IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREENPEACE, INC., Plaintiff, v. DEPARTMENT OF HOMELAND SECURITY, and NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, Defendants.	Civil Action No. 1:17-cv-00479-TJK Judge Kelly

PLAINTIFF'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Dated: September 29, 2017

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INTRODUCTION

The material facts in this case are undisputed. Greenpeace made a Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), in response to which the agency withheld all responsive records. Greenpeace appealed, and the agency issued a decision in Greenpeace's favor on the ground that the records were not subject to the claimed exemptions. The agency informed Greenpeace that the appellate ruling was its final action. Agency staff then purported to reprocess the request in accordance with that appellate decision, but again withheld all responsive records, on the basis of one of the very same exemption claims rejected on appeal, by redacting the records to the point where they conveyed no intelligible information. Greenpeace appealed again, and the agency informed it that the prior appellate ruling remained its final ruling, but that it could not force its staff to comply with that ruling.

Only after Greenpeace filed suit did the agency change course and assert that the appellate process had been an elaborate sham—that the ruling on Greenpeace's appeal was not in fact the one it sent to Greenpeace and twice said was its final action. Instead, the agency now claims that the real appellate ruling was a secret directive by the agency's Office of General Counsel (OGC) that "effectively overruled" the appellate decision that the agency issued to Greenpeace and repeatedly told Greenpeace was its final action. Defs. Opp. & Reply 28 (Defs. Opp.).

DHS's litigation position that the agency's real appellate ruling was the opposite of the one issued to Greenpeace fails as a matter of law. Its position is contrary to the structure of the administrative appeal procedure created by FOIA. Thus, not surprisingly, DHS cites no authority for the proposition that the agency may secretly "overrule" an appellate decision setting forth a final determination in favor of a requester. Nor does the agency provide any support for the assertion that it is entitled to *de novo* judicial review of whether requested records are exempt from

release under FOIA when its final action on the request was an appellate determination that the requester was entitled to the records requested.

The procedural posture of this case is unusual because rarely has an agency issued a final appellate decision in favor of a requester but then refused to process the FOIA request in accordance with that decision and forced the requester to sue. The closest analogue, *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988), provides the Court with clear guidance for resolving this case: The Court should compel DHS to abide by FOIA and release the records pursuant to the agency's ruling in the administrative appeal. Further, consistent with the first ALJ's determination, DHS has now admitted that many of the records it has withheld are not subject to exemption 7(F). Moreover, DHS has failed to provide any concrete, credible basis to believe that any of the records it identified in response to Greenpeace's request for a list of chemical facilities that were rendered safe could endanger anyone's physical safety.

ARGUMENT

I. The Agency is Unlawfully Withholding Records in Violation of its Own Final Action Determining Them to be Non-Exempt.

In its initial memorandum in support of its motion for summary judgment, Greenpeace explained that after the first ALJ issued his determination that the requested records are not exempt from disclosure, FOIA required DHS to make those records "promptly available." Pl. S.J. Mem. & Opp. 12-18 (Pl. Mem.); 5 U.S.C. § 552(a)(3)(A); *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 188-89 (D.C. Cir. 2013) (*CREW*). In the highly unusual circumstances where, as here, the FOIA administrative appeals process results in a final agency determination in favor of a FOIA requester but agency staff continues to withhold the non-exempt records in violation of FOIA, courts do not engage in *de novo* review of the rejected

exemption, but instead order relief in favor of the requester. *See Payne*, 837 F.2d at 494; *see also* Pl. Mem. 16-19.

In *Payne*, when agency staff continued to withhold records after the head of the agency reversed the staff's initial determinations, the court of appeals explained that the staff's refusal to abide the results of the administrative process was an abuse of FOIA worthy of equitable relief: "The appellants have fully complied with the administrative scheme. It was the [government's] abuse of this scheme that forced the appellants to bring [this] lawsuit[] to obtain release of the documents ….[T]he courts have a duty to prevent these abuses." 837 F.2d at 494 (internal quotation marks and citation omitted). Here, Greenpeace has similarly complied with the administrative process. DHS's abuse of the administrative scheme has forced Greenpeace to bring this suit to obtain the records that the agency, through its own administrative process, determined are not exempt. *Payne* dictates the outcome of this case: The Court must order the agency to abide by its own decision, which was in any event correct.

A. FOIA mandates that DHS comply with the final appellate determination it issued to the requester.

In its opposition papers, DHS insists that (1) DHS did not violate FOIA or DHS regulations because the OGC retained the authority to overrule the first ALJ; and (2) regardless of whether DHS violated FOIA, the only remedy available to Greenpeace is *de novo* review of DHS's exemption claim (even though its own final determination in the administrative appeal was that those records are *not* exempt). DHS is wrong. Its position that a secret determination never communicated to the requester constitutes the agency's ruling on appeal cannot be squared with the language and structure of FOIA; its assertions that its actions were consistent with its regulations and practices are not only legally erroneous, but contrary to the undisputed facts; and the agency cites no example of any case in which a court has undertaken *de novo* review of an

exemption claim where a final agency appellate decision had held that those records were subject to release.

1. DHS's contention that a secret determination overruling the agency's appellate determination was the "real" decision on appeal fails as a matter of law and fact.

DHS's insistence that its actual ruling on the appeal was a determination by the OGC—never communicated to Greenpeace—that Greenpeace was not entitled to the requested documents, cannot be squared with the text and structure of FOIA. Indeed, DHS makes no genuine attempt to argue that a secret determination can stand in for, let alone overrule, an appellate determination communicated to a requester as the agency's final action in accordance with FOIA's requirements. The reason for DHS's omission is apparent: The agency's litigation position has no support in the statute or case law interpreting it.

The agency's position rests on the fiction that the ALJ who decided Greenpeace's appeal was the *first* level FOIA reviewer and DHS's OGC was the appellate level of review. For example, DHS argues that OGC "acted … to correct an error" in the ALJ's "initial decision on Plaintiff's FOIA appeal." Defs. Opp. 5. And its opposition memorandum never once mentions DHS FOIA staff's initial determination of Greenpeace's FOIA request, which was subsequently overturned on appeal by the first ALJ. Hind Decl. Ex. D (initial determination). Because a secret, internal decision cannot, as a matter of law, override the agency's determination of a FOIA appeal as communicated to the requester, DHS's arguments that the after-the-fact overruling of the ALJ determination by OGC comported with the agency's standard internal procedures are unavailing. Besides being irrelevant, those arguments do not square with the plain meaning of FOIA, the applicable regulations and agency delegation of authority, or with the undisputed facts.

Absent unusual circumstances suggesting congressional intent to create a secret, ex parte appeal process, the natural meaning of any statute providing that a person may take an appeal is that the appellant will receive notice of the disposition of the appeal. FOIA is no different: The statute specifically provides that when a requester takes an appeal, the agency must "make a determination with respect to [the] appeal." 5 U.S.C. § 552(a)(6)(A)(ii). As the court of appeals explained in *CREW*, a "determination" under FOIA is, necessarily, a decision "communicated" to the requester. 711 F.3d at 277. DHS does not claim that it ever communicated OGC's purported appellate ruling to Greenpeace. *CREW* further explains that after the agency has issued a written "determination," the FOIA process moves into the "production" phase, during which the agency is required to "physically redact, duplicate or assemble for production the documents *that it has already gathered and decided to produce*" during the "determination" phase in order to make records "promptly available." Pl. Mem. 16, 19 (citing *CREW*, 711 F.3d at 283-84 (emphasis added)). Although DHS's opposition memorandum ignores *CREW*, the case demonstrates that FOIA provides no basis for OGC's decision to convert the production phase into a second appellate determination.

Examination of other provisions of FOIA underscores that the agency's secret veto of the decision communicated to Greenpeace could not have been the agency's "determination." For example, FOIA requires that when an agency makes any appellate determination in which "the denial of [a] request for records is in whole or in part upheld," it must "notify" the requester of the determination and the right to seek judicial review of that determination. 5 U.S.C. § 552(a)(6)(A)(ii). The agency does not contest that it never notified Greenpeace that it had upheld the denial of Greenpeace's request in whole or in part. Indeed, the agency's production letter to Greenpeace does not purport to give notice of any disposition of the appeal other than the decision

of the first ALJ, which DHS purported to be implementing. *See* Hind Decl. Ex. H. Moreover, the statute's timeframes for appellate determinations and the statute of limitations for seeking judicial review cannot be sensibly applied if, as DHS argues, the decision of an administrative appeal is not the one issued to the requester, but one secretly made at some unknown, later date.

The applicable regulations and official documents delegating authority, together with the undisputed facts, further demonstrate that the first ALJ's decision, and not the OGC's secret subsequent overruling of the first ALJ, was the final appellate determination of DHS. The July 2011 memorandum from the General Counsel of DHS states that while DHS regulation 6 C.F.R. § 5.9 provides that "appeals shall be filed with the [OGC] for processing and adjudication," OGC had "*in turn, assigned* … the responsibility of processing and adjudicating FOIA appeals" "to the Office of the Chief Counsel, Transportation Security Administration (OCC/TSA)." Hind Decl. Ex. F (emphasis added). The memorandum goes on to explain that DHS was "reassign[ing] for decision making" FOIA appeals from the OCC/TSA to the Coast Guard ALJs. *See id*. OGC's assignment of its authority to act on behalf of the "head of the agency" to the ALJs could not be written more clearly. DHS's post-hoc declaration that the July 2011 memorandum "is not and was never intended to be a delegation of authority document," Second Palmer Decl. ¶ 6, cannot negate the plain import of the memorandum.

Pursuant to the July 2011 memorandum, the first ALJ stated that his decision was not only "the official appeal decision on behalf of [DHS]," but was "the final action of [DHS]." Pl. Mem. 13-14, 19 (citing Hind Decl. Ex. G). When describing the effect of his decision, the first ALJ quoted 6 C.F.R. § 5.9(b), the relevant DHS regulation on the consequences of an adverse appellate determination. *See* Hind Decl. Ex. G ("[i]f the adverse determination is reversed or modified on appeal, in whole or in part, you will be notified in a written decision and your request will be

reprocessed in accordance with that appeal decision."). DHS's own subsequent production letter similarly confirmed that the first ALJ's decision was a decision of an "Administrative Law Judge" in "response to [the] administrative appeal." Hind Decl. Ex. H.[1] The second ALJ's decision further confirmed that the first ALJ's decision "constitute[d] final agency action" and that DHS was "obligated to comply with … [the] appeal decision." *See* Hind Decl. Ex. J.

Tellingly, defendants make no attempt to explain why, if OGC's claimed post-appeal review was genuinely a part of the agency process, OGC never informed Greenpeace or the ALJs that it retained and had exercised this authority, instead leaving all to believe that the agency was simply not complying with the first ALJ's final decision on behalf of the agency. Had DHS believed that the ALJs, and the agency staff who said that they were implementing the first ALJ's decision on remand, were misstating the roles of the ALJs in the administrative process, surely DHS would have made some effort—at the latest, when Greenpeace submitted its second appeal—to correct these "misstatements." Defs. Opp. 28; *see* Defs. Resp. to Pl. Statement of Genuine Issues

[1] DHS repeatedly makes a point of identifying the ALJs as "staff-attorneys." *See* Defs. Opp. 2 n.1 (citing Second Palmer Decl. ¶ 9); *id.* 24 n.10 (same). This terminology contrasts sharply with DHS's perspective during the administrative appeal process, during which DHS referred to the ALJs as "administrative law judges," *see* Hind Decl. Ex. H ("On June 27, 2014, an Administrative Law Judge issued a response to this administrative appeal stating that the Department's action in regard to this FOIA request to withhold the documents in their entirety was being reversed."). Similarly, DHS tries to deflect blame onto the first ALJ for DHS's failure to meet its burden to justify invoking the exemption by claiming that it was incumbent on the ALJ to "review[] court filings from the Department's active FOIA litigation prior to issuing" his determination. Second Palmer Decl. ¶ 12. This attack on the ALJ ignores both that it was DHS's burden to justify its claimed exemption, *see* 5 U.S.C. § 552(a)(4)(B), and that the ALJ requested additional information from DHS, thus providing DHS the opportunity to provide the very "court filings" that it now claims the ALJ ignored. Finally, DHS appears to chide the ALJ for not clearing the appeal decision with OGC before sending it to Greenpeace, *see* Second Palmer Decl. ¶¶ 11, 13, but does not claim that the ALJ was required to do so or that, as a factual matter, any ALJ handling a DHS FOIA appeal has ever done so.

(Defs. Resp.) ¶ 14. DHS's contemporaneous silence belies its newfound litigation position that the OGC lawfully retained a secret veto authority.

In an effort to overcome these legal and factual hurdles, DHS grasps at two straws, both of which snap upon inspection. First, DHS claims that because DHS FOIA regulation 6 C.F.R § 5.9 initially delegates the power of the "head of the agency" to the OGC, the OGC retained that authority and acted appropriately in secretly overruling the decision of the first ALJ. *See* Defs. Opp. 24. This argument ignores the July 2011 memorandum, in which OGC cites 6 C.F.R. § 5.9 and explicitly states that, it had "*in turn, assigned*" its authority under that provision, first to the OCC/TSA, and then to the ALJs. *See* Hind Decl. Ex. F. Rather than confronting this clear delegation, DHS selectively omits the "in turn, assigned" phrase from its excerpt of the July 2011 memorandum. *See* Defs. Opp. 27-28.[2]

Second, DHS claims that because Greenpeace was required to send its appeal letter to the OGC, and because Greenpeace complied with that requirement, Greenpeace had "actual notice" that OGC was authorized to secretly overrule the written decision of the first ALJ. *See* Defs. Opp. 24-25. The only "actual notice" in the record, however, is that provided in the notifications that Greenpeace received: the written decision of the first ALJ stating that it is the "official appeal decision" and "final action" of DHS; the subsequent letter producing the redacted records on remand, which states that it is implementing the ALJ's appellate decision, not a subsequent reversal of that decision by OGC; and the second ALJ's letter dismissing Greenpeace's second

[2] Similarly, the Court should reject DHS's circular argument that the fact that OGC "stepped in and effectively overruled the staff attorney" is itself "evidence[]" that OGC retained the lawful authority to do just. Defs. Opp. 28.

appeal, which again states that the first ALJ determination was DHS' "final agency action" and mentions no intervening decision overruling it. *See* Hind Decl. Exs. G, H, J.

Even accepting DHS's baseless argument that "notice" to a requester that the OGC might secretly overrule the ALJ's determination *could* authorize OGC to override that final determination—an argument DHS puts forth without any legal basis—DHS's view that requesters are "on notice" that the OGC plays such a role is extraordinarily implausible. If a FOIA request to DHS is denied by DHS FOIA staff, the requester's appeal is routinely directed to an ALJ. The requester is not free to insist that the appeal instead be adjudicated by DHS's OGC. And if the ALJ affirms the DHS FOIA staff's decision, the requester cannot assert that she is entitled to appeal the ALJ's decision to DHS's OGC. Nowhere does OGC inform the public that there is any second level of review available following issuance of appeal decisions, let alone that such review is available only when the appeal has determined that the requester is entitled to records. Like other requesters, Greenpeace had no idea that DHS purported to retain a secret veto authority until DHS filed its motion in this case because DHS never mentioned it until that time. *See* Hind Decl. ¶ 12.

As an alternative to its claim that it exercised authority to overrule the first ALJ, DHS suggests that the first ALJ's decision had "sufficient ambiguity" for DHS to completely redact the requested records during reprocessing without running afoul of the decision. Second Palmer Decl. ¶ 17. DHS's fallback position is contradicted by the undisputed facts. After DHS initially withheld the requested records in their entirety, the agency reversed itself in the first ALJ's decision on appeal because the agency's staff had "not provided adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemption[] … (b)(7)(F)." Hind Decl. Ex. G. DHS now claims that the first ALJ's decision only reversed DHS's decision to withhold the records "in their entirety," and thus left room for DHS to pursue redactions that accomplished exactly the same

result but fell short of withholding the records "in their entirety." *See* Defs. Opp. 31; Second Palmer Decl. ¶ 17; Defs. Resp. ¶ 10. The second ALJ correctly rejected this strained reading of the first ALJ's decision, explaining that DHS was not "adequately obey[ing]" the decision. Hind Decl. Ex. J. Perhaps more telling, DHS's argument contradicts its own admission that the redactions were designed to make it impossible to identify any facility on the list. *See* Defs. Resp. ¶ 19. Even assuming the first ALJ's appeal decision may have left some room for redactions for reasons *different* from those he rejected (in which case Greenpeace would have been entitled to a second appeal), it cannot be read to authorize what concededly amounts to the total withholding of the requested records on the *very same* basis that the appellate ruling rejected.

In short, the text and structure of FOIA, the applicable agency regulations and delegation memorandum, and the undisputed facts demonstrate that the first ALJ's decision was the official, final appellate determination of DHS that the requested records were not exempt from disclosure under FOIA. After that decision, DHS had no basis to continue to withhold or redact the non-exempt records; it was required to make the records "promptly available." *See* Pl. Mem. 12-21. The agency's contention that its decision on appeal was not the one sent to the requester and repeatedly described as the agency's final action, but was instead a secret determination never communicated to the requester, cannot be squared with either the statutory language and its authoritative construction in *CREW* or any coherent, common-sense view of the evident purposes manifested in the statutory language and structure. *See* Pl. Mem. 12-21. DHS's position makes a mockery of the very concept of an appeal.

2. *Payne* authorizes equitable relief to remedy DHS's abuse of the administrative process.

DHS concedes that FOIA authorizes the relief described in *Payne*: an order requiring production of records the agency's appeals process has determined to be releasable. Specifically,

DHS argues that Greenpeace is foreclosed from bringing an APA or mandamus claim because "FOIA provides the remedy for [Greenpeace]: an injunction compelling the agency to release the records that have been withheld." Defs. Opp. 32; *see id.* 25. At the same time, DHS attempts to evade *Payne* by arguing that it is limited to "policy or practice" claims. Defs. Opp. 7-8. DHS's argument turns FOIA on its head by suggesting that a court has the authority to remedy an agency's unlawful policy or practice of violating FOIA, but is impotent to remedy a one-off violation. DHS's position runs contrary to the well-established principle that FOIA vests the courts with "broad equitable authority." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1241 (D.C. Cir. 2017). Orders compelling "the simple release of extant records" lie in the heartland of that authority. *Id*. at 1242. Indeed, it is cases, like *Payne* but unlike this case, in which relief is granted against an agency's "'policy or practice' where it 'will impair the party's lawful access to information in the future,'" *id*. (citation omitted), that represent more unusual extensions of the court's remedial powers.

In *Payne*, the agency released the documents that were the subject of the particular FOIA requests as to which the requester had successfully appealed. *See* 837 F.2d at 494. That case thus avoided the situation presented here, where the agency's noncompliance with its own final appellate decision has forced the requester to bring suit to obtain the records as to which it prevailed on appeal. Nothing in *Payne* suggests that had the agency continued to withhold the records in that case, or only withheld records on a single occasion, the court would have been unable to provide relief. Accordingly, while *Payne* is generally recognized as the leading decision authorizing injunctive relief for policy or practice claims, it does not in any way suggest that courts can only provide equitable relief to redress an unlawful policy or practice under FOIA.

DHS seeks refuge in the principle that when an agency determines on appeal that its withholding of records was proper, it may invoke new exemptions when that determination is challenged before a court. DHS claims that Greenpeace's demand for relief here would "eviscerate this Court of its authority to review FOIA cases *de novo*." Defs. Opp. 4, 6-7.[3] DHS fails to appreciate, however, that in *every case* on which it relies, the agency's final determination on appeal was that the requester was *not* entitled to the records requested. *See Bayala v. U.S. Dep't of Homeland Sec., Office of Gen. Counsel*, 827 F.3d 31, 33-36 (D.C. Cir. 2016); *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 757 (D.C. Cir. 1978); *Gula v. Meese*, 699 F. Supp. 956, 958 (D.D.C. 1988). The well-established rule that, when a FOIA plaintiff challenges a final agency determination that records are exempt from release, the agency may rely on new exemptions, subject to *de novo* review by the court, is not pertinent here. DHS points to no case in which the final determination of the agency head in a FOIA administrative appeal was that the records requested were *not* exempt and should be provided to the requester, but the agency was nonetheless permitted to claim exemptions in court to defend withholding the records in defiance of its own final determination that they are releasable. Adopting DHS's position would undermine the critical

[3] Despite repeatedly proclaiming that DHS "handled [Greenpeace's] FOIA appeal properly," Defs. Opp. 8, 2, defendants also rely on irrelevant dicta from the court of appeals to argue that an agency may claim an exemption for the first time at the court of appeals if "'through pure mistake' Government attorneys had not invoked the correct exemption in the district court," Defs. Opp. 6-7 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978)). Putting aside that the court of appeals in *Jordan* noted that this exception was very rare, the court was also careful to point out that the courts should not permit an agency to "invoke an exemption for the first time on appeal in order to gain *a tactical advantage* over the requestor," because "it is not consistent with the broad remedial purpose of the FOIA to permit such agency maneuvering." *Jordan*, 591 F.2d at 780 (emphasis added). Similarly here, this Court must not condone DHS's secret "maneuvering" to frustrate the FOIA administrative appeals process.

role of administrative exhaustion in the FOIA process and open the floodgates for agencies to game the appeal process.

DHS also claims that Greenpeace's position would "compel [DHS] to release information without even giving the Department an opportunity to explain why its invocation of the exemption was appropriate." Defs. Opp. 4. DHS fails to acknowledge that its staff *had that very opportunity* in the appellate process, and the agency reached a final determination that the exemption was inapplicable. Specifically, in a letter dated August 7, 2013, the ALJ told the NPPD's FOIA officer that the ALJ was "unable to determine … whether NPPD properly applied FOIA Exemptions" because the file contained "no explanation or justification as to how these exemptions are applicable." Fuentes Decl. Ex. G. The ALJ asked the FOIA officer to "provide a memo providing the justifications for withholding these records pursuant to the articulated FOIA Exemptions." *Id.* DHS subsequently provided additional information to the ALJ. *See* Hind Decl. Ex. G. Even with this information, the ALJ held that "[a]fter a thorough review of [the] appeal and all applicable documents and the Agency's subsequent explanation … [t]he Agency has not provided adequate explanation as to why the requested records should be withheld pursuant to FOIA Exemptions (b)(5), (b)(7)(E) or (b)(7)(F)." *Id.* Ultimately, where, as here, agency appellate process reversed the DHS FOIA staff's withholding decision and determined that the records are not exempt, DHS has no authority to continue to withhold the non-exempt records in disregard of its own final action finding them subject to release. To the contrary, under FOIA, DHS must produce the non-exempt records. *See Payne*, 837 F.2d at 494.

B. The Court should enforce the agency's correct determination that DHS failed to meet its burden to invoke exemption 7(F).

Because DHS is unlawfully withholding of records in contradiction of its own final determination on appeal that the records are not exempt, the Court should not consider the

exemptions DHS asserts in this litigation. Even if *de novo* review of DHS's asserted exemption were proper, the Court should find, consistent with the agency's determination on appeal, that DHS has failed to meet its burden to demonstrate that the requested records are exempt from disclosure. *See* Pl. Mem. 21-28. Indeed, DHS concedes that much of the same information has already been publicly disclosed and that it has withheld the names of facilities that pose no risk to safety.

1. DHS's speculative and conclusory declarations fail to satisfy its burden under exemption 7(F).

Greenpeace previously explained that defendants' declarations were insufficient to satisfy their burden under FOIA. *See* Pl. Mem. 22-24. Greenpeace also provided declarations from experts with decades of experience with chemical safety, each of whom explained that releasing only the names of facilities that were no longer considered "high risk" under CFATS in 2012 cannot reasonably be expected to endanger the life or physical safety of any individuals, but is more likely to *increase* safety by encouraging further reductions. *See* Hind Decl. ¶¶ 16-21; Orum Decl. ¶¶ 7-15; Poje Decl. ¶¶ 9-13. DHS has failed to respond to these declarations or to provide any additional facts to support the application of exemption 7(F).[4] Rather, DHS has now conceded that, as Greenpeace demonstrated, the overwhelming majority of facilities in the requested records—109 out of 123 pages worth—housed *zero* chemicals of interest at the CFATS threshold screening

[4] Instead of addressing the declarations from Greenpeace's experts, DHS attempts to dismiss them out-of-hand with an inapplicable quote from a 1987 case from the Eastern District of Wisconsin that did not deal with exemption (7)(F). Defs. Opp. 10 (citing *Struth v. FBI*, 673 F. Supp. 949 (E.D. Wis. 1987)). To the extent that the case is relevant at all, *Struth* supports Greenpeace: There, the district court carefully considered the justifications the government provided for each redaction and rejected a conclusory assertion under exemption (b)(7)(C) that the redacted information had "little or no direct connection to plaintiff or the public's interest." 673 F. Supp. at 962. Similarly, here, the Court should reject DHS's reliance on exemption 7(F) because DHS has failed to provide a detailed justification for it.

quantity in 2012. *See* Pl. Mem. 23. In other words, 109 out of 123 pages worth of the facilities posed no more risk to safety than any other building in the country. *See id.*

In its opening brief, Greenpeace explained that although the D.C. Circuit has indicated that certain records relating to what that court termed "critical infrastructure"—records "such as 'blueprints, maps, and emergency plans' for 'bridges, airports, railroad tracks, dams, and research facilities'"—will usually satisfy exemption 7(F), nothing in DHS's declarations or *Vaughn* index suggests that the names of the facilities at issue here fall within the court of appeals' understanding of that category. *See* Pl. Mem. 24; Orum Decl. ¶ 13; *Pub. Employees for Envtl. Responsibility (PEER) v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195 (D.C. Cir. 2014). In *PEER*, the government invoked exemption 7(F) to withhold inundation maps for two specific dams that displayed downstream areas and populations that would be affected if the dams were to break, including the time it would take floodwaters to flow to specific locations and peak flow times at those locations. 740 F.3d at 199-200. The court noted that the record included an intelligence alert describing a plot to blow up one of the two dams and explained that the record supported a conclusion that the government had met its burden to demonstrate that the disclosure of the inundation maps for those two dams would risk safety because "[t]errorists or criminals could use that information to determine whether attacking a dam would be worthwhile, which dam would provide the most attractive target, and what the likely effect of a dam break would be." *Id.*

Rather than providing a detailed basis for withholding the 2012 list of chemical facility names, DHS merely parrots *PEER* (replacing the phrase "dam" with "facilities) and asserts, without citation to any declaration, that "[t]errorists could use the information in the lists to determine whether attacking a facility would be worthwhile and which facilities might provide the most attractive targets." Defs. Opp. 14. This bald assertion is contradicted by DHS's own

concession that "solely using the information in the responsive records, it would be impossible to tell which chemicals the facilities held … and if the facility currently holds [any] chemical[s]." Defs. Resp. ¶ 22. As DHS also concedes, the 2012 list provides absolutely no basis for any potential bad actor to conclude (a) that any specific chemical was at any specific facility in 2012; (b) that any specific chemical remains at any specific facility five years later; and (c) that any specific facility even continues to operate. Moreover, as noted, DHS also admits that nearly all of the listed facilities housed zero chemicals of interest in 2012. Thus, the second declaration from Jessica Falcon, which reiterates the risks posed by chemical facilities with chemicals of interest, fails to explain how facilities that have zero chemicals of interest could pose any risk of harm. *See generally* Second Falcon Decl. At best, a potential attacker might use such a list to determine *not* to attack such facilities, but that use of the records would not endanger any individual. Put simply, the list of chemical facilities is nothing like the inundation maps at issue in *PEER*, and it is not a record related to critical infrastructure as *PEER* used that term.

Compounding its erroneous application of *PEER*, DHS misconstrues Greenpeace's position and sets up a straw man, contending that Greenpeace's view would lead to "absurd outcomes such as excluding records for power plants, water treatment facilities, and ports." Defs. Opp. 12. However, Greenpeace is *not* arguing that records for facilities that are not "critical infrastructure" may never be withheld under exemption 7(F), but only that records related to such facilities do not "ordinarily … satisfy Exemption 7(F)." *PEER*, 740 F.3d at 206. Where, as here, DHS seeks to withhold records related to facilities that are not "critical infrastructure," DHS faces the typical high burden under FOIA, 5 U.S.C. § 552(a)(4)(B), which it has failed to carry in this case.

Further, the public facilities DHS lists—power plants, ports, and water treatment facilities—are different in kind from the chemical facilities listed in the records that Greenpeace seeks. And although *certain* records relevant to such facilities would plainly fit within the *PEER* definition of documents related to critical infrastructure, the case does not support the positon that *all* records related to anything that is or has ever been critical infrastructure are presumed to be exempt from disclosure.[5] Where, for example, facilities are no longer "critical infrastructure," the *PEER* presumption in favor of exemption 7(F) should not apply. Illustratively, if the FOIA request in *PEER* sought inundation maps for a dam that no longer existed, the agency could not withhold the records because the dam was once critical infrastructure. Similarly, here, where Greenpeace seeks only the names of facilities that are no longer high-risk and, in many cases, likely no longer in operation, any presumption in favor of withholding records under exemption 7(F) should not apply.

Having failed to provide any specific basis for its withholding, DHS offers news reports of two foreign terrorist plots. DHS first points to a delivery man who drove his truck into a chemical plant in France. *See* Defs. Opp. 16 n.6; Second Falcon Decl. ¶ 7 n.1. DHS gives no explanation of

[5] The court of appeals in *PEER* used the term "critical infrastructure" generically to describe facilities that typically may be associated with records that satisfy FOIA exemption 7(F); it did not purport to apply a statutory term. 740 F.3d at 205-06. Congress has not incorporated the term "critical infrastructure" into FOIA's exemptions, let alone defined it for purposes of FOIA, and the executive branch cannot amend FOIA's exemptions through directives dictating that certain records fall within "critical infrastructure" under other statutes and regulations that use that term. Thus, DHS's citations to statutes and directives unrelated to exemption 7(F) are irrelevant to this Court's determination. Moreover, DHS does not contend that these records fall within any exemption 3 statute protecting "critical infrastructure." In any event, no definition that DHS has provided supports its position that facilities that are no longer high-risk under CFATS are "critical infrastructure." The "incapacity or destruction" of facilities that are not high-risk and/or possess no chemicals of interest under CFATS poses no more risk to "national public health or safety" than the incapacity or destruction of any other building. *Cf.* 42 U.S.C. § 5195c.

how providing the names of facilities that were no longer high-risk in 2012 could increase the risk of similar incidents today in the United States. DHS also points to a foiled plot in Australia to create an improvised explosive device using hydrogen sulfide, a chemical on the CFATS Appendix A. Defs. Opp. 16 n.6; Second Falcon Decl. ¶ 7 n.2. Yet because the requested list does not indicate which facilities had or now have hydrogen sulfide, and because hydrogen sulfide can be purchased with relative ease on the internet without resorting to theft, DHS has failed to explain why providing Greenpeace with the requested records could increase the risk of similar plots in the United States. DHS's examples are a far cry from the intelligence information in *PEER* concerning a plot to attack the very dam for which records were sought. *See* 740 F.3d at 206. Thus, neither news report provides a basis for connecting the reported incidents to DHS's refusal to disclose the list of names of facilities in the United States that were no longer considered high-risk in 2012. If these are the *best* examples that DHS can come up with, they only confirm that DHS's invocation of exemption 7(F) as the basis for withholding the requested records in their entirety is speculative and unpersuasive.

2. DHS concedes that the identity of facilities that possess dangerous chemicals is already in the public domain.

Greenpeace explained that the EPA has already publicly disclosed the names and locations of facilities that currently house many of the CFATS chemicals of interest (at levels that reach EPA's reporting thresholds), and the amounts of those chemicals at each facility. *See* Pl. Mem. 25-27.[6] DHS concedes, as it must, that there is significant overlap among the other government

[6] DHS suggests that because Greenpeace stated in its FOIA request that the requested records were "not available to the public," Greenpeace is foreclosed from raising the public domain exception before this court. DHS unsurprisingly cites no case for this argument, which flies in the face of all of DHS's "*de novo*" arguments. *See* Defs. Opp. 2-7.

programs that publicly disclose chemical facilities and CFATS Appendix A. *See* Defs. Opp. 18; Defs. Resp. ¶¶ 36, 37, 38, 40, 42.[7] DHS's first response is to claim that the public domain doctrine is inapplicable because other agencies' judgments cannot affect DHS's exemption 7(F) claim. Defs. Opp. 18. The argument sidesteps Greenpeace's main point: EPA's public disclosure of names of facilities including those that *currently exceed* CFATS' thresholds renders implausible DHS's claim that the disclosure of facilities that DHS determined in 2012 *no longer exceed* CFATS' thresholds could cause the harm DHS asserts. *See* Pl. Mem. 26-27; *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 74 (D.D.C. 2012) ("The logic of this doctrine is that where information requested is truly public, the enforcement of an exemption cannot fulfill its purposes."); *see also* Defs. Opp. 16 (noting that "at least one court has construed the public domain doctrine to require release of records if the exemption at issue no longer serves any purpose" (citing *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1253 (10th Cir. 2011)).[8] DHS's opposition is conspicuously silent on that point.

DHS attempts to turn the availability of the EPA information against Greenpeace by claiming that *because* EPA's lists of overlapping facilities are publicly available, publicly disclosing the CFATS list is dangerous, to the extent that a comparison of the lists will demonstrate

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[7] DHS also claims that the overlap is "not as absolute as Plaintiff would have the Court believe." Defs. Opp. 18. Greenpeace has consistently stated that this argument only applies to chemicals that overlap with CFATS Appendix A. *See* Pl. Mem. 25-27. For the non-overlapping chemicals, DHS must release the list for all of the other reasons Greenpeace has provided.

[8] Rather than discussing the cases Greenpeace cites, DHS cites an unpublished D.C. Circuit decision. *See* Defs. Opp. 16 (citing *Isley v. Exec. Office for U.S. Attorneys*, 203 F.3d 52 (D.C. Cir. 1999) (unpublished table decision)). In *Isley*, the court concluded that the documents were not in the public domain because they were not "replicated in public documents or in any other 'permanent public record' which would indicate that they are freely available." *Isley*, 203 F.3d at *4. By contrast, Greenpeace has demonstrated that the RMP and TRI databases are freely available in permanent public records. *See* Pl. Mem. 25-27.

which facilities continue to maintain "large quantities" of dangerous chemicals but are not regulated under CFATS. Defs. Opp. 19. DHS's argument rests on its characterization of quantities of chemicals DHS has determined do not pose a "high risk" as "large quantities" and its implausible speculation that terrorists will target facilities that possess those chemicals at such low levels that DHS has not thought it worthwhile to secure them. DHS cannot have it both ways: DHS cannot claim that facilities that it determined in 2012 were not "high risk"—the great majority of which have zero chemicals of interest and are thus indistinguishable from any other building in the nation—are somehow transformed back into "high risk" facilities simply because they are publicly known. And as Greenpeace explained previously, even the identity of facilities that may have housed small amounts of unspecified chemicals in 2012—similar to those held by thousands of other facilities across the nation—does not pose a reasonable threat to public safety sufficient to withhold the information under exemption 7(F). Pl. Mem. 22 (citing Hind Decl. ¶¶ 16-17; Orum Decl. ¶¶ 8, 10, 14; Poje Decl. ¶ 12).

DHS also fails to grapple with the fact that, because EPA discloses the amounts of chemicals at each facility, a would-be attacker can already compare those amounts to the CFATS thresholds to determine which facilities are not currently subject to CFATS but have some amounts of CFATS chemicals of interest. Indeed, because the EPA disclosures are updated regularly—the TRI currently has information through 2016 and the RMP through 2015—there is no reason to believe that a prospective wrongdoer would choose to rely on DHS's obsolete list from 2012 as opposed to the publicly available and recently updated EPA data. Moreover, DHS implicitly speculates that facilities that are no longer regulated under CFATS no longer have security measures appropriate for whatever level of chemicals of interest they retain. It is equally likely

that facilities that put security measures into place under CFATS would continue those security measures if they continue to house CFATS chemicals of interest.

3. DHS admits that it has failed to segregate non-exempt portions of the withheld records.

Greenpeace previously demonstrated that DHS could not "justify withholding [the] entire document simply by showing that it contains some exempt material," and that DHS had not made the "detailed justification" necessary, but had only made "conclusory statements." Pl. Mem. 27 (citations omitted). DHS has now conceded that to the extent the records list "facilities that have completely and permanently removed all chemicals of interest," that information poses no threat sufficient to implicated exemption 7(F). DHS claims, however, that it cannot segregate and provide that information because it did not maintain that information in a "searchable format" until January 2015. Defs. Opp. 21.

Regardless of whether the information was in a "searchable format" prior to January 2015, FOIA required (and requires) DHS to take reasonable steps to segregate and release the nonexempt information. *See* 5 U.S.C. §§ 552(a)(8), 552(b). Further, DHS has conceded that it has maintained information related to changes in CFATS-covered chemical facility risk tiers since 2013, and it acknowledges that facilities may have reported that they have removed all chemicals of interest. *See* Second Falcon Decl. ¶¶ 13-14. Although the list was collected in 2012, the first ALJ ordered the 2012 list to be reprocessed in June 2014, well after DHS admits it began keeping records in 2013. *See* Hind Decl. Ex. G. Thus, FOIA required DHS to review the files for each facility to determine whether it satisfied exemption 7(F).

Moreover, where, as here there are "post-[segregability] decision changes in circumstances," the court should review the agency's segregability decision in light of those changes. *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1154 n.10 (D.C. Cir. 1991) (citing *Powell*

v. U.S. Bureau of Prisons, 927 F.2d 1239 (D.C.Cir.1991)); *see Scheer v. U.S. Dep't of Justice*, 35 F. Supp. 2d 9, 12 (D.D.C. 1999). In *Powell*, for example, the agency denied a FOIA request for an inmate monitoring manual, claiming the entire manual was exempt because publication would "significantly risk circumvention of the law," but then published portions of the manual when the case had reached the court of appeals. 927 F.2d at 1240-41. The court of appeals reasoned that it was appropriate to consider the subsequent publication decision in the first instance at the appellate level when assessing the segregability decision of the agency because the publication was directly relevant to the segregability determination. *See id.* at 1242-43. Here, although DHS asserted that it was too burdensome to determine the status of facilities on the list at the time of processing in 2014, the subsequent creation of a searchable database in January 2015 constitutes a significant change in circumstances. Accordingly, at a minimum, this Court should require DHS to reprocess the 2012 list based on the information within DHS's possession about the facilities on the list. If facilities on the 2012 list can be confirmed to contain no chemicals of interest, then, as DHS concedes, there is no basis for continuing to withhold the names of those facilities.

II. Defendants' Failure to Abide By Their Own Decision Violates the APA.

Greenpeace explained in its opening memorandum that DHS violated the APA in multiple ways: failing to reprocess Greenpeace's FOIA request in accordance with its final appellate decision constituted agency action unlawfully withheld, in violation of 5 U.S.C. § 706(1); and departing from its announced policy of delegating appellate decisions to Coast Guard ALJs by exercising a secret veto was arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A). *See* Pl. Mem. 28-32. DHS counters by claiming that this Court lacks jurisdiction under the APA and DHS was not required to take any discrete action as a consequence of the appeal decision.

Greenpeace agrees with DHS that FOIA provides an adequate, available remedy because this Court may issue an order compelling DHS to comply with the final appellate determination of the first ALJ. *See supra* pp. 10-13 (discussing *Payne*). Greenpeace relies on the APA in the alternative, with the understanding that relief under the APA is only available if this Court concludes that there is no adequate remedy under FOIA. *See* Pl. Mem. 32.

If the relief Greenpeace sought under FOIA were unavailable, Greenpeace should be granted summary judgment on its claim under section 706(1) of the APA because FOIA's text and structure, as well as DHS regulations and the July 2011 memorandum, imposed a discrete and mandatory obligation on DHS to produce the records in accordance with the agency's final appellate decision that the records are not exempt. *See* Pl. Mem. 30. Each of the cases DHS cites that have dismissed claims under section 706(1) involved statutes and regulations that only provided for "general mode[s] of operations." *See Ctr. for Biological Diversity v. Zinke*, No. 16-CV-738 (KBJ), 2017 WL 1755947, at *11 (D.D.C. May 4, 2017) (regulation provided that agency "shall continue ... to revise [their NEPA procedures] as necessary"); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 59 (2004) (statute provided that "the Secretary shall continue to manage such lands … in a manner so as not to impair the suitability of such areas for preservation as wilderness."). In contrast, here, after the first ALJ issued his final appellate determination, DHS was left with no discretion. DHS was instead required to "reprocess[]" Greenpeace's FOIA request "in accordance with th[e] appeal decision." 6 C.F.R. § 5.9(b); *see* 5 U.S.C. § 552(a)(6)(A).

DHS insists that because OGC retained the authority to secretly overrule the first ALJ, Greenpeace cannot state a claim under section 706(1). *See* Defs. Opp. 26-30. DHS's position is no more than a repackaged version of its argument on Greenpeace's FOIA claim that, despite FOIA, the agency's own FOIA regulations, and the agency's delegation of authority to the ALJ, OGC

lawfully retained a secret veto power. *See supra* pp. 4-10. Moreover, DHS has failed to contest that its *post hoc* explanation contravenes *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and cannot be credited in an APA challenge. *See* Pl. Mem. 31.

DHS also relies on *Bennett v. Spear* to argue that the first ALJ's decision was not "final agency action." *See* Defs. Opp. 28. Even putting aside that, as a matter of law on the undisputed facts here, the first ALJ's decision was the final appellate decision of DHS, *see supra* pp. 4-10, DHS's reliance on *Bennett* is misplaced because, as DHS itself admits, section 706(1) "is an exception to" the rule requiring final agency action, *id.* at 26. Greenpeace has demonstrated that by failing to reprocess Greenpeace's FOIA request in accordance with the first ALJ's decision, DHS "failed to take a discrete agency that it was required to take" in violation of 706(1). *See* Pl. Mem. 29-30. Section 706(1) requires nothing more.

Moreover, Greenpeace demonstrated in its initial memorandum that DHS's policy of secretly overruling the ALJs was arbitrary and capricious because it was an unexplained departure from the established DHS policies embodied in the July 2011 memorandum, as well as from the text and structure of FOIA and DHS FOIA regulations. *See* Pl. Mem. 30-31. In response, DHS repeats its claim that DHS FOIA regulations put Greenpeace "on notice" that the OGC had the authority to overrule the ALJ's action. *See* Defs. Opp. 30-31. Even assuming that notice would make DHS's arbitrary agency action permissible, DHS's litigation position is untenable as a matter of fact, *see supra* pp. 8-9, and cannot be credited as a matter of law, *see Chenery*, 318 U.S. at 94-95.

III. DHS's Failure to Comply With Their Nondiscretionary Obligations Under FOIA and DHS Regulations Warrants a Writ of Mandamus.

DHS argues that the mandamus claim is foreclosed by FOIA. Defs. Opp. 16. Again, Greenpeace seeks mandamus in the alternative, with the understanding that mandamus relief is

available only if neither FOIA nor the APA provides an adequate remedy. *See Am. Chemistry Council, Inc. v. U.S. Dep't of Health & Human Servs.*, 922 F. Supp. 2d 56, 66 (D.D.C. 2013). If the relief Greenpeace seeks were for some reason unavailable under FOIA or the APA, DHS's violation of its nondiscretionary obligation to process the records for relief in accordance with its own final decision that they are nonexempt would entitle Greenpeace to mandamus relief. *See* Pl. Mem. 32-33.

CONCLUSION

This Court should grant plaintiff's motion for summary judgment, deny defendants' motion to dismiss or, in the alternative, for summary judgment, declare that defendants' failure to provide the requested records is unlawful, and order defendants to disclose the unredacted records.

Dated: September 29, 2017

Respectfully submitted,

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