

Exhibit 6



United States Patent and Trademark Office

Office of the General Counsel

January 19, 2018

VIA U.S. MAIL
RETURN RECEIPT REQUESTED

Mr. Andrew Grossman
Baker Hostetler
Washington Square
1050 Connecticut Avenue NW, Suite 1100
Washington, DC 20036-5304

RE: *Freedom of Information Act Appeal No. A-18-00002 (Appeal of Request No. F-18-00027)*

Dear Mr. Grossman:

This determination responds to your letter dated December 13, 2017, to the United States Patent and Trademark Office ("USPTO" or "Agency"). This appeal is related to Freedom of Information Act ("FOIA") Request No. F-18-00027. Your appeal has been docketed as FOIA Appeal No. A-18-00002.

FOIA Request and Response

In your firm's initial request, submitted by email on November 6, 2017, you asked the Agency to produce:

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.

The Agency responded to your request on December 7, 2017, and informed you that the requested document is not an agency record and so there is no agency record responsive to your request. *See* Initial Determination (FOIA Request No. F-18-00027).

Appeal

You appealed the Agency's initial determination by letter dated December 13, 2017, and received by the USPTO Office of General Counsel on December 20, 2017. In your appeal, you argue that the requested email is an "agency record" and that the Agency's refusal to produce the document is therefore an improper withholding of the requested record.

Agency Record

In order for a document to be subject to disclosure under FOIA, it must be an "agency record." *See* 5 U.S.C. § 552(a)(4)(B).

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The U.S. Supreme Court has held that a document qualifies as an agency record if it is created or obtained by the agency and in the agency's control. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). "Control" means that the document has "come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145. Agency records do not include personal records in an employee's possession, even if those records are physically located at the agency. *Id.* The D.C. Circuit Court of Appeals has also described the analysis of whether a document is an agency record as a "totality of the circumstances" test that considers "a variety of factors surrounding the creation, possession, control, and use of the document by an agency." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006) (quoting *Bureau of Nat. Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1490 (D.C. Cir. 1984)).

Under both the two-prong analysis articulated by the Supreme Court and the totality of the circumstances test described by the D.C. Circuit, where a document is created by an agency employee and located within the agency, the use of the document becomes most probative in determining the document's status under FOIA. *See, e.g., Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 927 (D.C. Cir. 2011) (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.'").

Here, although the requested record was created by an Agency employee and is located within the Agency's email system, it was not used by the employees who sent and received the email, or by any other Agency employees, in conducting official Agency business, such as the examining of patents. Rather, the requested record was a personal communication between the two employees, Ms. Khuu and Mr. Briney. Although Ms. Khuu and Mr. Briney may not have had an expectation of privacy 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 FOIA. *See, e.g., Fennerty v. Bostick*, No. 6:14-CV-48-TC, 2015 WL 365701, at *4 (D. Or. Jan. 26, 2015).

The fact that the requested record is a patent examiner's email responding to another patent examiner's email that discusses Mr. Hyatt also does not render the email an agency record. Even if the record were deemed to relate to Agency business because of Mr. Hyatt's status as a patent applicant, that relation alone does not rise to the level of use in official business. *See, e.g., Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 140 n.6 (D.D.C. 2011) (quoting *Gallant v. N.L.R.B.*, 26 F.3d 168, 172 n.2 (D.C. Cir. 1994)) ("the mere fact that the document in question 'relates to' the business of the agency does not by itself render it an agency record").

Finally, the fact that the Agency produced Mr. Briney's original email (included in Exhibit A to your appeal) in discovery in litigation is not relevant to the analysis of whether the requested record is an agency record for purposes of FOIA. *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).

For the foregoing reasons, the requested record is not an agency record, and your appeal is denied.

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).

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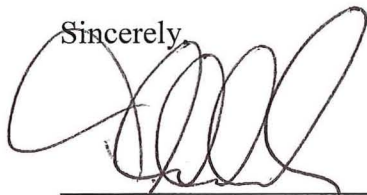
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Judicial review is available in the United States District Court for the district in which you reside or have a principal place of business, the United States District Court for the Eastern District of Virginia, or the United States District Court 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
Email: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448

Sincerely,



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