



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

January 25, 2022

VIA EMAIL

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

RE: ***Freedom of Information Act Appeal No. A-22-00004 (Appeal of Request No. F-21-00173)***

Dear Mr. Landreneau:

This determination responds to your appeal to the United States Patent and Trademark Office ("USPTO" or "Agency") of the USPTO's initial determination in connection with your Freedom of Information Act (FOIA)/Privacy Act Request No. F-21-00173. Your appeal, originally submitted on December 28, 2021, has been docketed as FOIA Appeal No. A-22-00004.

FOIA Request and Response

On July 18, 2021, you submitted a FOIA request asking the Agency to provide:

1. Please provide copies of all communications, documents, requests for approval, and records the PTO submitted to OPM regarding base salaries, bonus awards (including their calculation) for each of fiscal years 2012-2020 inclusive, and to each PTO employee working for the Patent Trial and Appeal Board (PTAB). This includes the names and signatures of the authorizing officials and pay information for all Administrative Patent Judges (APJs), Lead APJs, Vice Chief APJs, Deputy Chief APJ, and Chief APJ. The records under this request also include but not limited to any cover letters, submission slips, and any online submission forms provided to OPM when communicating the information sought hereunder.
2. Please provide copies of all communications, documents, records, and approvals that the PTO received from OPM in response to, and with respect to PTO's communications identified in Request 1 above. All versions of USPTO Agency Administrative Order 217-02A, Federal Register Publications and Rule Making, and Official Gazette Publications issued or in effect from Oct. 1, 2012 to present.

See FOIA Request No. F-21-00178.

The Agency initially provided a response to your request on September 29, 2021. *See* Initial Decision at 1. In that response, the FOIA Officer advised that the Agency had identified 75 pages of documents that were responsive to your request. *Id.* The FOIA Officer, however, advised you that “portions of [those documents] were redacted pursuant to Exemption (b)(6) of the FOIA.” *Id.*

Appeal

In your December 28, 2021 appeal, you asserted that the Agency “failed to conduct a proper search for responsive records.” You allege that “the PTO identified only Senior Executive Service (SES) employee records” while you believe that additional records are submitted to the Office of Personal Management for review. You also assert that the Agency improperly redacted bonus award information for Vice Chief APJ Janet Gongola pursuant to Exemption (b)(6).

Reasonableness of Search

When responding to a FOIA request, an agency is required to conduct a search that is “reasonably calculated to uncover all relevant documents.” *See Zavala v. Drug Enforcement Admin.*, 2010 WL 2574068, at *1 (D.C. Cir. 2010) (citing *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007)). An agency is not expected to take extraordinary measures to find requested records, but to conduct a search reasonably designed to identify and locate responsive documents. *Garcia v. U.S. Dep’t of Just.*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). An agency must search files likely to contain responsive materials. *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 126 (D.D.C. 2009). The standard for the reasonableness of the search is “generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Mosby v. Hunt*, No. 10-5296, 2011 WL 3240492, at* 1 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 313-16 (D.C. Cir. 2003)).

You asked for copies of documents concerning communications the PTO submitted to OPM regarding base salaries and bonus awards for each PTO employee working for the Patent Trial and Appeal Board (PTAB). In response to your appeal, a second search for the requested records was performed that did not reveal any additional responsive documents.

On appeal, you contend that additional records beyond those for the Senior Executive Service (“SES”) employees should have been produced. In support of your appeal, you argue that the Agency is responsible for maintaining performance records pursuant to 5 C.F.R. § 293.402, and that “[t]he Official Personnel Folder (OPF) of each employee in a position subject to civil service rules and regulations and of each former employee who held such a position is part of the records of the [OPM].” Appeal at 3, *quoting* 5 C.F.R. § 293.303(a). The Agency, however, maintains each OPF and does not submit those documents directly to OPM. Your request was for documents “submitted to OPM” to include “cover letter, submission slops, and any online submission forms provided to OPM. . .” Appeal at 1. As you noted in your appeal, the Director of OPM *may* require the agency to report information related to civilian employees, “in a manner and at times prescribed by the Director.” Appeal at 3, *quoting* 5 C.F.R. § 9.2. The Agency has complied with the requests actually made by OPM, and a review of the search conducted reveals that it produced all responsive documents in the Agency’s possession to your initial FOIA requests.

Based on the foregoing, your appeal is denied, with one exception, as detailed below.

Exemption (b)(6)

You have identified a single redaction the Agency made pursuant to Exemption (b)(6) as improper. Exemption (b)(6) protects information about individuals contained in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” All information that “applies to a particular individual” meets the threshold requirement for Exemption (b)(6) protection. *See Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982). *See also Associated Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009) (explaining that “[t]he phrase ‘similar files’ has a broad meaning and encompasses the government’s records on an individual which can be identified as applying to that individual”); *Forest Serv. Employees for Envtl. Ethics v. Forest Svc.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption (b)(6) is satisfied when government records contain information applying to particular individuals).

On appeal, you identified a single redaction made in the personnel records for Vice Chief APJ Janet Gongola. Appeal at 4 – 5. You alleged that the Agency had not redacted that particular entry for any other employee and posited that “this single entry redaction may be a simple error.” Appeal at 5. Upon review, I concur. The information at issue is within a responsive document, reasonably segregable, and nonexempt. It will therefore be released. I note, however, that the document still contains nine distinct redactions pursuant to Exemption (b)(6) which are appropriate and non-contested. Accordingly, with this appeal decision, the Agency is producing this document without the redaction at issue.

Final Decision and Appeal Rights

This is the final decision of the United States Patent and Trademark Office with respect to your appeal. You have the right to seek judicial review of this denial 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:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road

College Park, MD 20740-6001

E-mail: ogis@nara.gov

Telephone: 202-741-5769

Sincerely,

A handwritten signature in black ink, appearing to read "David Shewchuk". The signature is fluid and cursive, with the first name "David" and last name "Shewchuk" clearly distinguishable.

David Shewchuk
Deputy General Counsel for General Law
Office of the General Counsel

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) GONGOLA, JANET A				2. Social Security Number (b)(6)		3. Date of Birth (b)(6)		4. Effective Date 11/21/17			
FIRST ACTION				SECOND ACTION							
5-A. Code 879		5-B. Nature of Action SES PERFORMANCE AWARD				6-A. Code		6-B. Nature of Action			
5-C. Code VWK		5-D. Legal Authority 5 USC 5384				6-C. Code		6-D. Legal Authority			
5-E. Code		5-F. Legal Authority				6-E. Code		6-F. Legal Authority			
7. FROM: Position Title and Number						15. TO: Position Title and Number VICE CHIEF ADMIN PATENT JUDGE - ENGAGE 66026724 PT1624					
8. Pay Plan		9. Occ. Code		10. Grade or Level		11. Step or Rate		12. Total Salary		13. Pay Basis	
								10,959.00			
12A. Basic Pay		12B. Locality Adj. .00		12C. Adj. Basic Pay		12D. Other Pay .00		20A. Basic Pay		20B. Locality Adj. .00	
								20C. Adj. Basic Pay		20D. Other Pay .00	
14. Name and Location of Position's Organization						22. Name and Location of Position's Organization PATENT AND TRADEMARK OFFICE UNDER SEC AND DIR OF USPTO PATENT TRIAL AND APPEAL BOARD JUDGES & PATENT ATTNYS- DIV 1 CM 561150200000000000 PP 23 2017					
EMPLOYEE DATA											
23. Veterans Preference (b)(6) 1 - None 3 - 10-Point/Disability 5 - 10-Point/Other 2 - 5-Point 4 - 10-Point/Compensable 6 - 10-Point/Compensable/30%						24. Tenure 0 0 - None 2 - Conditional 1 - Permanent 3 - Indefinite		25. Agency Use		26. Veterans Preference for RIF (b)(6) YES (b)(6) NO	
27. FEGLI (b)(6)						28. Annuitant Indicator (b)(6)		29. Pay Rate Determinant (b)(6)			
30. Retirement Plan (b)(6)				31. Service Comp. Date (Leave) 09/24/03		32. Work Schedule F FULL TIME		33. Part-Time Hours Per Biweekly Pay Period			
POSITION DATA											
34. Position Occupied 4 1 - Competitive Service 3 - SES General 2 - Excepted Service 4 - SES Career Reserved				35. FLSA Category E E - Exempt N - Nonexempt		36. Appropriation Code				37. Bargaining Unit Status 8888	
38. Duty Station Code 51-0040-510				39. Duty Station (City - County - State or Overseas Location) ALEXANDRIA ALEXANDRIA VA							
40. Agency Data		41.		42.		43. Not Pi		44. NP			
45. Remarks											
46. Employing Department or Agency DEPARTMENT OF COMMERCE						50. Signature/Authentication and Title of Approving Official ELECTRONICALLY SIGNED BY: ANNE MENDEZ DIRECTOR, HUMAN CAPITAL MGMT.					
47. Agency Code CM 56		48. Personnel Office ID 2794		49. Approval Date 11/21/17							