UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Before the Court are a series of motions pursuant to a cause of action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, relating to the withholding of a single email message by the United States Patent and Trademark Office ("PTO"). The email at-issue (the "Khuu email") was sent by one PTO patent examiner to another using PTO's email system in response to a prior work-related email concerning a patent applicant, Plaintiff Gilbert P. Hyatt, whose patent applications the two examiners were responsible for examining at the time the email was sent. The PTO nevertheless denied Mr. Hyatt's request for production of this email message on the ground that it is not an agency record, and now argues in the alternative that the document is nevertheless exempt from disclosure under FOIA's Exemption 6.

The current record before the Court and the parties' motions and cross motions for summary judgment, ECF nos. 3, 15, leave outstanding a genuine issue of material fact that can easily be remedied by PTO's producing the email to the Court for *in camera* review. Although

in camera review is the exception rather than the rule in FOIA cases, *see NLRB v. Robbins Tire & Rubber Co.*, 437, U.S. 214, 224 (1978), nothing about the instant matter, nor the litigation history between the parties, is typical. Hundreds of pages of court filings have been spent litigating the nature of this single email. Trees have been felled over what the Court reasonably assumes is a single page, though perhaps it is two pages.

Courts balance certain factors to determine whether information residing within an agency is indeed an "agency record" for FOIA purposes. *See Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996). This analysis is not done in a vacuum, however, since, to the extent what is being litigated is whether a certain document is an "agency record" rather than a "personal record," the latter is determined by looking at the totality of the circumstances "surrounding the creation, maintenance, and use" of the record. *Bureau of Nat'l Affairs, Inc. v. DOJ*, 742 F.2d 1484, 1492 (D.C. Cir. 1984).

Despite the vigor with which the PTO is opposing production of the Khuu email, the government has only described it as containing a "personal opinion [Ms. Khuu] expressed to a close colleague in the context of an email exchange about divorce proceedings." ECF no. 15-4 at 6. The PTO has failed to cite for the Court which jurisdiction, in which galaxy, would find that description enough for the government to carry its burden to establish there is no question of material fact remaining in this matter. Given the unique set of circumstances here, including Khuu's work in PTO's Art Unit 2615 which is dedicated nearly full-time to examining Mr. Hyatt's patent applications, a more detailed description of the email's contents was critical to determining whether the document reasonably could be interpreted as relating to the examination of Mr. Hyatt's applications. Had the government been able to represent that Ms. Khuu's email makes no mention or reference to Mr. Hyatt, by name, pronoun, or allusion, it should have done

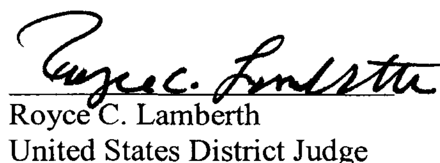
so explicitly. Instead, the government's declarant does nothing to cabin the potential scope of the content of the email, and fails even to suggest that the opinion was *about* divorce, instead only saying that Ms. Khuu expressed some opinion "in the context of an email exchange about divorce proceedings." *Id.* The government also failed to provide any basis upon which the Court could determine whether certain parts of the email might be segregable, assuming that it is an agency record.

Contrary to the government's insistence that granting the plaintiff's Motion to Compel, ECF no. 4, at this time would be "premature,"[1] ECF no. 17 at 2, the Court has no appetite to wreak further environmental destruction, or waste its or the parties' other resources on another round of briefing over this single email. *Cf. Juarez v. Dep't of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008). It is therefore **ORDERED**:

That the plaintiff's Motion to Compel [ECF no. 4] is **GRANTED**; and it is **FURTHER ORDERED** that the PTO shall produce to the Court for *in camera* review the document referred to as the Khuu email, within 10 days of issuance of this Order.

SO ORDERED.

Date: 7/23/18



Royce C. Lamberth
United States District Judge

[1] To be clear, the defendant in this matter is not the only party that has made rather absurd statements in its briefs. The plaintiff's characterization of portions of Mr. Briney's deposition testimony greatly mischaracterizes that testimony. Even if the plaintiff's briefs had accurately portrayed the context of Mr. Briney's statements concerning his understanding of certain PTO policies, it is somewhat baffling why the plaintiff would think that to be equivalent to an official statement of PTO policy.