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Office of Information Policy
U.S. Department of Justice
1425 New York Ave., N.W.
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Washington, D.C. 20530-0001

To Whom It May Concern:

I write to appeal the denial of my request for records on misconduct findings in cases of complaints against Department of Justice (DOJ) attorneys hired by the Executive Office of Immigration Review (hereafter "immigration judges").

On November 4, 2009 I wrote that I was requesting the "final opinions, including concurring and dissenting opinions, as well as orders, in the adjudication of cases decided by the EOIR Office of Professional Responsibility in its investigations of complaints filed against immigration judges since 1995. I am requesting all of these decisions as well as any reports or memoranda pertaining to these opinions and produced by employees of the EOIR since 1995."

In a response sent in excess of the 20 day period for a FOIA reply this request was denied on January 25, 2010. There was no specific reason stated for the delay and the substantive response is inconsistent with potential grounds for delay. This is evidence of bad faith on part of the Office of Professional Responsibility (OPR) consistent with its general practice of covering-up immigration judge misconduct as well as harassing private practitioners who pursue complaints against immigration judges.

The stated reasons my request was denied were 5 U.S.C. § 552(b)(6) and 5 U.S.C. § 552(b)(7)(C). The denial also stated that there was no "overriding public interest" in immigration judge misconduct.

The stated reasons for the denial are factually inaccurate and also incorrect as a matter of policy.

5 U.S.C. § 552(b)(6) exempts: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

5 U.S.C. § 552(b)(7)(C) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]"

As I stated in my initial request, OPR findings of misconduct against immigration judges are not covered by either of these exemptions.

5 U.S.C. § 552 states.:
"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;"

The OPR adjudicates misconduct "cases" and issues misconduct "decisions." Decisions, findings, and opinions resulting from investigations by a federal agency into employee misconduct, especially misconduct violating civil rights laws and the U.S. Constitution, should not and are not shielded from disclosure under 5 U.S.C. § 552 because of employment by the federal government. Were administrative decisions or investigations noting misconduct by federal employees exempt from public disclosure, virtually no reports of misconduct by federal employees would be available. This is demonstrably not the case.

For instance, on July 28, 2008, a the Office of the Inspector General issued a report "An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General." The report, co-written by the OPR, documents and criticizes the politicized process of appointing immigration judges "by Monica Goodling and other staff in the Office of the Attorney General." Obviously the OPR did not shield from public disclosure findings of misconduct by Monica Goodling and the other staff employed by the federal government. Especially in light of the fact that her misconduct was directly related to hiring the federal employees whose records of misconduct I am attempting to secure, this denial is baseless and at odds with other precedents as well as the letter and spirit of 5 U.S.C. § 552.

The regulations OPR cites in attempting to prevent the public from learning of immigration judge misconduct are designed for the purpose of protecting legitimate employee privacy interests. Immigration judge misconduct is generally not a "personal" or "private" matter. Courtroom misconduct, ex parte communications, and lying about immigration proceedings have a strong impact on the lives of U.S. citizens, whom immigration judges have unlawfully deported, as well as immigrants. Moreover, this misconduct is not only public by its nature, but often occurs in a public setting – under DOJ regulation courts are open to the public and hence misconduct as a result of deviating from the Immigration Judge Benchbook, courtroom demeanor, and misinterpretations of fact and law would be occurring in a public setting. There is therefore no "unwarranted invasion of personal privacy," as would be required for exemptions under 5 U.S.C. § 552(b)(6) and 5 U.S.C. § 552(b)(7)(C).

If the DOJ truly believed that its attorneys who work in immigration courts, because of their status as federal employees, should not have their violations of DOJ regulations open to public inspection, then the DOJ would have to close the immigration courts, as these provide daily examples of immigration judge misconduct. Likewise, if the DOJ truly believed its attorneys who work in immigration courts have privacy protections shielding against the disclosure of misconduct reviews by the OPR, then the OPR would not release the results of its investigations to those submitting the complaints. However, the OPR does release its decisions to petitioners filing grievances against immigration attorneys and these petitioners may release these results to the public. This is not a sufficient form of public disclosure but it does indicate that the OPR is only discriminating against the press and otherwise does not maintain its immigration judges have a privacy interest in the outcomes of their decisions.

If, based on a case by case analysis, the OPR in responding to this request encounters findings of misconduct that are truly private and do not emerge as a result of immigration hearings or other matters of public concern, e.g., hypothetically, despite frequent admonitions, an immigration judge has persistently parked in the space of the Chief Immigration Judge, then this particular case may be exempted from release or the name redacted. However, a blanket denial of misconduct findings by the OPR otherwise clearly violates 5 U.S.C. § 552.

Finally, the statement that there is no "overriding public interest" in immigration judge misconduct is factually incorrect. To the extent that immigration courts are of overriding public interest, the misconduct of those presiding over those venues is therefore also of overriding public interest. Second, this public interest can be seen in the number of reports by professional organizations as well as newspapers that are presently inquiring into immigration judge misconduct.[1]

The opinions by the OPR are exempted from any privacy protections, as they should be in light of the important public interest in the professional conduct of immigration judges. The EOIR publishes a list of practitioners sanctioned by the OPR and there is no legal reason for not releasing similar information about immigration judges. Surely, the federal government may not claim that U.S. citizens who have their conduct evaluated by federal employees have fewer privacy rights for the same misconduct than the employees who are evaluating them. However, as indicated by the present ruling on my FOIA request, this is indeed the case.

My request has been assigned the number F10-00038 and was initially made on November 25, 2009. I had requested all decisions by the Office of Professional Responsibility since 1995 in response to misconduct complaints filed against immigration judges. Per my previous request, I am asking for this on an expedited basis because of the actual and potential grievous harm perpetrated by immigration judges against those in EOIR proceedings, triggering a right of the public and respondents' to know whether individuals making life and death decisions are demonstrably unqualified to do so.

Sincerely,

Jacqueline Stevens
Professor

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[1] Examples of nationwide public interest in immigration judge misconduct include: Appleseed, "Assembly Line Injustice," report (2009), at http://www.chicagoappleseed.org/programs/immigration_court_reform; Brian Donohue, "Deportation Judges Faulted for Pattern of Misbehavior," (Dec. 2, 2005), Newhouse News Service "a panel of judges for the 3rd U.S. Circuit Court of Appeals issued a scathing decision describing "a disturbing pattern of immigration judge misconduct" that continues despite repeated warnings from appellate courts across the nation"); Gaiutra Bahadur, "Bullying Immigration Judge Absent, Replaced," (June 2, 2006) *Philadelphia Inquirer*; Ann Simmons, "Complaints About Immigration Judges Prompt A Review; Attorney General Blasts `Abusive' Conduct on Bench," (Feb. 12, 2006), *Los Angeles Times*; Eric Lichtblau, "Report Faults Aids in Hiring at Justice Department," (July 29, 2008), *New York Times*, A1; Hernán Rozemberg, "Review Slams Department of Justice's Reform Work," (Sept. 8, 2008), *San Antonio Express-News*, 1A.