

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GILBERT P. HYATT,  
Plaintiff,

v.

UNITED STATES PATENT  
AND TRADEMARK OFFICE,  
Defendant.

Civil Action No. 18-234

**Plaintiff’s Reply in Support of Plaintiffs’ Motions for Summary Judgment  
and To Compel Production of Document for *In Camera* Review  
and Response in Opposition To Defendant’s Cross-Motion for Summary Judgment**

As the Plaintiff predicted, rather than produce a single, short email for the Court’s review, Defendant United States Patent and Trademark Office (“PTO”) filed over 130 pages of briefing and other materials, including a lengthy declaration that is likely many times longer than the email itself. Despite the bulk of its filing, the PTO does not dispute that the Khuu Email was sent from one patent examiner responsible for examining Plaintiff Gilbert Hyatt’s patent applications to another such examiner during business hours, using the PTO’s email system, and (as PTO concedes) concerns the subject of their work, Mr. Hyatt. In fact, the PTO contends that the contents of the Khuu Email are apparently so offensive that its very disclosure to Mr. Hyatt is likely to provoke serious response—a startling admission regarding a quasi-judicial officer’s communications concerning a member of the public over whom she exercises legal authority. Nonetheless, the PTO insists that this email is not subject to the Freedom of Information Act at all. Under the PTO’s position, even pervasive communications among agency personnel disparaging and insulting persons whose rights they adjudicate and reflecting extreme and unlawful bias could be suppressed from public disclosure. But “the basic purpose of the Freedom of Information Act [is] to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). The PTO’s briefing confirms that public scrutiny is sorely needed here.

By taking the position that the Khuu Email is not an agency record, the PTO is engaging in the type of misclassification that the D.C. Circuit has cautioned that courts must police against to ensure that “[t]he term ‘agency records’...not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies.” *Bureau of Nat’l Affairs, Inc. v. United States Dep’t of Justice*, 742 F.2d 1484, 1494 (D.C. Cir. 1984). Despite bearing the burden of proof to demonstrate that the Khuu Email is not an agency record, the PTO identifies zero material and undisputed facts supporting that position, and its sole piece of evidence is a declaration by a person—not Ms. Khuu—who lacks personal knowledge of the facts that the PTO would have to establish to prevail on that defense. The PTO having failed to substantiate its “agency record” defense, as well as the plainly inapplicable FOIA exemption that it didn’t think to raise before, Mr. Hyatt is entitled to summary judgment.

### **Factual Background**

In its Response to Plaintiff’s Statement of Undisputed Material Facts, the PTO confirms the factual circumstances surrounding the Khuu Email: Using the PTO’s email system, Examiner Walter Briney sent an email concerning Mr. Hyatt’s divorce to other personnel in the Art Unit responsible for examining Mr. Hyatt’s patent applications, and Examiner Cindy Khuu sent Mr. Briney a response (also using the PTO’s email system) that, by default, likely included the complete contents of Mr. Briney’s initial email. Defs. Resp. to Ps. Statement of Undisputed Material Facts, ¶¶ 3–5, 9, 11–14. The PTO’s Response also confirms that the Khuu Email is stored on the PTO’s email system, *id.* at 15–16, that the PTO regularly uses and disposes of records stored on its email system, *id.* at ¶ 12, that both Mr. Briney and Ms. Khuu were responsible at the time for examining Mr. Hyatt’s patent applications, *id.* at ¶ 17, and that neither has any other connection to Mr. Hyatt, *id.* at ¶ 18. Notably, the PTO confirms that the Khuu Email concerns Mr. Hyatt, rather than Ms. Khuu’s general thoughts on the topic of divorce or any other topic under the sun. *Id.* at ¶ 10.

The Plaintiff does not contend that there exists a genuine issue necessary to be litigated with respect to the facts set forth in Defendant’s Statement of Material Facts Not in Genuine Dispute, which states only that Mr. Hyatt filed a FOIA request and that the PTO identified the responsive record, denied the request, and then denied Mr. Hyatt’s administrative appeal. Notably, Defendant’s Statement sets forth no facts concerning the Khuu Email itself or the PTO’s record systems, as might be relevant to whether the Khuu Email is an agency record or whether it is subject to any FOIA exemption. Although the Defendant did file a declaration in support of its cross-motion for summary judgment—by Louis Boston, the PTO’s FOIA Officer, who lacks any personal knowledge of the factual circumstances surrounding the Khuu Email—it does not aver that any of the facts set forth in that declaration are undisputed and material.

### Argument

#### **I. The PTO Fails To Carry Its Burden of Proving that the Khuu Email Is Not an Agency Record**

The PTO bears the burden of proving that the Khuu Email, which resides on the PTO’s email system, is not an agency record. *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994) (holding that agency has burden of proving that document within its possession is not an agency record). Having failed to identify any undisputed facts in support of its position, the PTO has obviously failed to carry that burden.

To begin with, the PTO does not dispute that it “create[d] or obtain[ed]” the Khuu Email, the first element for determining whether material constitutes an “agency record” subject to FOIA. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989).

Although the PTO does dispute the other element—whether it was “in control of the requested materials at the time the FOIA request is made,” *id.*—it has failed to show that any of the four factors relevant to determination of that element support its asserted lack of “control” of the Khuu Email. *See Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (identifying factors).

Indeed, the PTO has identified zero undisputed facts material to that determination. *See* Defs. Statement of Material Facts Not in Genuine Dispute. Given that it is *the PTO's burden* to demonstrate that the Khuu Email is not an agency record, its failure to set forth any undisputed facts at all in support of that showing requires the Court to deny its cross-motion for summary judgment on that issue. Fed. R. Civ. P. 56(a).

Likewise, the PTO's refusal to provide any facts regarding the Khuu Email's contents and its declarant's lack of personal knowledge concerning the circumstances surrounding the Khuu Email mean that Mr. Hyatt's is entitled to summary judgment on this issue. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56[] mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

To be clear, Mr. Hyatt does not dispute that the PTO's declarant is competent to testify via declaration on the adequacy of the agency's search, which is not at issue. *See, e.g., Allen v. Federal Bureau of Prisons*, 263 F. Supp. 3d 236, 242 (D.D.C. 2017) ("Declarations containing hearsay in recounting searches for documents are generally acceptable in FOIA cases[.]") (quotation marks and alteration omitted). But testifying to another person's intentions, personal impressions, and consideration of "personal feeling or opinions" (Boston Decl. at ¶ 12) is something else entirely. That applies in particular to agency claims that, due to agency employees' intentions and uses of particular documents, those documents do not qualify as "agency records" subject to FOIA. On that basis, the Second Circuit in *Grand Cent. Partnership, Inc. v. Cuomo*, rejected reliance on an official's declaration testimony concerning other agency employees' intentions in creating documents, which the agency contended were not "agency records," and their use of those documents because that testimony was not supported by

personal knowledge. 166 F.3d 473, 480–81 (2d Cir. 1999). Indeed, the court observed that, in just about every case “where a dispute existed as to the nature of records created within an agency, the government submitted affidavits by the authors of the documents themselves, thus providing the courts with a sufficient factual basis upon which to determine whether contested items were ‘agency records’ or personal materials”—the very thing that the PTO declined to provide here. *Id.* Under *Grand Central Partnership*, Paragraph 17 of the Boston Declaration, which addresses Ms. Khuu’s and Mr. Briney’s intentions and actions, lacks the required support in personal knowledge and is therefore not proper evidence in support of or opposition to summary judgment. It must be disregarded.

Paragraph 17 is also improper because it addresses the ways that patent examiners carry out their duties when the declarant, who is not a patent examiner, has no identified personal experience on which to base that testimony. *See Evans v. U.S. Dep’t of Interior*, 135 F. Supp. 3d 799, 812 (N.D. Ind. 2015) (striking portions of declaration where law enforcement officer opined on how criminals might use certain information due to lack of personal knowledge). And it is improperly conclusory, such as where it states that the Khuu Email “was not created for official agency purposes or in the course of the employee conducting agency business,” was “not used or planned to be used in any official agency business,” and was not “intended” to be used in official business. *See Dep’t of Justice Guide to the Freedom of Information Act* 108 n.308 (2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf> (citing cases where courts disregarded legal conclusions and other conclusory statements contained in agency declarations in FOIA suits).<sup>1</sup>

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<sup>1</sup> Paragraphs 10–12 are improper and should not be considered for the same reasons, providing unsupported generalizations, legal conclusions, and other conclusory statements concerning the patent examination process. Likewise, Paragraphs 16 and 18 set forth only legal conclusions and should be disregarded on that basis. And paragraph 19 is impermissibly conclusory, simply asserting that Ms. Khuu has a “strong privacy interest” in the Khuu Email and that there is no public interest in its disclosure.

In any event, all four of the relevant factors weigh in favor of finding that the Khuu Email is an agency record subject like any other to FOIA.

**A. The Intent of the Document’s Creator to Retain or Relinquish Control Over the Records**

Evidence of Ms. Khuu’s intentions is conspicuous only by its absence. Despite that Ms. Khuu is a PTO employee, the PTO declined to introduce any admissible evidence of her intentions, such as through a declaration. Instead, the PTO argues only (at 5) that her intentions can be inferred by the asserted facts that the Khuu Email was not shared with any of Ms. Khuu’s and Mr. Briney’s coworkers, that she deleted it from her email mailbox, and that Ms. Khuu and Mr. Briney did not use or plan to use it in agency business. The problem with these factual assertions is that, but for the fact that Ms. Khuu deleted the email (which raises its own questions), the PTO’s declarant has no personal knowledge of any of them, and so they are not competent evidence. *See, e.g.*, Boston Decl. at ¶ 17 (“Neither Ms. Khuu nor Mr. Briney used or intended to use the document....”).

In any instance, the PTO concedes that Ms. Khuu did in fact relinquish control over the email to the PTO when she placed it in PTO’s email system and thereby into the PTO’s possession and under its control. Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶¶ 11, 15–16. Accordingly, this factor weighs in favor of the agency’s control.

**B. The Ability of the Agency to Use or Dispose of the Record As It Sees Fit**

The PTO concedes that it “regularly uses and disposes of records stored on its email system,” such as the Khuu Email, and does not dispute that it has the “ability to use or dispose” of the Khuu Email. Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶ 12. Because the PTO has that *ability*, which is what this factor measures, it weighs in favor of the agency’s control. Indeed, the PTO does not appear to make any argument regarding this factor.

The averment of the PTO’s declarant that “[e]xaminers are not permitted to consider their personal feelings or opinions when determining whether to allow or reject a patent

application,” Boston Decl. at ¶ 12, states a legal conclusion and therefore must be disregarded. It is also irrelevant to this factor, because it does not address the agency’s *ability* to use or dispose of the record. And it is insufficient. The whole point of Mr. Hyatt’s FOIA request is to determine the extent of the PTO’s animus towards Mr. Hyatt that has prejudiced the examination of his patent applications. In effect, the PTO’s suggestion here is that FOIA excludes from disclosure materials reflecting bias or animus of government personnel, because such materials would always concern things that government personnel are not allowed to consider when exercising their authority. Unsurprisingly, the PTO identifies no case law supporting such an unlikely proposition.

Moreover, the PTO does not demonstrate that it could not use the Khuu Email for purposes other than patent examination. For example, it could (and perhaps should) use the Khuu Email to assess whether Hyatt Unit examiners have violated the PTO’s Code of Ethics by using an agency email account for an activity that would bring discredit on the agency: disparaging a patent applicant.<sup>2</sup> It could also use the Khuu Email to determine whether PTO personnel violated any of the PTO’s rules for use of its email system.<sup>3</sup> At a minimum, the PTO has the ability to use the Khuu Email in those ways.

**C. The Extent to Which Agency Personnel Have Read or Relied Upon the Document**

The PTO does not dispute that two of its personnel responsible for examination of Mr. Hyatt’s patent applications—Ms. Khuu and Mr. Briney—read the Khuu Email. *See* Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶ 9. Nor does it dispute that the email

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<sup>2</sup> *See* PTO, 2015 Summary of Ethics Rules 3, available at [https://www.uspto.gov/sites/default/files/documents/sge\\_summary\\_of\\_ethics\\_rules\\_2015.pdf](https://www.uspto.gov/sites/default/files/documents/sge_summary_of_ethics_rules_2015.pdf) (stating that PTO personnel may not use “office access to email and the internet...for engaging in any activity that would discredit USPTO” or “for prohibited discriminatory conduct”).

<sup>3</sup> *See* USPTO Rules of the Road, OCIO POL-36 (2012), at 8, available at [www.governmentattic.org/6docs/USPTO-RulesOfTheRoad\\_2012.pdf](http://www.governmentattic.org/6docs/USPTO-RulesOfTheRoad_2012.pdf) (prohibiting use of “USPTO resources to store or transmit offensive material”).

served to convey information or opinion about a patent applicant from one examiner responsible for that applicant's applications to another. *Id.* at ¶ 10. And that should be the end of the matter.

The PTO's arguments to the contrary assert that its personnel did not rely upon the Khuu Email, but again it presents no admissible evidence to that effect, only a conclusory statement by a person lacking any personal knowledge of what Ms. Khuu and Mr. Briney did or intended with respect to the Khuu Email. *See* Boston Decl. at ¶ 17. What did Ms. Khuu hope to achieve by sending the Khuu Email? Did Mr. Briney take into account Ms. Khuu's views on Mr. Hyatt when examining Mr. Hyatt's applications, or did they otherwise influence his actions concerning Mr. Hyatt? Did Ms. Khuu or Mr. Briney print out the Khuu Email? Did they discuss it or its contents with other PTO personnel? The PTO's declarant says nothing about any of these things, and he has no personal knowledge of them.

Similarly, the PTO's declarant offers no basis for his conclusory assertion, unsupported by personal knowledge, that the Khuu Email "was not created for official agency business purposes or in the course of the employee conducting agency business." To the contrary, Mr. Briney offered sworn testimony that he sent the email underlying the Khuu Email for what would be a legitimate business purpose of the Art Unit 2615 "team": "to understand...and see that Mr. Hyatt places a great value on his patent applications. I don't—I mean, the only reason I could think to do that was you got to treat this guy with respect. He doesn't deserve derision, don't paint him into a corner. Treat him fairly. Look at the facts." Briney Dep. 135:2-9. PTO examiners, of course, have a legal obligation to treat applicants fairly, and it is Mr. Briney's testimony that their discussion of Mr. Hyatt's personal life helps examiners to carry out that legal requirement. The PTO's declarant offers no facts to show why Ms. Khuu's email response, which was sent to her fellow examiner using PTO resources, does not serve the same exact business purpose.

Likewise, in addition to not being based on personal knowledge, the PTO's declaration is far too vague and conclusory to support the PTO's contention that PTO personnel did not



rely on the Khuu Email. For one thing, the PTO introduces no meaningful evidence as to the content of the Khuu Email, so that the Court could evaluate how it might have been used. The closest it comes is its concession that the Khuu Email concerns Mr. Hyatt—who is, after all, the subject of Art Unit 2615’s business activities and, in particular, Ms. Khuu’s and Mr. Briney’s work. Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶¶ 10, 17. Paragraph 19 of the declaration asserts that “Ms. Khuu has strong privacy interest in the personal opinion she expressed to a close colleague in the context of an email exchange about divorce proceedings.” But beyond taking excruciating pains to avoid stating the nature of Ms. Khuu’s “personal opinion,” that conclusory statement says absolutely nothing about the content of that opinion that could support the PTO’s assertion that its personnel did not rely on the Khuu Email. Similarly, the PTO’s declaration provides no basis for its conclusory assertion that “[t]here is no legitimate public interest in disclosure because the requested document does little to shed light or contribute significantly to public understanding of the operations or activities of the USPTO.” Boston Decl. at ¶ 19. Indeed, if PTO personnel are disparaging a patent applicant—which the PTO seems to imply when it says (at 11) that disclosure of the Khuu Email would “likely” cause Ms. Khuu to be subjected to “harassment”—that is something the public has an overwhelming and legitimate interest in knowing.

In that respect, the circumstances of this case are precisely opposed to those in *Judicial Watch v. Federal Housing Finance Agency*, an authority cited by the PTO. In that case, an agency happened to obtain legal control over documents when it took two corporations into conservatorship but never took actual possession of the documents, much less read or relied on them in carrying out any of its activities. 646 F. 3d 924, 927–28 (D.C. Cir. 2011).<sup>4</sup> The

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<sup>4</sup> The PTO incorrectly describes (at 5) *Judicial Watch* as involving “documents that—like here—were created by agency employees and were within the possession of the agency.” In fact, that case involved documents created by employees of private corporations that were subsequently placed into the conservatorship of an agency and appear to have never come into the agency’s actual (as opposed to legal) possession. 646 F.3d at 926, 928.

court denied disclosure, recognizing that “[t]he public cannot learn anything about agency decisionmaking from a document the agency neither created nor consulted....” *Id.* at 927. Here, by contrast, the public stands to learn much through disclosure about how the PTO treats patent applicants, whether and how the agency’s procedures are subject to bias and partiality, and ultimately whether PTO personnel may be involved in misconduct against particular applicants. Where, as here, “the documents sought may shed light on alleged government malfeasance,” agency-asserted “privilege is routinely denied” to secure “the public’s interest in honest, effective government.” *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (quotation marks omitted).

Finally, the PTO’s argumentation incorrectly assumes that this *Burka* factor is conjunctive (“and”), and not disjunctive (“or”), such that both “read[ing]” and “reli[ance]” are required. But that’s not how the *Burka* court put it, expressly using the disjunctive (“read or relied”) to make clear that one or the other will suffice. That reading of *Burka* is confirmed by cases like *BNA*, where the D.C. Circuit found that certain daily appointment sheets of the then-Assistant Attorney General for the Antitrust Division were agency records in part because they were “distributed” within the Agency, whereas desk calendars that “were not distributed” but instead were “retained solely for the convenience of the individual official[]” in organizing his “personal and business appointments” were not agency records. *BNA*, 742 F.2d at 1496; *see also Consumer Fed’n of Am. v. U.S. Dep’t of Agric.*, 455 F.3d 283, 286 (D.C. Cir. 2006) (again considering whether a document was distributed in determining whether or not it was an agency record).<sup>5</sup> Reliance on the Khuu Email by agency personnel may further support its status as an agency record, but the undisputed fact that the Khuu Email was read by Mr. Briney is sufficient for this factor to weigh in favor of the agency’s control.

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<sup>5</sup> The *Consumer Federation of America* court found that distribution of a calendar solely to an agency official’s secretary was effectively personal use. 455 F.3d at 286, 293. Mr. Briney is not Ms. Khuu’s secretary.

**D. The Degree to which the Document Was Integrated Into the Agency's Record System or Files**

The PTO concedes that the Khuu Email is “stored on PTO’s email system.” Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶ 15. While the PTO attempts to downplay this factor by arguing that the Khuu Email was not placed in an official agency file, that proves too much, given that virtually all examiner intra-office email communications on specific patent applications, which undoubtedly are government records, are never placed in application files or other official agency files. Moreover, the D.C. Circuit rejected this type of argument in *Consumer Federation of America*, noting that “technological changes” since the time when nearly all documents were in paper form meant that electronically stored documents are subject to *greater* agency control than had been commonplace in earlier eras. *Consumer Fed’n of Am.*, 455 F.3d at 290. This final factor, like all the rest, weighs in favor of the agency’s control.

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It should not be overlooked that the PTO here is attempting to shield from disclosure communications among agency personnel on an agency email system concerning a member of the public who has official business before those same agency personnel. None of the cases cited by the PTO come anywhere near permitting an agency to exclude such materials from FOIA disclosure obligations. Several involve attempts to obtain materials that concern individuals’ political nominations, rather than any agency business. *Gallant v. NLRB*, 26 F.3d 168 (D.C. Cir. 1994) (attempt to obtain documents relating to NLRB Commissioner’s efforts to secure renomination to Board); *Media Research Center v. U.S. Dep’t of Justice*, 818 F. Supp. 2d 131 (D.D.C. 2011) (attempt to obtain emails of then-Solicitor General Kagan concerning nomination to Supreme Court). Others consider the status of the personal calendars of agency officials. See *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Bureau of Nat. Affairs, Inc. v. U.S. Dep’t of Justice*, 742 F.2d 1484 (D.C. Cir. 1984). And one addresses a government employee’s attempt to obtain personal emails between that employee’s ex-wife

and her new husband that were sent on the government system. *Fennerty v. Bostick*, 2015 WL 365701 \*4 (D. Ore. Jan. 26, 2015).

But what about cases addressing communications among agency personnel concerning a member of the public who has official business before those same agency personnel? PTO identifies not a single apposite case. Nor does the PTO identify any cases involving documents that reflect an agency's bias against or disparagement of a member of the public subject to the agency's authority. The reason for this lack of precedent is presumably that no agency has ever had the audacity to claim that such materials are not agency records or the arrogance to expect that such a claim would be upheld. Disclosure of such materials is, after all, central to FOIA's purpose of shining light on the operations of government.

## **II. The PTO Fails To Carry Its Burden of Demonstrating That the Khuu Email Is a Personnel Record**

FOIA's strong "presumption favoring disclosure...is at its zenith under Exemption 6," *see Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002), and the PTO has the burden of proving that FOIA Exemption 6, for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," applies to the Khuu Email. *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980). Once again, the PTO fails to carry that burden.

When an agency claims that Exemption 6 applies, "the threshold question is whether the requested information is contained in a personnel, medical, or similar file." *Nat'l Ass'n of Home Builders*, 309 F.3d at 32. "If it is, then the court must determine whether the information is of such a nature that its disclosure would constitute a clearly unwarranted privacy invasion," balancing "the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Id.* (quotation marks omitted).

To begin with, the PTO has not identified any undisputed facts material to either determination. Indeed, the only fact on record concerning the contents of the Khuu Email is that it concerns Mr. Hyatt. Defs. Resp. to Ps. Statement of Undisputed Material Facts ¶ 10.

Given that the PTO bears the burden of demonstrating that a FOIA exemption applies, its failure to set forth any undisputed facts at all in support of that showing requires the Court to deny its cross-motion for summary judgment on that issue. Fed. R. Civ. P. 56(a).

Likewise, the PTO's refusal to provide any facts regarding the Khuu Email's contents, Ms. Khuu's potential privacy interest in it, or the potential public interest in its disclosure—points that the PTO supports with only a conclusory assertion and no proper evidence, *see* Boston Decl. at ¶ 19—means that Mr. Hyatt is entitled to summary judgment on this issue. *Celotex, supra*.

In any instance, the undisputed facts demonstrate that the PTO's assertion of Exemption 6 does not clear the threshold. The PTO contends that the Khuu Email expresses an opinion regarding Mr. Hyatt. Boston Decl. ¶ 19; Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶ 10. As such, it is not a personnel file, medical file, or other kind of “detailed Government record[] on an individual” that could possibly qualify for withholding under Exemption 6. *Nat'l Ass'n of Home Builders*, 309 F.3d at 33 (quoting *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982)). Indeed, the PTO provides no evidence at all relevant to this threshold inquiry, only a bare assertion of “privacy interest” that, were it not improperly conclusory, would at most be relevant to the second step of the Exemption 6 inquiry. Boston Decl. at ¶ 19. Moreover, the undisputed facts reflect that the Khuu Email is not a file maintained *on Ms. Khuu*, on whose behalf the PTO asserts this exemption, but (as the PTO concedes) on Mr. Hyatt. Defs. Resp. to Ps. Statement of Undisputed Material Facts at ¶ 10. “Correspondence does not become personal solely because it identifies a government employee.” *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008). Accordingly, Exemption 6 is inapplicable to the Khuu Email.

Even if the PTO could get past the threshold, the public interest in disclosure of the Khuu Email outweighs any conceivable privacy interest Ms. Khuu may have in it. The Court is, at this point, well aware of Mr. Hyatt's long history with the PTO. Mr. Hyatt is an inventor who has had approximately 400 patent applications pending at the PTO in recent years, some

of which have been pending for over 40 years. Trial Tr. 50:20–51:5 (Feb. 12, 2018) (Hyatt) (No. 09-1864). He has good reason to believe that the agency is implacably opposed to him personally, violates his statutory and constitutional rights as a matter of routine, and is unwilling to give his patent applications the fair and impartial consideration to which he is entitled under law. *See, e.g.*, Declaration of Gilbert P. Hyatt in Support of Plaintiff’s Motion for Discovery Pursuant to Rule 56(d), *Hyatt v. Matal*, No. 05-2310, ECF No. 98 (D.D.C. filed Dec. 27, 2016) [hereinafter “Hyatt Decl.”].<sup>6</sup> The public has a weighty and legitimate interest in knowing how PTO examiners are treating patent applicants, understanding how the PTO has persecuted Mr. Hyatt and his patent applications, and learning about potential misconduct and bias in the operations of the agency. Disclosure of the Khuu Email would “shed light on an agency’s performance of its statutory duties” and thereby “let citizens know what their government is up to.” *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999).

By contrast, it is unclear what legitimate privacy interest Ms. Khuu could have in the Khuu Email, much less that her interest is (as required) “substantial.” *Nat’l Ass’n of Home Builders*, 309 F.3d at 33. As the PTO concedes, the Khuu Email concerns Mr. Hyatt, not Ms. Khuu. The PTO presents no evidence concerning Ms. Khuu’s interest, only a conclusory assertion that she has one. Boston Decl. at ¶ 19. The only concrete interest that the PTO identifies in its briefing is its unsupported assertion (at 11) that, if the Khuu Email is disclosed, “[i]t is likely that Ms. Khuu would be subjected to annoyance or harassment disclosure of the Khuu Email, by Plaintiff...”

First of all, it is offensive for PTO to assert in a court filing, available to the public, that its official position is that Mr. Hyatt, who has never harassed anyone, is “likely” to harass Ms. Khuu. Second, this assertion is a tacit acknowledgement that the contents of the Khuu Email are themselves disparaging, offensive, incendiary, or perhaps even libelous. That only heightens the public interest in disclosure of the Khuu Email, and certainly does not weigh in

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<sup>6</sup> The Plaintiff hereby incorporates the above-cited declaration by reference.

favor of withholding it. In effect, the PTO is arguing that, the more offensive a statement by a public official, the greater that official's interest is in withholding it from disclosure, so as to avoid "annoyance or harassment." That is precisely backwards. Third, the PTO provides no factual basis for its assertion of any threat to Ms. Khuu's privacy interests. That too is fatal because "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Dep't of Air Force v. Rose*, 425 U.S. 352, 380 n. 19 (1976); *see also Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987) ("Withholding information to prevent speculative harm is indeed contrary to the statute's policy favoring disclosure."). Fourth, the PTO's assertion of Ms. Khuu's interest makes no sense at all—why would Mr. Hyatt harass a patent examiner who is responsible for examination of his patent applications and thereby wields great power over him?

Not only does the PTO fail to support its assertion that disclosure would lead Mr. Hyatt to harass Ms. Khuu, its principal legal authority on this point, *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980), concerned shielding the names of the FBI officials involved in the investigation of Dr. Martin Luther King, Jr. It is not credible to claim that, whatever Ms. Khuu's stated opinion on Mr. Hyatt, it puts her at risk of the same degree of harassment (from the public or otherwise) as being officially named as the FBI agent who dug up dirt on Martin Luther King for J. Edgar Hoover. Likewise, Ms. Khuu's stated opinions on Mr. Hyatt are not akin to the last words of the Challenger astronauts. *See N.Y. Times Co. v. NASA*, 920 F.2d 1002 (D.C. Cir. 1990) (en banc). And the circumstances here are nothing like those in *Yonemoto v. Dep't of Veterans Affairs*, 2007 WL 1310165 (D. Haw. May 2, 2007), where a government worker used FOIA to request his coworkers' emails concerning him—most of which he ultimately did obtain<sup>7</sup>—as the records at issue there did not implicate the public

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<sup>7</sup> The PTO omits that the *Yonemoto* litigation continued for several years after that initial decision, numerous of the requested records were voluntarily produced to the plaintiff, and some of the applications of Exemption 6 were effectively vacated on appeal, with those upheld generally involving the disclosure of health information. *See Yonemoto v. Department of Veterans Affairs*, 686 F. 3d 681, 696–99 (9th Cir. 2011).

interest in disclosure anywhere near so much as the Khuu Email, which stands to shed light on the government's operations and potentially official misconduct.

Courts often repeat the bromide that sunlight is the best disinfectant, but it rings true for the Khuu Email. The Court should reject the PTO's attempt to block its disclosure under FOIA Exemption 6.

### **III. If Necessary, The Court Should Review the Khuu Email *In Camera***

Given the PTO's failure to substantiate its defenses on which it bears the burden of proof, the parties' papers permit the Court to grant Mr. Hyatt's motion for summary judgment and deny the PTO's cross-motion. But if the Court determines that it cannot decide this matter on the papers alone, it should review the single email at issue *in camera*. The PTO has presented no evidence at all regarding the contents of the Khuu Email other than the concession that it concerns Mr. Hyatt. As such, if the Court does not find that the briefing here suffices to determine the pending summary judgment motions, simply reviewing the email is likely to be the most efficient way for the Court to determine whether FOIA requires its disclosure. The only alternatives are unattractive: direct PTO to produce another lengthy declaration concerning a single email, with supplemental briefing to follow, or go to trial. Neither of these alternatives would further judicial or party economy—to say the least.

While the government's affidavits in a FOIA case ordinarily are entitled to the presumption of good faith, that presumption cannot carry the day here for at least two reasons. First, as noted, the PTO's declarant says almost nothing about the contents of the Khuu Email; the Court cannot rely on something that the PTO declined to provide. Second, the PTO's repeated disparagement of Mr. Hyatt and the bad faith it has shown toward Mr. Hyatt make application of the presumption inappropriate in this case. *See, e.g.*, Pl.'s Mot. to Compel Production, Exs. E, F, *Hyatt v. Matal*, No. 09-1864, ECF No. 140 (D.D.C. filed June 26, 2017) (other internal PTO emails disparaging Mr. Hyatt that the agency initially improperly redacted); Hyatt Decl., *supra* (declaration testimony identifying PTO misconduct



against Mr. Hyatt). The PTO's decision to withhold the Khuu Email is sufficiently unusual that there is no precedent of an agency withholding a document in anywhere near similar circumstances. Given these circumstances, the presumption of regularity cannot apply to the PTO's treatment of this FOIA request.

**Conclusion**

For the foregoing reasons, the Court should grant the Plaintiff's motion for summary judgment, deny the Defendant's cross-motion for summary judgment, and if necessary order the PTO to produce the Khuu Email to the Court for *in camera* review.

Dated: April 23, 2018

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on April 23, 2018, I caused the foregoing to be filed with the Court electronically using the CM/ECF system, which will serve all counsel of record.

/s/ Andrew M. Grossman  
Andrew M. Grossman