



UNITED STATES PATENT AND TRADEMARK OFFICE

Office of the General Counsel

June 28, 2023

VIA EMAIL

Mr. Eugene Quinn
IP Watchdog, Inc.
gquinn@ipwatchdog.com

RE: ***Freedom of Information Act (FOIA) Request No. F-23-00029***

Dear Mr. Quinn:

This is the FOIA Office's final response to F-23-00029. We previously provided an interim response to you on April 24, 2023.

The USPTO reviewed an additional 60 pages of records that are responsive to your request. Portions of these records have been redacted or withheld in full pursuant to Exemptions 5 and 6 of the FOIA.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This allows agencies to withhold records that are normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. The USPTO is applying the deliberative process privilege to portions of these records.

The deliberative process privilege protects records that are both predecisional and deliberative. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 512 (D.C. Cir. 2011). Here, the withheld information is predecisional because it consists of drafts and emails which express opinions and recommendations regarding proposed agency actions antecedent to the adoption of a position (*Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F.Supp.2d 146, 172 (D.D.C. 2004)). The withheld information is deliberative because it consists of employees' recommendations and opinions on legal and policy matters. *Skinner v. U.S. Dep't of Justice*, 2010 WL 3832602 (D.D.C. 2010)(internal citations omitted). Facts expressed in these deliberative communications are not reasonably segregable, and thus are not suitable for disclosure. Release of this material would "almost certainly have a *chilling effect* on candid expression of views." *Schell v. Dep't of HHS*, 843 F.2d 933, 942 (6th Cir. 1988) (emphasis added).

Exemption 6 of the FOIA 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.” *Dep’t of State v. Washington Post*, 456 U.S. 595, 601 (1982). Information that applies to a particular individual meets the threshold requirement for Exemption (b)(6) protection. *Id.* The privacy interest at stake belongs to the individual, not the agency. *See Dep’t of Justice v. Reporter’s Comm. for Freedom of the Press*, 489 U.S. 749, 763-65 (1989). Exemption (b)(6) requires a balancing of an individual’s right to privacy against the public’s right to disclosure. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008).

Here, the Department of Commerce employees’ email addresses and phone numbers are information that applies to particular individuals, and in which those individuals have a legitimate privacy interest. The burden is on the requester to establish that disclosure of this information would serve the public interest. *See Bangoura v. Dep’t of the Army*, 607 F. Supp. 2d 134, 148-49 (D.D.C. 2009). When balancing the public interest of release against individual privacy interest, the Supreme Court has made clear that information that does not directly reveal the operations or activities of the federal government falls outside the ambit of the public interest. *See Reporters Comm.*, 489 U.S. at 775. The withheld information does little to shed light or contribute significantly to public understanding of the operations or activities of the USPTO. Your FOIA request does not assert a public interest that outweighs the privacy interest, nor is one otherwise evident. As such, the FOIA dictates that the information be withheld.

As required by the FOIA Improvement Act of 2016 and Department of Justice guidance, USPTO has conducted a foreseeable harm review and reasonably foresees that disclosure of the withheld material would harm an interest protected by a FOIA exemption.

You may contact the FOIA Public Liaison at 571-272-9585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

You have the right to appeal this initial decision to the Deputy General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450, or you may submit an appeal electronically to FOIARequests@USPTO.gov. An appeal must be received within 90 calendar days from the date of this letter. The appeal must be in writing. You must include a copy of your original request, this letter, and a statement of the reasons why the information should be made available and why this initial denial is in error. If you submit your appeal by mail, both the letter and the envelope must be clearly marked “Freedom of Information Appeal.”

Sincerely,

Caitlin Trujillo
USPTO FOIA Officer
Office of General Law