United States Patent and Trademark Office

Office of the General Counsel

April 3, 2020

SENT VIA U.S. Mail

Mr. Randy Landreneau
U.S. Inventor
17440 Dallas Parkway
Dallas, TX 75287

RE: ***Freedom of Information Act Appeal A-20-00001 (Appeal of Request No. F-19-00277)***

Dear Mr. Landreneau,

This determination responds to your letter dated February 3, 2020 and received by the United States Patent and Trademark Office ("USPTO" or "Agency") on February 4, 2020, appealing the USPTO's November 4, 2019 initial determination in connection with your Freedom of Information Act (FOIA) Request, No. F-19-00277. This appeal has been docketed as FOIA Appeal No. A-20-00001.

The FOIA request asked for:

1. Under the U.S. Office of Personnel Management (OPM) Performance Appraisal Regulations, 5 C.F.R. § 430.206, all Patent Trial and Appeal Board (PTAB) employees, including each Administrative Patent Judge (APJ) must be presented with, and bound by, a Performance Appraisal Plan (PAP) for each year. Please provide copies of the PAPs for each PTAB APJ employment grade including Chief APJs for fiscal years 2013, 2016, and 2019. The request included, without limitation, appraisal forms and bonus calculation guidance for all APJ employment grades, and all documents submitted to OPM in order to approve said PAPs including under 5 C.F.R. § 430.209(a).
2. Please provide copies of all documents and guidance documents concerning APJ production expectancies, work product quotas, or docket management goals for all PTAB APJ employment grades in effect as of this request.
3. Please provide copies of any and all employment agreements (collective bargaining or group contracts) between the government and any organization, union, or association representing PTAB APJs. This request is limited to such agreement(s) and any amendments and attachments thereto that are in force as of this request.

4. Please provide copies of all BPAI's or PTAB's enumerated Standard Operating Procedures (SOP) 1, 5, 6, 7, 8, and 9 in effect in 2011, 2014, and 2019. If any of these SOPs is not in effect today, please provide documents reflecting termination or expiration of that SOP.

See FOIA Request No. F-19-00277.

On November 4, 2019, the Agency responded to the FOIA request and stated that it had identified 95 pages of documents responsive to the FOIA request. *See* Initial Determination (FOIA Request No. F-19-00277). Documents responsive to Items 1 and 4 of the request were released in full. *Id.* Documents responsive to Item 2 of the request were withheld in full pursuant to Exemption (b)(2) of the FOIA. *Id.* The Agency identified no records responsive to Item 3 of the request. *Id.*

The appeal raises several challenges to the Agency's initial determination. *See* Appeal A-20-00001. First, the appeal claims that USPTO did not conduct a proper search. The appeal claims the Agency's document production failed to identify and disclose responsive documents within the USPTO's control. *See* Appeal A-20-00001, at 2. Specifically, the Appeal asserted that the USPTO did not provide documents responsive to Item 1 of the FOIA request, including PAPs as requested in the FOIA request, documents submitted to OPM for PAP approval, and bonus calculation information. *See id.* at 3-4. Lastly, the appeal challenges the Agency's withholding of documents pursuant to Exemption (b)(2) of the FOIA. *See id.* at 4-5.

For reasons set forth below, the appeal is granted in part and denied in part.

Adequacy of Search

The appeal claims that USPTO did not conduct a proper search and that it failed to identify and disclose responsive documents within the USPTO's control. *See* Appeal A-20-00001, at 2. Specifically, the Appeal asserted that the USPTO did not provide documents responsive to Item 1 of the FOIA request, including PAPs as requested in the FOIA request, documents submitted to OPM for PAP approval, and bonus calculation information. *See id.* at 3-4.

An agency is required to conduct a search that is "reasonably calculated to uncover all relevant documents." *Zavala v. Drug Enforcement Admin.*, No. 09-5357, 2010 WL 2574068, at *1 (D.C. Cir. June 7, 2010) (citing *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) and *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The Agency must search files likely to contain responsive materials. *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 126 (D.D.C. 2009). "[T]he search 'need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the [plaintiff's] specific request.'" *Clay v. U.S. Dep't of Justice*, 680 F. Supp. 2d 239, 244 (D.D.C. 2010) (alteration in original) (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)).

Here, a supplemental search was conducted. Additional documents were identified as responsive to Item 1 of the FOIA request. Those documents, which consist of PAPs for the years identified in the FOIA request, documents submitted to OPM for performance appraisal system approval,

and bonus calculation information are provided to you as Attachment 1.[1] However, portions of these documents were redacted pursuant to Exemption 6 of the FOIA, which permits the withholding of "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)(6). The term "similar files" has been broadly construed to cover "detailed Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 601 (1982). The privacy interest at stake belongs to the individual, not the Agency. *See U.S. Dep't of Justice v. Reporter's Comm. for Freedom of Press*, 489 U.S. 749, 763-65 (1989). Employees have a substantial interest in maintaining the privacy of their performance evaluations. *See Fed. Labor Relations Auth. (FLRA) v. Dep't of Commerce*, 962 F.2d 1055, 1059 (D.C. Cir. 1992); *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) ("[S]ubstantial privacy interests are at stake" with the release of performance appraisal ratings); *Lewis v. Envtl. Prot. Agency*, No. 06-2660, 2006 WL 3227787, at *6 (E.D. Pa. Nov. 3, 2006). "[D]isclosure even of favorable information may well embarrass an individual or incite jealousy in his or her co-workers." *FLRA,* 962 F.2d at 1059 (alteration in original); *Ripskis*, 746 F.2d at 3 (opining that release of favorable ratings information would likely "spur unhealthy comparisons among HUD employees and thus breed discord in the workplace"). Consequently, all personal information on or reflecting individual performance records were redacted pursuant to Exemption 6 of the FOIA.

Exemption (b)(2)

The appeal also summarily, and without any substantive analysis or argument, challenges the application of FOIA Exemption (b)(2) to withhold documents responsive to Item 2 of the FOIA request. *See* Appeal A-20-00001, at 4-5. Further, even if some document are exempt, the appeal claims that the USPTO is required to release reasonably segregable portions of the withheld documents. *Id.* at 5. Finally, the appeal claims that the USPTO waived application of the exemption since it previously released the "same type of information." *Id.* at 6.

Exemption (b)(2) of the FOIA exempts from mandatory disclosure agency records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The standard for what documents are permitted to be withheld pursuant to this exemption was articulated in *Milner v. Department of the Navy*, 562 U.S. 562 (2011). In *Milner*, the plaintiff sought records regarding munitions stored on a Naval base in Puget Sound, Washington and included information that prescribed the minimum storage distance between munitions necessary to minimize the likelihood of a chain reaction explosion in the event that one or more of the stored explosives detonates. *See id.* at 567-68. The Court of Appeals for the Ninth Circuit held that the records were "predominantly internal" because they were used for the internal purpose of

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[1] With regard to FY13 PAPs, please note that the Deputy Chief Judge encumbered both the Vice Chief and Deputy Chief Judge positions in that fiscal year. Additionally, since documents from 2013 are outside the document retention period for these types of documents, the Agency was not able to produce a PAP for the Deputy Chief Judge position for 2013. Regarding the FY16 PAPs, the Vice Chief position was empty for FY16 and no one encumbered a PAP for that position. Despite searching in PTAB and Office of Human Resources records, the Agency was unable to locate a PAP for FY16 for the Deputy Chief Judge position.

instructing Navy personnel in how to do their jobs, and they would significantly risk circumvention of the law if released because wrongdoers could use the ESQD information to devise an attack to cause the maximum amount of damage to the Naval base. *See Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 971 (9th Cir. 2009). On appeal, the Supreme Court held that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources" and, as a result, found that "[t]he explosive maps and data requested here do not qualify for withholding under that exemption." *Milner*, 562 U.S. at 581. In reaching this holding, the Court focused on the following words of Exemption 2: "related solely to the internal personnel rules and practices of an agency." *Id.* at 569. The Court found, "[t]he key word" and "the one that most clearly marks the provision's boundaries" is the word "personnel." *Id.* That word, in common usage, "means 'the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives.'" *Id.* (alterations in original). Further, because the word "personnel" is used in the statute as an adjective to modify "rules and practices," the Court found that the term "refers to human resources matters." *Id.* Exempt records "concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.* at 570. Thus, Exemption 2 does not apply to all internal rules and practices but, instead, pertains only to records about personnel. *Id.* at 578. Such a definition precludes an application that would be so broad as to strip the word "personnel" of any meaning, "produc[ing] a sweeping exemption, posing the risk that FOIA would become less a disclosure than 'a withholding statute.'" *Id.*

Since *Milner* one court has held that "use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like" are the types of documents that may qualify for withholding under Exemption 2. *Brown v. FBI*, 873 F. Supp. 2d 388, 400 (D.D.C. 2012) (quoting *Milner,* 562 U.S. at 565). The types of records for which Exemption 2 has been found to no longer be applicable include computer codes pertaining to a highly sensitive database (*Skinner v. U.S. Dep't of Justice*, 806 F. Supp. 2d 105, 112 (D.D.C. 2011) (finding Exemption 2 inapplicable to sensitive law enforcement computer codes after *Milner*)); psychological records pertaining to an inmate (*Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011)); records regarding inmate discipline, inmate supervision and prison incident responses (*Kubik v. U.S. Fed. Bureau of Prisons*, No. 10-6078, 2011 WL 2619538, at *5-6 (D. Or. 2011)); and telephone numbers, email addresses, login names, and passwords (*Friedman v. U.S. Secret Serv.*, 282 F. Supp. 3d 291, 298 (D.D.C. 2017); *Brown v. FBI*, 873 F. Supp. at 400).

Here, the appeal summarily challenges the application of FOIA Exemption 2 to withhold documents responsive to Item 2. A review of those documents, however, reveals that those documents were properly withheld. The documents relate solely to human resources matters, as permitted by *Milner*, and as explained in the Initial Determination. Consequently, on this basis, the appeal is denied.

Reasonably Segregable

The appeal also challenges the blanket withholding of documents in response to Item 2 of the FOIA request and claims that the USPTO is required to release reasonably segregable portions of the withheld documents. *See* Appeal A-20-00001, at 5.
The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Federal agencies are directed to "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible." FOIA Improvement Act of 2016, Pub. L. No. 114-185, sec. 2, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)(I)). Further, an agency cannot "justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944, 950 (D.C. Cir. 1998). However, "a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." *Mead Data Cent., Inc.*, 566 F.2d at 261 n. 55. When nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible. *Id.* at 260; *Kimberlin,* 139 F.3d at 950. Further, there is no duty to segregate materials which are, by definition, wholly exempt from disclosure. *See e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005).

A review of the withheld documents here reveals that the documents response to Item 2 of the FOIA request were appropriately withheld in full. The small amount of potentially nonexempt material is inextricably intertwined with exempt information. Further, the time spent identifying and disclosing disjointed words and information would not provide any useful information or content to Appellant. Thus, the documents were not reasonably segregable and the appeal on this basis is denied.

Waiver

The final argument in the appeal is that the Agency waived application of FOIA Exemption 2 since it previously released the "same type of information." *See* Appeal A-20-00001, at 6. However, the appeal does not sufficiently establish that there was a waiver of the exemption here.

When an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information. *See ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013). In other words, "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Id.* at 426-27 (quoting *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007)). A FOIA requester bears the burden of demonstrating that an exemption is waived. *See Buzzfeed, Inc. v. U.S. Dep't of Justice*, 344 F. Supp. 3d 396, 408 (D.D.C. 2018) (holding that "[p]rior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure" (alteration in original)); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 890 F. Supp. 2d 35, 46 (D.D.C. 2012) (reiterating that plaintiff carries burden of "producing at least some evidence" of

waiver). Three elements are required to prove that an official public disclosure has occurred: the information requested (1) is "as specific as the information previously released," (2) "match[es] the information previously disclosed," and (3) has "already . . . been made public through an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)) (citing *Afshar v. Dep't of State,* 702 F.2d 1125, 1133 (D.C. Cir. 1983)). Further, the release of certain documents does not waive the use of exemptions "as to other documents." *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989); *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1024 (7th Cir. 2012); *Rockwell Int'l. Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (finding privilege not waived because "quoting portions of some attachments" is not inconsistent with desire to protect rest).

Here, the appeal falls far short of proving the Agency waived its reliance on Exemption (b)(2) to withhold responsive documents. First, the appeal does assert or prove that the requested information was as specific as, or matches in any way, the information alleged to have been previously released. In fact, the appeal itself merely asserts that the information sought in Item 2 is "the same type" of information as previously released. That is insufficient to prove existence of a waiver. Further, to the extent that Appellant relies on the testimony of Robert Budens to prove waiver here, that testimony was not an official disclosure by the USPTO. That testimony was of then USPTO President of the Patent Office Professional Association, not an officer of the USPTO.

For these reasons, Appellant's claims of waiver are denied.

Final Decision and Appeal Rights

Thank you for contacting the USPTO. This is the final decision of the United States Patent and Trademark Office with respect to your appeal. The appeal is granted in part and denied in part. You have the right to seek judicial review of this decision as provided in 5 U.S.C. § 552(a)(4)(B). Judicial review is available in the United States District Court for the district in which you reside or have a principal place of business, the United States District Court for the Eastern District of Virginia, or the United States District Court for the District of Columbia.

Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

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Sincerely,

David Shewchuk
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