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

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| **GILBERT P. HYATT**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**U.S. PATENT AND TRADEMARK OFFICE,**<br><br>**Defendant.** | **Civil Action No. 18-234 (RCL)** |

**MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION**

Plaintiff Gilbert P. Hyatt has brought this action against Defendant, the United States Patent and Trademark Office ("USPTO" or "Agency"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, challenging the Agency's response to a FOIA request seeking an email exchanged by two patent examiners. Defendant did not release the requested document on the basis that it is not an agency record; Plaintiff disputes this characterization. Summary judgment should be granted in favor of Defendant because the responsive document is not an agency record subject to disclosure under FOIA. Alternatively, even if the document is an agency record, it was properly withheld under FOIA Exemption 6 because its disclosure would constitute a clearly unwarranted invasion of privacy.

## FACTUAL BACKGROUND

Defendant's accompanying Statement of Material Facts Not in Genuine Dispute addresses Plaintiff's FOIA request and Defendant's response, and that statement is incorporated herein by reference. In brief, Plaintiff filed a FOIA request seeking "the email sent by PTO examiner Cindy

Khuu in response to a March 10, 2016 email sent by PTO examiner Walter Briney regarding Mr. Hyatt's 1993 divorce proceedings." Plaintiff had received a copy of the March 10, 2016, email written by Mr. Briney in connection with separate litigation with the Agency. Defendant conducted an appropriate search and identified the requested document. However, Defendant determined that the document was not an agency record subject to disclosure under FOIA and on that basis did not release the document.

## LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 325. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.*

The vast majority of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each

responsive record that it has located either has been produced to the plaintiff or is not subject to disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

## ARGUMENT

FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). In order for a document to be subject to disclosure under FOIA, it must be an "agency record." 5 U.S.C. § 552(f)(2)(A). Here, Defendant properly did not release the document responsive to Plaintiff's FOIA request because it was a personal record, and not an agency record subject to FOIA. Alternatively, even if the requested document could be considered an agency record, it was properly withheld under FOIA Exemption 6 because its disclosure would constitute a clearly unwarranted invasion of the privacy of its author.

### A. The Requested Document Is Not an Agency Record

Defendant properly declined to release the document sought by Plaintiff's FOIA request because that document is not an agency record subject to disclosure under FOIA. A document qualifies as an "agency record" if it is created or obtained by an agency and in the agency's control at the time of the request. *Tax Analysts*, 492 U.S. at 144-45. "Control" means that the document has "come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. However, an agency does not control employees' personal records, even if those records are physically located at the agency. *Id.* Courts look to four factors to determine whether an agency controls a document:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

*Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 926 (D.C. Cir. 2011) (quoting *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996)). The D.C. Circuit has also applied a totality of the circumstances test to determine whether a document is an agency record or a personal record, which similarly considers "a variety of factors surrounding the creation, possession, control, and use of the document by the agency." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) ("*CFA*") (quoting *Bureau of Nat. Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1490 (D.C. Cir. 1984) ("*BNA*")). Applying these standards, Defendant maintains that the requested document here is a personal record, not an agency record.

First, although the requested document was sent by a USPTO employee, Ms. Khuu, and exists within the USPTO's email system, at most this establishes that the Agency has possession of the document—a fact that is not disputed. However, at all times, the document remained in the individual email accounts of Ms. Khuu and Mr. Briney; it was never shared with any coworkers

and was never placed in any official Agency files. Boston Decl. ¶ 17. Indeed, Ms. Khuu deleted the email from her account sometime after sending it, further indicating that she never intended that the USPTO control the document. *Id.* The notion that some emails found within employees' Agency email accounts would be personal records, rather than agency records, makes sense because the Agency has a policy permitting limited personal use of government resources, including email. *Id.* And, although Ms. Khuu and Mr. Briney may not have had an expectation of *privacy from their employer* in personal emails sent and received using the Agency's email system, such expectations do not convert personal correspondence into an agency record for purposes of *public disclosure* under FOIA. *See, e.g.*, *Fennerty v. Bostick*, No. 6:14-CV-48-TC, 2015 WL 365701, at *4 (D. Or. Jan. 26, 2015) (although agency employee did not have expectation of privacy in emails sent with agency email address and shared those emails with other agency employees, "such expectations and conduct does not convert the emails concerning personal matters into agency records").

In any event, where a document is created by an agency employee and located within the agency, the *use* of the document—including whether agency personnel have read or relied upon it in conducting official agency business—becomes most probative in determining the document's status under FOIA. *See, e.g., Judicial Watch*, 646 F.3d at 927 (quoting *CFA*, 455 F.3d at 288) ("In deciding whether an agency controls a document its employees created, we have consistently found that 'use is the decisive factor.'"). Both *Judicial Watch* and *CFA* involved documents that—like here—were created by agency employees and were within the possession of the agency. Those cases involved agendas and calendars of agency employees, which the courts concluded were used to facilitate agency business, including through their distribution to other agency employees. *Judicial Watch*, 646 F.3d at 927-28; *CFA*, 455 F.3d at 291-93. By contrast, the requested document

here was never shared with anyone beyond the sender and recipient, and, rather than being used to facilitate agency business, it reflected a personal communication between those two individuals. Most importantly, the requested document was never used or planned to be used in any official agency business, including the examination of patent applications. The examination of patents is governed by law and regulation and specifically does not permit patent examiners to consider their personal feelings or opinions in conducting their duties. Boston Decl. ¶ 12. The use of the requested document solely for personal reasons should be dispositive here.

Although Plaintiff argues that Ms. Khuu's intent in creating the document is irrelevant, Plaintiff correctly acknowledges just two paragraphs earlier in his motion that the inquiry as to an agency's use of a document is "tethered to the purpose behind the records' creation in the first instance." Pl.'s Mem. at 4 (quoting *Washington Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 71 (D.D.C. 2006) (citing *BNA*, 742 F.2d at 1490)). Plaintiff simply asserts, without more, that the requested document was created for the purpose of conveying information about a patent applicant and that, therefore, the document is an agency record. But in fact, Ms. Khuu created the requested document for personal purposes—to convey her personal thoughts and opinions—and not for use in official agency business. Boston Decl. ¶ 17. And, the portion of *BNA* cited by the court in *Washington Post* explains in full that, for purposes of the critical "use" factor, an "inquiry is . . . required into the purpose for which the document was created, the actual use of the document, and the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document to carry out the business of the agency." *BNA*, 742 F.2d at 1490. Here, not only did Ms. Khuu create the requested document for personal reasons, the document was only ever actually used as a personal communication between her and Mr. Briney,

and no employees acting within the scope of their employment relied upon the document in carrying out the business of the USPTO.

Plaintiff also wrongly asserts that the requested document is an agency record because it relates to patent examination. As an initial matter, Plaintiff blatantly mischaracterizes the testimony of Mr. Briney regarding both his original email (which Plaintiff already has) and Ms. Khuu's responsive email (the requested document at issue here). Mr. Briney's original email had included a link to an article about Plaintiff's divorce proceedings, and the Agency produced this record to Plaintiff in connection with separate litigation. Mr. Briney did not, as Plaintiff asserts, testify that "he shared the article with his fellow examiners because it 'relate[s] to examination within PTO policy' of Mr. Hyatt's applications." Compl. ¶ 13; Pl.'s Statement of Undisputed Facts ¶ 6. In fact, Mr. Briney testified that "[s]earching for patent applicants is part of prior art searching and researching the case because you need to look for articles they may have written, things that could create a bar against their right to a patent." Boston Decl. ¶ 21. When Plaintiff's attorney asked, "So that's a legitimate purpose relating to examination within PTO policy, in your view?" Mr. Briney responded, "Yes." *Id.* This testimony was not addressed even to Mr. Briney's original email, which is not at issue here. In no way does it demonstrate that Ms. Khuu's reply email relates to patent examination or, by extension, that that document is an agency record, and Plaintiff's selective use of an out-of-context quotation is deceptive and deeply misleading.

Plaintiff went even further in his motion, though, by falsely stating that Mr. Briney testified "that information regarding Mr. Hyatt's personal affairs was relevant to his work as a patent examiner, as well as how patent[] examiners were likely to treat Mr. Hyatt." Pl.'s Mem. at 4. Mr. Briney in fact testified to the opposite. Mr. Briney did testify that he sent his original email to his art unit so that others would "treat this guy with respect," and he acknowledged that he and

coworkers had "talked about Hyatt in general." Boston Decl. ¶ 22. But when Mr. Briney was asked whether their general communications about Plaintiff were "relevant to the examination of his patent applications," Mr. Briney stated, "No. It was never intended to . . . feed back into the job, just human curiosity." *Id.* Mr. Briney's limited testimony on this issue cannot reasonably be construed to mean that Plaintiff's personal affairs were relevant to the official examination of patents by the USPTO. More to the point, however, his testimony does not, as Plaintiff suggests, prove or even imply that *Ms. Khuu's* personal opinions expressed in her reply email relate to the examination of patents or any other official Agency business. Mr. Briney's testimony about Ms. Khuu's reply was limited solely to the fact that he received it. *Id.* ¶ 23.

In any event, even if the requested document were deemed to relate to USPTO business on the basis that it includes a patent examiner's mental impressions in the context of the divorce litigation of a patent applicant, that relation alone does not rise to the level of *use* in official business. *See BNA*, 742 F.2d at 1493 ("In particular, the statute cannot be extended to sweep into FOIA's reach personal papers that may 'relate to' an employee's work—such as a personal diary containing an individual's private reflections on his or her work—but which the individual does not rely upon to perform his or her duties."). That is, even if the requested document were deemed to "relate to" USPTO business because Plaintiff is a patent applicant, it reflects Ms. Khuu's private reflections, which were not relied on in either her or Mr. Briney's (or any other USPTO employee's) performance of their official duties. *See, e.g.*, *Media Research Ctr.*, 818 F. Supp. 2d at 140 (citing *Gallant v. N.L.R.B.*, 26 F.3d 168, 172 n.2 (D.C. Cir. 1994)) (communications sent or received by then-Solicitor General Elena Kagan regarding her pending Supreme Court nomination were not agency records, even though they "related to" agency business). The critical assessment for purposes of whether a document is an agency record under FOIA is its *actual use*

in the conduct of official duties, not some hypothetical use. *See Judicial Watch*, 646 F.3d at 928 ("where an agency has neither created nor referenced a document in the 'conduct of its official duties,' the agency has not exercised the degree of control required to subject the document to disclosure under FOIA").

In sum, when all of the factors are considered—and in particular, when the use (or lack thereof) of the requested document is considered—the requested email is a personal record, not an agency record within the scope of FOIA. Defendant acted properly in declining to release the document.

### B. Alternatively, the Requested Document Was Properly Withheld Under Exemption 6

Even if the requested document is deemed an agency record, it was properly withheld under FOIA because it falls within the scope of Exemption 6. FOIA Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Gov't Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 98, 105-06 (D.D.C. 2010). "An author [of a document] may be a 'particular individual,' and as such may have a privacy interest cognizable under Exemption 6." *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1007 (D.C. Cir. 1990).

In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether,

on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46; *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004). "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

The requested document here was properly withheld under Exemption 6 because it solely contains an individual's personal opinion in which she has a strong privacy interest. In that regard, the author of a document "do[es] have a personal privacy interest in the thoughts and beliefs contained in their communications." *Yonemoto v. Dep't of Veterans Affairs*, No. CV 06-00378, 2007 WL 1310165, *3-4 (D. Haw. May 2, 2007) ("[T]he individual email authors' subjective interests in the non-disclosure of information contained in [emails stating their personal feelings about a coworker] is very similar to individuals' subjective interest in the non-disclosure of their medical and personnel records.").[1] Ms. Khuu expressed her personal opinion in the context of an article about Plaintiff's divorce proceedings—a topic that, despite Plaintiff's status as a patent applicant, is personal in nature. Similarly, in *Yonemoto*, the court held that emails exchanged

[1] And, just as with the agency record analysis above, the outcome here is not changed by the fact that Ms. Khuu emailed her personal thoughts using her USPTO email address. *See Yonemoto*, 2007 WL 1310165 at *4 ("Just because the VA would have the legal right to search their emails does not mean that the authors have no interest in preventing the VA from making that information public.").

between coworkers, discussing their personal feelings about another coworker (the plaintiff requester), were "of a personal, not business, nature" and were properly withheld under Exemption 6. *Id.* To that end, government employees have a privacy interest "in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives." *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980). It is likely that Ms. Khuu would be subjected to annoyance or harassment, by Plaintiff or others, based on her personal opinions about a sensitive topic such as divorce. There is a clearly established privacy interest at stake here.[2]

Finally, there is no apparent legitimate public interest in disclosure here. The requested document was not used or planned to be used in the conduct of official Agency business and solely embodies the personal opinions of Ms. Khuu. In short, it does not contribute in any significant way to the public understanding of the operations or activities of the USPTO. Although Plaintiff has rehashed in detail for the Court how he obtained the original email sent by Mr. Briney—but was unable to obtain the requested document here—in discovery in his earlier lawsuits against the USPTO, "[i]t is the 'interest of the general public, and not that of the private litigant' that the Court considers in this analysis. Public interest in disclosure of federal government records 'does not include helping an individual obtain information for his personal use.'" *Thomas v. U.S. Dep't of*

[2] Moreover, it is clear that withholding the entire contents of Ms. Khuu's email under Exemption 6 is necessary in order to protect her privacy interest. In some circumstances it might be possible to protect the privacy of the author of a document by simply redacting her name. Here, however, the horse has already left the barn—the FOIA request itself identified Ms. Khuu as the author of the requested document. Even if the contents of the requested document would not be identifiable to Ms. Khuu if her name were redacted, the request itself has made that impossible. Nor does it matter that the requested document contains the text of Mr. Briney's email to which Ms. Khuu replied. To the extent that the original email would be subject to disclosure under FOIA (which is not at issue here), that portion of the requested document would be segregable and would not change the analysis regarding the requested document.

*Justice*, 531 F. Supp. 2d 102, 108-09 (D.D.C. 2008) (quoting *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981); *Oguaju v. U.S.*, 288 F.3d 448, 450 (D.C. Cir. 2002)). Whatever light Plaintiff believes the requested document might shed in his separate litigation with the USPTO, it does not fulfill the public interest required by the balancing test here. Thus, the application of Exemption 6 is appropriate because Ms. Khuu has a strong privacy interest in the personal communication in the email.

## CONCLUSION

Defendant properly did not release the requested document to Plaintiff because it is not an agency record subject to disclosure under FOIA. Rather, it is a personal record that was not subject to the USPTO's control under the factors set forth by the courts. Even if the requested document could be considered an agency record, though, it was properly withheld under FOIA Exemption 6. The privacy interest that the author of the document has in her personal opinions expressed in the document far outweigh any public interest articulable by Plaintiff. Plaintiff's attempts to relitigate a discovery dispute from other litigation do not change the applicability of FOIA or its exemptions to the requested document.[3]

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant as to all claims in this case and deny Plaintiff's motion for summary judgment.

Dated: April 9, 2018

Respectfully submitted,

JESSIE K. LIU

[3] In that regard, the parameters of the FOIA disclosure regime and civil discovery are not the same, and the fact that the USPTO produced the original email from Mr. Briney to Plaintiff in other litigation is not relevant to the analysis here. *See, e.g., Stonehill v. I.R.S.*, 558 F.3d 534, 538 (D.C. Cir. 2009) (discussing distinctions between FOIA disclosure regime and civil discovery); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975) ("The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.").

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