

August 10, 2010

FREEDOM OF INFORMATION APPEAL

RE: F10-00038 (OPR)
Appeal No. 2010-1370 (OIP)

Director, Office of Information Policy
United States Department of Justice
1425 New York Ave., N.W.
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Washington, D.C. 20530-0001
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Dear Director Melanie Ann Pustay,

I write under 28 C.F.R. § 16.9 to appeal the July 22, 2010 response by the Office of Professional Responsibility (OPR) to my November 4, 2009 request under the the Freedom of Information Act (FOIA) for OPR immigration judge misconduct reports since 1995.

Before delving into the legal analysis, I want to discuss the larger importance of this request. In 2010 immigration courts will have deported an estimated 400,000 U.S. residents. I am familiar with the rules for immigration hearings and have documented in detail immigration judges unlawfully deporting people who have a legal right to remain in the United States, including dozens of United States citizens, many born here. And I have observed the government turning the other way to overlook and even cover-up egregious immigration judge misconduct.

Immigration law enforcement in this country is of the utmost national interest. As the choke point for deportation proceedings immigration courts play a major role in the actions under debate. For years, enforcing media policies that are inconsistent with regulations, the U.S. Constitution, and the Model Code of Judicial Conduct, the Department of Justice (DOJ) and component agencies have been preventing public scrutiny of immigration judges. My reporting on misconduct by Immigration and Customs Enforcement has led to five articles in *The Nation* magazine, resulting in changes in immigration law enforcement procedures and a 2011 award from Project Uncensored for #4 in its Top 25 Censored Stories of 2010. I am trying to do similar reporting on immigration courts and the government is attempting to obstruct this.

On January 25, 2010 Marlene Wahowiak, OPR special counsel for FOIA, denied my November 4, 2009 request. I sent an appeal on March 3, 2010. Associate Director Janice Galli McLeod of the Office of Information Policy (OIP) responded on April 9, 2010. Ms. McLeod affirmed my appeal and wrote that she was "remanding [my] request for a search for responsive records."

On April 27, 2010 I spoke with OPR FOIA specialist Patricia Reiersen and explained that I was writing an article for *The Nation* magazine, and therefore would limit the request in exchange for it being tracked on an expedited basis. Ms. Reiersen agreed to this. She told me on or about that date that she was finishing work on a matter related to a lawsuit and that a response to my request was next in the queue.

The OPR, after months of demonstrably unjustified delays then reneged on its commitment and used stonewalling and obfuscation to squash the reports' release, attempting to effect in practice an intention it could not accomplish by law.

On July 25, 2010, more than seven months after my request and three months after I was initially assured receipt of these ten OPR misconduct reports and complaints, and only after the intercession of another government agency, I received zero (0) misconduct complaints and five (5) OPR reports on its investigations into immigration judge misconduct.

My article for *The Nation* magazine on immigration judge misconduct is presently being edited for publication in September. I am therefore respectfully requesting that the OIP expedite its review of this appeal and immediately request the OPR's compliance with the law and our agreement. Including the reports sent, and starting from the date of the OIP's receipt of this letter, I am requesting the ten most recent immigration judge misconduct reports and the underlying complaints prompting the investigations, regardless of the originating agency.

Documents Sent to me by OPR

On July 22, 2010, OPR sent me the following:

- 1) Five memoranda from Mary Patrice Brown, Acting Director of OPR to Thomas Snow, Acting Director of EOIR, informing him of OPR investigative reports, essentially cover letters for the release of reports with the same date.
- 2) Five highly redacted OPR reports on investigations into possible IJ misconduct.

Reasons for Appeal

1. Documents Missing In Violation of Agreement with Ms. Patricia Reiersen

On July 22, 2010, Margaret S. McCarty, OPR Assistant Counsel, wrote a letter to me stating: "...we have processed the complaint and final report in the ten most recently closed investigations of immigration judges and located 14 documents responsive to your request. I have determined that 10 documents may be released to you in part. Copies are enclosed."

First, the five memoranda from Mary Patrice Brown to Thomas Snow are neither complaints nor

reports and thus tangential to my request. I believe they are included solely to increase the appearance of compliance by bumping up the number of documents released, but these documents have nothing to do with actual compliance with the remand and OPR's commitment to release ten reports from misconduct investigations and the underlying complaints prompting these.

Second, in an undated letter Pat Reiersen memorializes an April 27, 2010 telephone conversation in which she explained to me the nature of the files containing OPR immigration judge (IJ) misconduct reports. Ms. Reiersen told me that each file for a closed investigation contains a complaint, and possibly transcripts from interviews, written material responsive to the complaint from the IJ, and other written materials as well as a final report. I understand that OPR is now claiming that multiple complaints may result in one report. First, I have received no complaints, period. And second, this is a new and unjustified interpretation of our agreement. Per my initial request and the remand, our conversation focused releasing reports subsequent to closed investigations, not initial complaints.

At no point did Ms. Reiersen suggest that OPR would construe the remand in a manner that would mean releasing fewer than ten complaints and ten reports. This appears to be something her colleagues cooked up later to prevent releasing materials they never wanted to release in the first place. When Ms. Reiersen wrote me and said that OPR will "process the ten most *recently closed investigations of immigration judges*" (emphasis added) this refers to 10 separate investigations for an unknown number of underlying complaints. Her note indicating that the response would include "only the complaint and final report from each file" correctly summarized a commitment to pursue the appropriate redactions for the ten most recently closed IJ misconduct investigations.

We also discussed the fact that complaints may originate from various sources. At no point between April 27, 2010 and July 22, 2010 did Ms. Reiersen or anyone else from OPR indicate that complaints from outside OPR would be treated differently from complaints generated within OPR or that, among the ten "processed" reports and complaints some might be excluded entirely. Indeed, the opposite was stated. If Ms. Reiersen or anyone else had mentioned these newly announced and unlawful grounds for withholding reports, I would have challenged that claim immediately.

2. Documents Missing In Violation of OIP Remand

Ms. McCarty states "I have determined that one document originated in the Executive Office of Immigration Review and one document falls under the jurisdiction of the Office of Information Policy (OIP)" and indicates she is "referring these documents to EOIR and OIP for their review and direct response to you." The legal authority she cites for this is 28 C.F.R. § 16.4(c) 2.

This unclear paragraph does not indicate the nature of the documents referred back to the EOIR and OIP, nor does it indicate that these documents are being withheld (see below). However, I do not have any documents that appear to originate from EOIR or OIP so it does appear that OPR has located documents responsive to my request that originated with EOIR and OIP and is withholding them from me.

I do not believe this exclusion from release conforms with 28 C.F.R. § 16.4(c) 2 .

28 C.F.R. § 16.4(c) 2, states: "Ordinarily, the component or agency that originated a record will be presumed to be best able to determine whether to disclose it." The regulation ensures one agency is not inappropriately releasing documents under the authority of another agency. But in this case, OIP has

already determined that these documents are releasable to me under the FOIA.

28 C.F.R. § 16.4(c) states:

"(c) Consultations and referrals. When a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. *If the receiving component determines that it is best able to process the record in response to the request, then it shall do so*" (emphasis added).

The OPR received a remand from OIP directing OPR to "send any and all releasable records" pertaining to "investigations of of complaints filed against immigration judges" to me. Ms. McCarty provides no legal grounds in this particular case for the inference that the EOIR Office of General Counsel of the OIP Office of General Counsel, both of which are under the umbrella of the OIP's FOIA determinations, have any authority to second-guess the April 9, 2010 remand. Only the OPR knows definitively whether the OPR has initiated an investigation and completed an IJ misconduct report. Therefore, any complaint sent to OPR for investigation would have to have its responsiveness to my FOIA request ascertained by the OPR and not the originating agency. Since the OPR deemed it possessed documents responsive to my FOIA request, it is the agency "best able to process the record in response to the request," per 28 C.F.R. § 16.4(c) 2.

2) The OPR position on 28 C.F.R. § 16.4(c) 2 for some documents is contradicted by its inclusion of information from the EOIR in materials it did release. In documents that redact up to four consecutive pages, the OPR nonetheless released, for example, a misconduct report containing the following: "The Office of the General Counsel of the Executive Office of Immigration Review (EOIR-OGC) referred to OPR judicial criticism of Immigration Judge [redacted]" (OPR IJ Misconduct Rept. 01/06/2010, p. 2). If the OPR believed it was not authorized to release information generated from another agency, then it would have had to omit this and other references to findings from EOIR.

In addition, Ms. McCarty asserts 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C) for exempting from release the "remaining information."

This assertion is vague and repeats with no new information or arguments the assertion of two exemptions 5 U.S.C. § 552(b)(6) and (b) (7)(C) that the OPR used in its letter of January 25, 2010, assertions that the OIP found unpersuasive on April 9, 2010.

Both of these asserted exemptions are without legal authority and violate DOJ FOIA policy, as articulated by Attorney General Eric Holder, Jr. on the basis of a Presidential directive and rearticulated by the OIP, to wit: "[I]n keeping with the Attorney General's directive, agencies 'should not withhold information simply because [they] may do so legally.' Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President's directive that '[i]n the face of doubt, openness prevails.'"

Ms. McCarty provides no information about the documents she is failing to release and no analysis of why withholding them outweighs the benefits of transparency and accountability that the FOIA is designed to protect. According to the OIP, "The determination of whether an agency reasonably

foresees harm from release of a particular record, or record portion, goes hand-in-hand with the determination of whether to make a discretionary release of information. Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5. " OPR does not even bother to assert harm but simply asserts its prerogative to withhold documents because of 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C).

Finally, because the OPR has chosen to ignore the OIP's remand in which it found OPR's earlier assertions of 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C) unconvincing, I refer you to my initial appeal of March 3, 2010 (attached) in which I provided detailed analysis challenging these parts of the Code as grounds for exempting from the FOIA OPR's immigration judge misconduct investigations.

OPR Obstructing FOIA Implementation

In addition to the prima facie legal analysis above, I am also asking you to consider the underlying integrity of the OPR and its assertions. I believe that Acting Director Mary Patrice Brown and the staff at OPR are deliberately violating regulations and procedures designed to enhance government transparency and accountability. (On or about July 2, 2010 I left a message for Ms. Brown with a member of her staff in which I indicated that I was planning to file a lawsuit because of misinformation from her office and unlawful delays in releasing documents. She did not respond and I did not receive the documents.)

Here are the reasons for this belief:

1) OPR ignores statutory timelines. I submitted my FOIA request on November 4, 2009. According to the 28 C.F.R. §16.6 (b), "Ordinarily, a component shall have twenty business days from when a request is received to determine whether to grant or deny the request. Once a component makes a determination to grant a request in whole or in part, it shall notify the requester in writing."

Assuming my request was received between November 6-8, 2009, this means that I should have received a response by December 4-7, 2009. Yet OPR failed to reply until January 25, 2009, well over a month after the deadline authorized by law.

2) OPR obstructs freedom of the press and EOIR accountability.

After the request had been remanded to OPR I was given several repeatedly elongated time frames for when I could expect the 10 OPR reports and the respective underlying complaints, one stating I would have it in early May, another late May, a third June, and then a fourth in August (via Ms. McCleod). (The OIP analyst tasked to my appeal spoke with me in early May; she also had spoken with Ms. Reiersen and OPR assured her as well that it would be responding to my request on an expedited basis; I believe the OIP analyst's first name is Karen.)

These repeated and indefinite delays violate 28 CFR §16.6. This section states: "Where the statutory time limits for processing a request cannot be met because of 'unusual circumstances,' as defined in the FOIA, and the component determines to extend the time limits on that basis, the component shall as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed. Where the extension is for more than ten working days, the component shall provide the requester with an opportunity either to modify the

request so that it may be processed within the time limits or to arrange an alternative time period with the component for processing the request or a modified request."

OPR's failure to adhere to this regulation made it impossible for me to produce an article with timely reporting. I had gone to immigration courts in March and April 2009 and was hoping to have the misconduct reports so that readers, including members of Congress, would have the information in a timely fashion. The problem of perpetually shifting the the time line, as well as the delays themselves, means it will never be possible to produce a magazine article that includes reporting contemporaneous with the release of information from the OPR FOIA office. Also, these specific delays meant that House staff and members doing EOIR oversight did not have the information on immigration judge misconduct in time for hearings on immigration courts held on June 16, 2010.

After OPR failed to meet its June commitment, OPR stopped returning my phone calls. When I happened to be in Washington, D.C. in late June for other research, I decided to stop by and inquire in person. Calling from a phone in the visitors' lobby, I asked to speak with Ms. Wahowiak or Ms. Reiersen. Instead of talking or meeting with me and providing a new time line as required by law, Ms. Wahowiak instructed a DOJ guard to tell me to leave the building.

3) OPR ignores FOIA remand. Based on Ms. Reiersen telling me in June that the reports were ready for review by Ms. Wahowiak, I developed the impression that Ms. Wahowiak was simply ignoring the OIP's remand by stopping the review at her desk, an action consistent with her stated policy preference on January 25, 2010.

On or about July 3, 2010, Ms. McLeod, at my request, learned of a new "sometime in August" time line for releasing the reports and shared this information with me. Fearful that this game would continue indefinitely, I decided to file a lawsuit. In the course of writing the complaint, I learned of a new office for assisting FOIA requestors and initiated a follow up through the efforts of Office of Government Information Services (OGIS).

Within two days of OGIS attorney Corinna Zarek speaking with personnel at OPR, OPR sent me the misconduct reports.

The fact that the agency violating several sections of the FOIA is not only housed in the DOJ but is an office charged with enforcing high standards of professional conduct and, of course, all government regulations, makes these actions especially disturbing.

In closing, I am requesting that the OIP instruct the OPR to produce documents that are responsive to our agreement. Per the OIP remand on April 9, 2010, my agreement with Ms. Reiersen on April 27, 2010, and FOIA law and OIP policy discussed above I am requesting a total of the ten most recent immigration judge misconduct reports beginning from the date of OIP's receipt of this appeal. And I am requesting the complaint or complaints associated with each of them.

Please note that I am reserving my right to further appeal the redactions and to request additional reports and complaints that I traded away on the unfulfilled promise that my request was going to be expedited. However, in light of the time-sensitivity of my publication deadline, I am at present limiting my appeal to the entirety of the limited document request to which OPR previously agreed.

Please address replies to Jacqueline Stevens, [REDACTED FOR PRIVACY]. If you have any questions please feel free to contact me by email at jacqueline-stevens@northwestern.edu or phone at [REDACTED FOR PRIVACY].

Thank you so much for your time and attention to this appeal.

Sincerely,

Jacqueline Stevens
Professor