would not reveal anything about the government’s operations because the actions of immigration judges are not “government[] actions.” Defs.’ Opp’n at 7. This categorical distinction urged by the government is belied by commonsense. The government, of course, acts through its officials. In any event, as the Supreme Court has made clear, the public interest relevant for Exemption 6 purposes includes the actions of both the government as a whole and its individual officials. *See Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6 (1994) (describing the public interest pertinent to Exemption 6 as whether disclosure would shed “light on the activities of government agencies or officials”).

Nor is the government’s distinction between government action and the acts of government officials supported by the case law. The government cites *Beck v. DOJ*, 997 F.2d 1489 (D.C. Cir. 1993), for the proposition that disclosure of an employee’s identity does not “in itself shed light on the employer agency’s actions.” Defs.’ Opp’n at 7 (internal quotation marks omitted). But *Beck* dealt with disclosure of the identities “of one or two individual relatively low-level government wrongdoers, released in isolation.” 997 F.2d at 1493. There was “no evidence, let alone any public knowledge, that wrongdoing ha[d] occurred.” *Id.* at 1494. The D.C. Circuit determined that disclosure, under those circumstances, would “not provide information about the agency’s own conduct.” *Id.* at 1493. In contrast, as AILA has explained, immigration judges

should be treated like high-ranking officials in light of their critical role in the administration of justice in immigration courts. *See* Pl.’s S.J. Memo. at 3-5, 24; *see also supra* p.5. In addition, some immigration judges have been disciplined or otherwise subject to corrective action for wrongdoing, and AILA has established that there is substantial public concern about whether immigration judges have acted with impunity. *See* Pl.’s S.J. Memo. at 9-12, 19-22.

*Department of Air Force v. Rose*, 425 U.S. 352 (1976), on which the government also relies, Defs.’ Opp’n at 7, is even further afield. *Rose* dealt with disclosure of information about Air Force Academy cadets, not government employees, and the requesters sought access to information about cadets “with personal references or other identifying information deleted.” 425 U.S. at 380 (internal quotation marks omitted). *Rose* thus had no reason to decide whether, and in what circumstances, disclosure of the names of government employees and other identifying information could serve the public interest. Indeed, although the Supreme Court in a later case suggested that releasing names and identifying information in *Rose* would not have served the public interest in information about the Air Force Academy’s conduct, it did so based on the presumption that cadets should be treated like private citizens. *See DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 774-75 (1989) (discussing *Rose* as illustrative of the point that release of “private citizens[’]” information “would not shed any light on the conduct of any Government agency or official” (internal quotation marks omitted)).

**3.** The government portrays as “crude[.]” AILA’s contention that disclosure is likely to have a positive deterrent effect on judges, thus serving the public interest. Defs.’ Opp’n at 8. As the D.C. Circuit has recognized, however, “one of [FOIA’s] paramount goals . . . is to deter secrecy in government and the corruption it can breed.” *Sinito v. DOJ*, 176 F.3d 512, 514 (D.C.

Cir. 1999); *see also id.* (describing FOIA's goal as "promoting honesty and reducing waste in government by exposing official conduct to public scrutiny" (internal quotation marks and alterations omitted)).

4. The government gives short shrift to AILA's argument that disclosure of immigration judges' identities would enable the public to assess more comprehensively EOIR's investigation and resolution of complaints. Defs.' Opp'n at 6-7. The government first plucks out of context AILA's statement that the public "can draw some conclusions from the anonymized records released by EOIR," *id.* at 7 (internal quotation marks omitted), and contends that the public can already ascertain any patterns of abusive behavior or misconduct, *id.* at 8. As AILA has explained, however, the public could conduct a more detailed and meaningful analysis if immigration judges' names were available. Pl.'s S.J. Memo. at 23. Specifically, disclosure of immigration judges' identities would allow researchers to find public biographical information not reflected in the released records. *Id.* The public could then consider this information in determining which factors influence how EOIR investigates and resolves complaints and the likelihood of a complaint being filed against a particular judge. *See id.*<sup>1</sup>

The government also argues in this regard that any "potential marginal increase in research possibilities" does not outweigh immigration judges' privacy interests. Defs.' Opp'n at 9. But this conclusory assertion is devoid of any analysis as to the value to the public of the added research possibilities gained by disclosure of immigration judges' names and identifying

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<sup>1</sup> In its motion for summary judgment, AILA pointed to an example of a General Accountability Office (GAO) study in which researchers used immigration judges' names to obtain through Internet searches supplemental information about the judges not already contained in an existing database. *See* GAO, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts 66-67, Appendix I (2008) (submitted as Doc. 20-1, Murray Decl., Attach. P). AILA did not contend, as the government suggests, *see* Defs.' Opp'n at 9, that asylum outcome rates equate to evidence of misconduct by immigration judges.

information. Moreover, the relevant question is whether the incremental value to researchers and the public as described above, *in combination with the other benefits of disclosure identified by AILA*, outweighs immigration judges' privacy interest in the withheld information.

5. As AILA has argued, private attorneys are more likely to feel secure in reporting a complaint about an immigration judge without fear of retaliation if they know that they are not alone in identifying conduct by a particular judge. Pl.'s S.J. Memo. at 22. Therefore, disclosing immigration judges' names and identifying information would create a feedback loop to EOIR and the public, resulting in the availability of more information about judges' behavior.

The government challenges this contention on two grounds. It first argues that "AILA does not point to a single instance of actual or perceived retaliation," Defs.' Opp'n at 8, but that assertion is factually incorrect. AILA's motion for summary judgment expressly relied on the testimony of Ms. Trina Realmuto from the National Immigration Project, who described an instance in which a private immigration attorney was subject to retaliation for questioning an immigration judge's conduct. *See* Pl.'s S.J. Memo. at 22 (citing Doc. 20-3, Realmuto Decl. ¶ 8). Ms. Realmuto, in addition to Mr. Robert Deasy from AILA, also described in detail attorneys' fears of retaliation related to making complaints. *See id.* (citing Realmuto Decl. ¶ 14; Doc. 20-2, Deasy Decl. ¶ 12). AILA's motion for summary judgment also described an incident—recounted in a released complaint file—in which an immigration judge admonished court staff for reporting his or her improper conduct and for considering a call to security personnel to deal with that conduct. *See id.* at 19 (citing Doc. 20-1, Murray Decl. ¶ 18, which described complaint 619). Substantial evidence thus supports AILA's contention that retaliation for reporting immigration judge misconduct is a significant concern, both in perception and reality.

The government next contends that individuals may file complaints anonymously, thus reducing any risk of retaliation. But in many cases, the nature of a complaint will inevitably allow an immigration judge to identify the complainant as either the non-citizen in proceedings or his or her attorney. For this reason, AILA focused on the risk of retaliation to private litigants and their counsel, and the impact that disclosure of judges' identities would have on these complainants' willingness to come forward.

6. The government contends that, on balance, the privacy interest of immigration judges outweighs the public interest in disclosure, even in cases in which allegations of misconduct are confirmed. *See* Defs.' Opp'n at 9-10. Its position rests heavily on its contention that immigration judges should be treated as low-level officials because they are career, non-supervisory attorneys. *Id.* But the cases that the government cites in support—*Jefferson v. DOJ*, 284 F.3d 172 (D.C. Cir. 2002), *Kimberlin v. DOJ*, 139 F.3d 944 (D.C. Cir. 1998), *Beck*, 997 F.2d 1489, and *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005)—do not involve immigration judges or judges of any kind. The government employees implicated in those cases were not charged—as immigration judges are—with making life-or-death decisions affecting individuals who appear before them, or with ensuring that vulnerable individuals, often acting without counsel, understand their legal rights in court. *See* Pl.'s S.J. Memo. at 4-5. In addition, two of the cases cited by the government—*Jefferson* and *Kimberlin*—permitted withholding based on a balancing of public and privacy interests under Exemption 7(c), not Exemption 6. The standard under Exemption 7(c) is more protective of privacy interests than the standard applicable to Exemption 6, *see Reporters Comm.*, 489 U.S. at 756, thus limiting the relevance of *Jefferson* and *Kimberlin* here. In sum, in light of immigration judges' critical role in the immigration system, these judges are not—as the government would have it—"rank-and-file" employees, Defs.' Opp'n at 2, and

under Exemption 6, which requires that disclosure constitute a “clearly unwarranted” invasion of personal privacy, the names and identifying information of these judges should be disclosed.

7. As AILA has explained, disclosure of immigration judges’ names and identifying information finds support in the practices of the judiciary with respect to complaints against Article III judges and of EOIR itself with respect to complaints against immigration practitioners. Pl.’s S.J. Memo. at 26-27. The government attempts to distinguish these examples on the ground that “disclosure of identifying information in connection with substantiated complaints against Article III judges or immigration practitioners is required or authorized by statute and regulation.” Defs.’ Opp’n at 10-11. This argument misses the point. The examples to which AILA pointed indicate a strong public interest in information comparable to that sought by AILA. That DOJ has adopted “[n]o comparable provision[.]” for disclosure, *id.* at 11, is neither surprising—in light of DOJ’s interest in protecting its own—nor relevant. Were it otherwise, the government could receive additional protection from disclosure under FOIA simply by resting on a history of secrecy in a given area.

8. The government states in a footnote that even if FOIA would require it to release names and identifying information for a subset of complaints resolved in a particular way, such as by a finding of substantiation, this information cannot be released without revealing other names and identifying information that are exempt from disclosure. Its assertion in this regard is based on the fact that it provided AILA with a key that links each complaint file number to a unique identifier for an immigration judge. *See id.* at 3 n.1. This argument should be rejected. The government cannot transform a non-exempt document into an exempt one through choices made by the government in litigation.

**C. Requested Information That Does Not Identify Immigration Judges Should Be Released.**

Although the government's argument is based on a purported need to protect the identity of individual immigration judges, the government has not demonstrated that all withheld information would, if released, identify those judges. Specifically, information about the gender of an immigration judge would not identify individual judges in the absence of disclosures regarding judges' base cities, nor would all locational information, regardless of location size, identify such judges. *See* Pl.'s S.J. Memo. at 27-28. The government does not respond to AILA's argument in this regard. Accordingly, this Court should order the government to release information about the gender of immigration judges and all locations withheld from the released records (except street addresses, which AILA does not seek, *see id.* at 28).

**II. The Government Improperly Redacted Purportedly "Non-Responsive" Information from Responsive Records.**

In its motion for summary judgment, AILA challenged the government's extensive withholding of information that the government deemed "non-responsive" from responsive records released to AILA. *See id.* at 28-29. AILA emphasized that its FOIA request sought "complaints" against immigration judges and a variety of "records" relating to complaints. Doc. 16-1, Rodrigues Decl., Ex. A (FOIA Request), at 1. It thus argued that, "[u]nder the plain language of its FOIA request," it was entitled to all information in responsive records, unless one of FOIA's nine exclusive exemptions applied. Pl.'s S.J. Memo. at 28.

**A.** The government's opposition distorts AILA's argument as one based on the plain language of FOIA, rather than AILA's FOIA request. *See* Defs.' Opp'n at 11. The government thus provides no response to AILA's contention that the request's language must control. In any

event, the cases that the government cites do not stand for the proposition that FOIA permits agencies to withhold information that they deem non-responsive from responsive records.

Although *Keys v. DHS*, 510 F. Supp. 2d 121 (D.D.C. 2007), states that “FOIA’s focus is on disclosure of information, not documents,” it does so in the context of reiterating the well-established rule that “an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Id.* at 131 (internal quotation marks omitted); *see also* 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”). The situation addressed by *Keys* is quite obviously distinct from the one at issue here. Likewise, *Citizens for Responsibility & Ethics in Washington v. DOJ*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2604640, \*7 (D.D.C. June 11, 2014), and *Competitive Enterprise Institute v. EPA*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 308093, \*7 (D.D.C. Jan. 29, 2014), hold that documents that are non-responsive in their entirety are not subject to FOIA’s disclosure requirements and may be withheld without justification. Neither case provides the government license to withhold information it deems non-responsive from responsive records.

Moreover, although AILA believes all of the purportedly non-responsive redactions are unlawful, the government’s position is at odds even with defendant DOJ’s more permissive guidance on FOIA processing. 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](http://www.justice.gov/oip/foia_updates/Vol_XVI_3/page3.htm). Thus, if any information on a page is responsive, the “entire page should be included as within

the scope of th[e] [FOIA] request.” *Id.* In addition, even with respect to whole pages of 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 did so on a page-by-page basis even after AILA raised concerns about these redactions during the production period. *See* Supplemental Murray Decl. ¶ 10. Accordingly, even under defendant DOJ’s own guidance for FOIA processing, the government cannot justify its redactions here.

**B.** In addition, the information deemed non-responsive by the government is in fact responsive, at least in large part. The government states that this information falls into two categories: (1) “matters unrelated to AILA’s FOIA request, such as other work-related matters,” or (2) “complaint file information unrelated to th[e] particular complaint [at issue in the complaint file] but concerning other complaints.” Defs.’ Opp’n at 12 (citing Supplemental Rodrigues Decl. ¶ 4 & Ex. A). Neither category can be termed non-responsive in its entirety.

With respect to the first category, a review of the records makes plain that some withheld information is clearly related to the FOIA request. For example, the government has described a redacted sentence in complaint file 110 as “unrelated to the complaint and its resolution,” *see* Supplemental Rodrigues Decl., Ex. A at 2, where the sentence appears in an e-mail memorializing an oral counseling meeting between an immigration judge and his or her supervisor regarding a complaint. *See* Supplemental Murray Decl. ¶ 4 & Ex. B. A paragraph of

the e-mail begins by noting the precise time at which the meeting began. It then describes the substance of the exchange between the immigration judge and supervisor, after which one sentence is redacted in full. The following sentence states that the immigration judge “was professional and respectful” during the meeting and then notes the time at which the discussion ended. In this context, it is patently absurd to contend that the redacted information is “unrelated to the complaint and its resolution.”

The government makes the same, unjustifiable contention with respect to information in Complaint 635, *see* Supplemental Rodrigues Decl., Ex. A at 7. The redaction for purportedly non-responsive information appears in an immigration judge’s e-mail response to a directive that he or she recuse from certain cases due to ethical concerns. The redacted paragraph or portion thereof appears in the middle of the immigration judge’s rebuttal, following the judge’s justification for his or her behavior and preceding a request that the recusal directive be stayed. Supplemental Murray Decl. ¶ 5 & Ex. C.

It is likewise clear that the second category identified by the government—information that is concededly related to AILA’s FOIA request but purportedly unrelated to the particular complaint file from which it was redacted—cannot properly be withheld. Indeed, the government’s justification for making these redactions is *not* that the information is unresponsive to AILA’s FOIA request, but that the redactions make “it easier to understand the subject complaint file.” Supplemental Rodrigues Decl. ¶ 7. In essence, the government’s explanation itself reveals that the withheld information is in fact responsive to the FOIA request.

The government attempts to justify these arbitrary redactions by assuring the Court that the information can be obtained elsewhere among the released records. It states that the government has, “for clarity purposes, released [the withheld information] as part of [its]

corresponding complaint file.” Defs.’ Opp’n at 12. The government’s justification has two flaws. First, the evidence does not support the government’s assertion that all redactions in this category are for information released elsewhere in the complaint files. The supplemental declaration of Mr. Rodrigues states that this information was disclosed as part of “the complaint file to which it related” only “to the extent that the non-responsive information concerned another complaint *and its resolution*.” Supplemental Rodrigues Decl. ¶ 7 (emphasis added); *see also id.*, Ex. A at 1 n.1 (noting that the supplemental *Vaughn* index “does not specify the associated complaint number” for a “non-responsive redaction” addressing a separate complaint where the redacted information does not “identify the complaint number, *if any*, to which it relates” (emphasis added)). Mr. Rodrigues’s own declaration thus suggests that some information in this category has not been released, which is consistent with the fact that AILA’s FOIA request sought only records relating to closed complaints.

Second, the government’s assertion that it redacted this information to make “it easier to understand the subject complaint file,” Supplemental Rodrigues Decl. ¶ 7, rings hollow. By obscuring the totality of the records in context, the government’s redactions—in addition to being unlawful under FOIA—only serve to make it more difficult for AILA and the public to understand how EOIR considers and responds to complaints. And even if the redacted information *is* available somewhere else in the released records, AILA has no way of identifying which pieces of information redacted from one record are produced in another record, short of sifting through—by the government’s estimate—16,000 pages of records to identify duplicates that have different portions redacted as “non-responsive.” Although the government has now produced a *Vaughn* index that purports to reflect all “non-responsive” redactions, the index repeatedly states that redacted information concerns an “unrelated complaint” but does not

identify to which complaint the information relates. *See generally* Supplemental Rodrigues Decl., Ex. A. It is, therefore, unclear whether the government even knows where else one could find the information it has redacted as “non-responsive.”

### **III. FOIA Requires the Proactive, Electronic Disclosure of Complaint Resolutions.**

Resolutions of complaints against immigration judges constitute orders made in the adjudication of cases and, where accompanied by a statement of the agency’s reasons, final opinions. *See* Pl.’s S.J. Memo. at 29-37. Accordingly, under FOIA, the government has an obligation to proactively release these resolutions—even in the absence of a FOIA request—by sharing them with the public online. *See* 5 U.S.C. § 552(a)(2)(A) (requiring agencies to make available without a FOIA request all “final opinions, . . . as well as orders, made in the adjudication of cases”); *id.* § 552(a)(2) (requiring publication by electronic means of such materials created after 1996). In arguing to the contrary, the government misunderstands FOIA’s structure and misreads existing case law.

**A.** The government first contends that reading FOIA, § 552(a)(2)(A), to encompass complaint resolutions would “do[] away with Exemption 6 and the protection it affords federal employees for their disciplinary and employment records.” Defs.’ Opp’n at 13. The government is wrong. FOIA expressly contemplates that final opinions subject to its proactive disclosure provision may contain personal, private information that should not be released, and the statute provides a mechanism for withholding that information while releasing all other portions of covered records. Specifically, 5 U.S.C. § 552(a)(2) provides that “an agency may delete identifying details when it makes available or publishes an opinion” if deletion is “required to prevent a clearly unwarranted invasion of personal privacy.” This provision thus mirrors the standard for withholding under Exemption 6. *See id.* § 552(b)(6). Accordingly, even if this Court

were to determine that release of immigration judges' names and other identifying information would constitute a clearly unwarranted invasion of personal privacy, its conclusion would have no effect on whether the other portions of the complaint resolutions are subject to affirmative disclosure online under § 552(a)(2)(A).

**B.** The government also contends that reading § 552(a)(2)(A) to cover complaint resolutions would subject “every employee disciplinary action, along with myriad other internal agency decisions,” to publication. Defs.’ Opp’n at 13. But even assuming the government’s dire prediction would be sufficient to overcome the command of § 552(a)(2)(A), it has no basis in reality. Resolutions of complaints against immigration judges are in many ways unique. EOIR implemented and made mandatory an adversarial complaint process, and it did so for the public’s use. It also committed to responding to complaints by, among other things, dismissing them for various reasons or finding that they warrant the imposition of corrective or disciplinary action. *See* Pl.’s S.J. Memo. at 31-34. Under these circumstances, the Court need not decide—in order to rule in favor of AILA—whether resolutions of exclusively internal agency decisions constitute orders and final opinions subject to proactive disclosure under § 552(a)(2)(A). The complaint resolutions do not fit that description.

**C.** In a general reprise of its motion for summary judgment, the government argues that the complaint resolutions cannot be orders or final opinions because the complaint process is voluntary and non-adversarial and complaint resolutions are not precedential. The government continues to miss the mark by misreading the relevant case law and by portraying the complaints and complaint process in a manner inconsistent with the facts.

**1.** The government contends that the complaint resolutions are not orders or final opinions subject to proactive disclosure because the complaint process is a “voluntary initiative.”

Defs.' Opp'n at 15. This characterization is not accurate, however, because, as the government has conceded, DOJ provided for the "complaint process through regulation." *Id.* Agencies often adopt regulations, not based on an express statutory command, but in the exercise of their discretionary authority. These regulations will, in many instances, bind the agency to take or refrain from taking certain actions. To be sure, the agency could repeal its regulations, but until then, its regulations constitute law, and actions taken pursuant to regulatory mandate are not voluntary in any sense of the word.

2. The government argues that the resolutions are not orders or final opinions because they are not the product of an adversarial process. *Id.* As an initial matter, § 552(a)(2)(A)'s plain language is not limited to orders resulting from an adversarial process. The government's position also finds no support in the broad definition of "order" supplied by the Administrative Procedure Act (APA), 5 U.S.C. § 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing"), which the Supreme Court and D.C. Circuit have relied on in interpreting § 552(a)(2)(A). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975); *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 25 (D.C. Cir. 1978).

Moreover, as the government concedes, *Rockwell International Corp. v. DOJ*, 235 F.3d 598 (D.C. Cir. 2001), and *Common Cause v. IRS*, 646 F.2d 656 (D.C. Cir. 1981), merely "not[ed]" that agency decisions not subject to FOIA's affirmative disclosure requirement "were made outside the context of an adversarial dispute with another party." Defs.' S.J. Memo. at 25. Neither case held that an adversarial proceeding is required for § 552(a)(2)(A) to apply. Rather, in each case, the D.C. Circuit concluded that agency decisions did not constitute "orders" because they represented the "voluntary suggestion, evaluation, and rejection of a proposed

policy by an agency.” *Common Cause*, 646 F.2d at 659; *Rockwell*, 235 F.3d at 603 (“voluntarily undertaken internal agency investigation”); *cf. Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 971-72 (7th Cir. 1977) (holding that a report reflecting a Special Prosecutor’s decision not to seek indictment of President Nixon was a final disposition subject to § 552(a)(2)(A) without discussing whether the decision was adversarial). Each case then contrasted such circumstances with those present in *Sears*, which involved an “agency’s final, unappealable decision not to pursue a judicial remedy in an adversarial dispute.” *Common Cause* 646 F.2d at 659; *accord Rockwell*, 235 F.3d at 603 (quoting same language from *Common Cause*).

In any event, the complaint process at issue is adversarial. Complaints are generally filed by a third party, including immigrants or their attorneys. EOIR may contact complainants as part of its investigation process, and it has committed itself to keeping complainants apprised of whether action has been taken on their complaints. Keller Decl., Ex. A at 3 & Ex. B. Moreover, an immigration judge may challenge a disciplinary action taken in response to a complaint and often refutes the allegations of complaints. *Id.* ¶ 28; *see also* Murray Decl. ¶ 11 & Attach. C. In light of these facts, the complaints are the product of an adversarial process vis-à-vis complainants and immigration judges. *See* Pl.’s S.J. Memo. at 34-35.

The government does not contest these facts. *See* Defs.’ Opp’n at 15; *see also* Defs.’ Response to Pl.’s Statement of Facts ¶¶ 15-17. Rather, in its view, whether a document is the product of an adversarial process—and thus constitutes an order or final opinion made in the adjudication of a case—depends only on whether there is a “hearing, examination of witnesses or taking of evidence.” Defs.’ Opp’n at 15. The government cites no legal authority for this position, nor is plaintiff aware of any. Indeed, while the procedures identified by the government

might be necessary to conduct a formal adjudication on the record under the APA, *see* 5 U.S.C. §§ 554, 556, it is well-established that agencies may proceed by formal as well as informal adjudications, *see, e.g., Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990). And agencies render orders—and when accompanied by a statement of reasons, final opinions—under either type of adjudication. *See* 5 U.S.C. § 551(6).

3. Finally, the government asserts that documents covered by § 552(a)(2), including orders and final opinions specified in § 552(a)(2)(A), must have a “precedential effect” that applies “to the public.” Defs.’ Opp’n at 14. Numerous court of appeals decisions, however, have not required that a document be precedential to constitute an order or final opinion under FOIA. *See* Pl.’s S.J. Memo. at 35. In addition, the government’s reading of § 552(a)(2) is at variance with FOIA’s structure. That provision requires affirmative publication not only of orders and final opinions made in the adjudication of cases, 5 U.S.C. § 552(a)(2)(A), but also of “statements of policy and interpretations” adopted by the agency, *id.* § 552(a)(2)(B). If the government’s reading were correct, statements of policy would have to be precedential to be subject to FOIA’s affirmative disclosure requirement, but the D.C. Circuit has categorically rejected such a possibility. *See, e.g., Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (explaining that a “policy statement” is not “a precedent” (internal quotation marks omitted)); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (explaining that an agency’s general statement of policy “is not finally determinative of the issues or rights to which it is addressed” and that an “agency cannot apply or rely upon a general statement of policy as law” (internal quotation marks omitted)); *cf. Tax Analysts v. IRS*, 117 F.3d 607, 617 n.9 (D.C. Cir. 1997) (noting in a FOIA Exemption 5 case that “general statements of policy” are exempt from the APA’s notice-and-comment requirement because they “are not binding,” yet “no one could

reasonably suppose that because statements of agency policy fall within the notice and comment exception, all agency policy statements are exempt from disclosure under FOIA” (internal quotation marks omitted)).

The government relies on *Smith v. NTSB*, 981 F.2d 1326 (D.C. Cir. 1993), and *Vietnam Veterans of America v. Department of Navy*, 876 F.2d 164, 165 (D.C. Cir. 1989), for its position regarding precedential effect, but that reliance is misplaced. In *Smith*, a pilot asserted that the Federal Aviation Administration could not suspend his pilot’s license based on a sanctions policy that was not publicly available at the time of the violation leading to the suspension. 981 F.2d at 1327-28. The D.C. Circuit agreed, explaining that, under FOIA, an agency is required to make affirmatively available “administrative staff manuals and instructions to staff that affect a member of the public”; otherwise, the agency cannot rely on such documents in an enforcement action. *Id.* (quoting § 552(a)(2)(C)). The D.C. Circuit noted in passing that FOIA’s legislative history made clear that Congress “meant for the agency to disclose all . . . documents having precedential significance,” and concluded that such documents “certainly include[] a manual setting out the [agency’s] sanctions policy.” *Id.* at 1328 (internal quotation marks omitted). As is clear from this context, *Smith* does not stand for the proposition that § 552(a)(2)’s coverage—or specifically § 552(a)(2)(A)’s application—hinges on a finding that documents are precedential.

Likewise, *Vietnam Veterans* did not hold—as the government contends—that “FOIA’s proactive disclosure provision did not apply to [certain] legal opinions . . . because they did not operate as law.” Defs.’ Opp’n at 13-14. Rather, in that case, the D.C. Circuit concluded in a four-paragraph opinion that particular legal opinions did not fall under § 552(a)(1) or § 552(a)(2) because the opinions did “not contain statements of policy or interpretations adopted by” the agencies, as is required for portions of those provisions to apply. 876 F.2d at 165; *see* 5 U.S.C.

§ 552(a)(1)(D) (requiring publication in the Federal Register of “statements of general policy or interpretations of general applicability formulated and adopted by the agency”); *id.* § 552(a)(2)(B) (requiring affirmative disclosure of “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”).

In any event, as AILA explained in its motion for summary judgment, the government is wrong as a factual matter that the complaint resolutions have no precedential effect. *See* Pl.’s S.J. Memo. at 35-36.

#### **IV. The Government Misstates the Scope of Issues Remaining in This Litigation.**

In two footnotes, the government makes inaccurate statements that warrant correction regarding the scope of claims remaining at issue. First, AILA has not, as the government contends, “abandoned” its claims under the APA and Mandamus and Venue Act for affirmative disclosure of complaint resolutions. Defs.’ Opp’n at 13 n.7. Rather, AILA has made clear that the Court simply need not reach these claims to rule in AILA’s favor. *See* Pl.’s S.J. Memo. at 36-37. Specifically, AILA brought the alternative APA and mandamus claims to ensure that, if the Court finds that complaint resolutions constitute orders and final opinions under FOIA, 5 U.S.C. § 552(a)(2)(A), the Court will have sufficient remedial power to order electronic publication of those resolutions, regardless whether the remedial power is derived from FOIA or some other source of law. *Cf. Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1202-03 (D.C. Cir. 1996) (holding that courts’ remedial power under FOIA to address violations of § 552(a)(1) does not extend to ordering publication in the Federal Register but noting that plaintiff had waived parallel claims under the APA or the Mandamus and Venue Act for such relief). Here, because the government has waived any challenge to the Court’s remedial power under FOIA to address § 552(a)(2)(A) violations, instead arguing only that complaint resolutions

do not constitute orders or final opinions, the Court need not reach the alternative APA and mandamus claims to order electronic publication.

Second, the government contends that AILA's fee-related claims are not moot, thus suggesting that the government still intends to assess fees against AILA for record production and that the parties will later move for summary judgment on these issues. *See* Defs.' Opp'n at 15 n.8. It is far too late in the day for the government to suggest that it will charge AILA processing fees. AILA was entitled to processing of its request at no charge, as explained in its exhaustive, 196-page administrative appeal and in follow-up correspondence with the government. *See* Supplemental Murray Decl. ¶ 6 & Ex. D (administrative appeal without attachments); *id.* ¶ 7 & Ex. E (follow-up correspondence). Since then, the government has processed AILA's FOIA request without charging AILA fees, and it has not taken the steps required by its own regulations—such as demanding fees or obtaining confirmation of AILA's willingness to pay fees before processing the request—that might have permitted it to assess fees at an earlier time. *See* 28 C.F.R. § 16.11(e). Accordingly, the fee-related claims are moot because the government has processed its request without assessing or demanding fees. Should the government demand fees at some future time, however, AILA reserves all rights to contest such a demand and would move for summary judgment on its fee-related claims.<sup>2</sup>

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<sup>2</sup> That the government now suggests it might assess fees is particularly remarkable in light of developments during litigation. After AILA filed this case, the parties' counsel discussed whether litigation over the fee-related claims would be necessary, at which time government counsel expressed concern that AILA was a commercial requester not entitled to a fee waiver. He stated that "there may be a conception on the agency's part that these records and analysis would be paywalled for AILA members only" and asked plaintiff's counsel to "confirm that AILA w[ould] make any released records, along with AILA's analysis, available to the public at no cost." Supplemental Murray Decl. ¶ 9. Plaintiff's counsel confirmed that AILA intended to share with the public information obtained through the FOIA request, and the government began producing records without mentioning fees again. *Id.* AILA then posted the records it received

**CONCLUSION**

For the foregoing reasons, AILA's motion for summary judgment should be granted and the defendants' cross-motion for summary judgment denied.

Respectfully submitted,

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on its public website; as of the filing of AILA's cross-motion for summary judgment, those records had received more than 4,800 public "views." Deasy Decl. ¶ 5.