No. 19-5201 **September Term, 2019**

1:16-cv-01868-RC

Filed On: January 16, 2020

Jack Jordan,

Appellant

v.

United States Department of Labor,

Appellee

BEFORE: Henderson, Srinivasan, and Katsas, Circuit Judges

O R D E R

Upon consideration of the motion to compel the district court to include the Powers email in the record and forward it to this court, the response thereto, and the reply; the motion for a ruling in appellant's favor on the motion to compel; the motion for summary reversal, the response thereto, and the reply; and the motion for summary affirmance and the response thereto, it is

ORDERED that the motion to compel the district court to include the Powers email in the record and forward it to this court and the motion for a ruling in appellant's favor on that motion be denied. Each of appellant's substantive arguments was either considered and rejected by this court in a related appeal, or could have been raised in that appeal. See No. 18-5128, Jordan v. Dep't of Labor (D.C. Cir. Oct. 19, 2018); LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) ("When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court."); id. at 1395 n.7 ("If a party fails to raise a point he could have raised in the first appeal, the 'waiver variant' of the law-of-the-case doctrine generally precludes the court from considering the point in the next appeal of the same case."). Moreover, for the reasons discussed below, appellant has not shown that he is entitled to disclosure of the Powers email. It is

FURTHER ORDERED that the motion for summary reversal be denied and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying appellant's motion for relief from the judgment under Federal Rule

of Civil Procedure 60. See People for the Ethical Treatment of Animals v. U.S. Dep't of Health & Human Services, 901 F.3d 343, 355 (D.C. Cir. 2018). Appellant has not presented any newly discovered evidence that would affect the outcome of this case, shown that the judgment under review is void or that it would be inequitable to enforce the judgment, or shown any misconduct, fraud, or other grounds for relief under Rule 60.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK JORDAN,	:		
	:		
Plaintiff,	:	Civil Action No.:	16-CV-1868 (RC)
	:		
v.	:	Re Document No.:	67
	:		
U.S. DEPARTMENT OF LABOR,	:		
	:		
Defendant.	:		

MEMORANDUM OPINION

DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

I. INTRODUCTION

This Freedom of Information Act ("FOIA") matter comes before the Court on Plaintiff Jack Jordan's ("Mr. Jordan's") motion for relief from judgment. Mr. Jordan previously submitted FOIA requests with the United States Department of Labor's ("DOL's") Office of Administrative Law Judges, seeking unredacted versions of two emails related to a lawsuit in which Mr. Jordan represented his wife, Maria Jordan, against DynCorp International, Inc. ("DynCorp"). In a prior opinion, this Court granted summary judgment to DOL in part, upholding DOL's withholding of one email (the "Powers email") as protected by the attorney client privilege but ordering the production of the second email (the "Huber email") to Mr. Jordan. Mr. Jordan now seeks relief from the Court's grant of summary judgment regarding the Powers email pursuant to Federal Rule of Civil Procedure 60. Because Mr. Jordan fails to meet the standards set forth in Rule 60, the Court denies the motion.

II. FACTUAL BACKGROUND

The Court presumes familiarity with its prior opinions, *see Jordan v. U.S. Dep't of Labor* ("*Jordan I*"), 273 F. Supp. 3d 214 (D.D.C. 2017); *Jordan v. U.S. Dep't of Labor* ("*Jordan II*"), 308 F. Supp. 3d 24 (D.D.C. 2018), and only briefly summarizes the facts relevant to the present motion.

Mr. Jordan, an attorney, represented his wife in a 2016 Defense Base Act case against DynCorp before DOL. *Jordan I*, 273 F. Supp. 3d at 219. Mr. Jordan submitted a number of FOIA requests to DOL regarding the case, seeking, *inter alia*, the disclosure of emails forwarded to a DOL Administrative Law Judge by DynCorp. *See id.* at 219–20. In response, DOL disclosed redacted versions of the Huber and Powers emails but refused to produce unredacted versions, which it contended were protected by the attorney-client privilege. *See id.* at 220–21. Mr. Jordan commenced litigation in this Court in September 2016, seeking "[i]njunctive relief ordering the DOL to disclose to [Mr. Jordan] all previously undisclosed versions of the [DynCorp] [e]mails." Compl. at 10–11, ECF No. 1; Pl.'s Unopposed Mot. Leave Amend. Compl., ECF No. 19. Both Mr. Jordan and the DOL moved for summary judgment on the issue of whether the Powers and Huber emails were protected by the attorney-client privilege. *See Jordan I*, 273 F. Supp. 3d at 224.

After conducting an *in camera* inspection of the two emails, this Court granted summary judgment in part to DOL, determining that the Powers email was privileged and properly withheld, but that DOL had not sufficiently justified the basis for withholding the Huber email. *Id.* at 227. The Court noted that the Powers email, unlike the Huber email, was labelled "subject to attorney-client privilege" and contained an explicit request for legal advice. *Id.* And it found that DOL had released all reasonably segregable portions of the Powers email. *Id.* at 235. In a

later opinion denying the DOL's renewed motion for summary judgment, the Court found that the Huber email was not covered by attorney-client privilege and ordered the disclosure of that document. *Jordan II*, 308 F. Supp. 3d at 44. The Court also denied Mr. Jordan's motion for reconsideration of its determination that the Powers email was protected by the attorney-client privilege. *See id.* at 38–39.

Mr. Jordan then appealed this Court's holding regarding the Powers email to the D.C. Circuit. Pl.'s Notice of Appeal, ECF No. 62. The D.C. Circuit summarily affirmed, holding that this Court "did not err" in concluding that the Powers email was exempt from disclosure. *Jordan v. U.S. Dep't of Labor* ("*Jordan III*"), No. 18-5128, 2018 WL 5819393 at *1 (D.C. Cir. Oct. 19, 2018). Moreover, the Circuit held that "[t]o the extent [Mr. Jordan] s[ought] disclosure of the parts of the Powers email that read 'attorney-client privilege' and seek an explicit request for legal advice, the district court did not err in declining to require disclosure of such disjointed words." *Id.* at *2.

Mr. Jordan has now filed a motion for relief from judgment, asking this Court to set aside its prior ruling and to hold that the Powers email is not protected by attorney-client privilege. Pl.'s Mot. Relief J. 10, ECF No. 67.

III. LEGAL STANDARDS

"Rule 60(b) provides a mechanism for relief from a judgment or order by permitting the court to relieve a party or its legal representative from a final judgment, order, or proceeding[.]" *Oladokun v. Corr. Treatment Facility*, 309 F.R.D. 94, 97 (D.D.C. 2015). The burden falls to the party seeking relief to "[show] that he or she is entitled to relief." *Id.*; *see also Green v. AFL-CIO*, 287 F.R.D. 107, 109 (D.D.C. 2012). The final decision to grant or deny a Rule 60(b) motion is "committed to the discretion of the District Court," *United Mine Workers 1974*

Pension v. Pittston Co., 984 F.2d 469, 476 (D.C. Cir. 1993), which "balance[s] the interest in justice with the interest in protecting the finality of judgments," *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004). The movant "must provide the district court with reason to believe that vacating the judgment will not be an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995).

IV. ANALYSIS

Mr. Jordan asserts that relief from the Court's judgment is warranted under Rules 60(a), 60(b)(2), 60(b)(3), 60(d)(3), 60(b)(4), 60(b)(5), and 60(b)(6). This Court reviews in turn Mr. Jordan's arguments as to Rules 60(a) and 60(b)(1); Rule 60(b)(2); Rules 60(b)(3) and 60(d)(3); Rule 60(b)(4); Rule 60(b)(5); and Rule 60(b)(6). Because it concludes that Mr. Jordan's contentions are without merit, the Court denies the motion.

A. Mr. Jordan Is Not Entitled to Relief Under Rule 60(a) or Rule 60(b)(1)

Mr. Jordan asserts that relief is warranted under Rule 60(a) because this Court mistakenly found the Powers email to contain an express request for legal advice. Pl.'s Mot. Relief 29. He argues that the Court's finding was "contrary to all potentially relevant evidence," because "no evidence even indicated that Powers email was sent to obtain any legal advice or services, and copious evidence indicated that it was not sent to any recipient for any such purpose." Pl.'s Mot. Relief 20. Mr. Jordan further contends that the Court is mistaken about the holding of the D.C. Circuit, which he believes explained that this Court incorrectly found the Powers email to be privileged. *Id.* The Court first briefly reviews why relief under Rule 60(a) is unwarranted, and then addresses whether Jordan's arguments warrant relief under Rule 60(b)(1). The Court finds that they do not.

Rule 60(a) allows a court to correct a "clerical mistake or a mistake arising from oversight or omission." Fed. R. Civ. P 60(a). This rule is narrowly construed and may not be invoked to "change the substance or order of a judgment." *Fanning v. George Jones Excavating, L.L.C.*, 312 F.R.D. 238, 239 (D.D.C. 2015). It only applies when "the record indicates that the court intended to do one thing, but by virtue of a clerical mistake or oversight, did another." *Id.* (quoting 12 Moore's Federal Practice § 60.11(1)(a) (3d. ed. 2015)). Unless something in the record suggests that the court "intended to enter the parties' proposed judgment but accidently forgot to do so," the substance of a court order or judgment will be considered a "conscious decision." *Id.* Here, Mr. Jordan has failed to present any evidence to suggest that this Court made a clerical error, oversight, or omission. His contention that this Court's holding was in error, even if true, would be an error of "substance, not expression," putting it outside the scope of Rule 60(a). *Fanning*, 312 F.R.D. at 239. Because Rule 60(a) motions are only proper to correct clerical errors, and Mr. Jordan points to none, the Court denies the motion for relief from judgment on that ground.

However, Mr. Jordan's assertions would have been properly raised under Rule 60(b)(1), so this Court will address them as such. Rule 60(b)(1) motions permit the court to grant relief from a final judgment upon a finding of mistake, inadvertence, surprise, or excusable neglect. Federal courts are split over whether parties may use Rule 60(b) motions to address alleged mistakes of legal reasoning, and the D.C. Circuit "allows Rule 60(b) motions to challenge legal errors only in the most extreme situations: namely, when the district court based its legal reasoning on case law that it had failed to realize had been overturned." *Ward v. Kennard*, 200 F.R.D. 137, 139 (D.D.C. 2001) (citing *D.C. Fed'n of Civic Ass'ns v. Volpe*, 520 F.2d 451, 451–53 (D.C. Cir. 1975)); *see also Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 811 F.

Supp. 2d 216, 227 (D.D.C. 2011) (noting that district courts are only permitted to "provide relief upon reconsideration of a final judgment in circumstances where there has been a change in the controlling law since the issuance of the final judgment").

Mr. Jordan's motion fares no better under Rule 60(b)(1) because his arguments rest on an inaccurate reading of the order issued by the D.C. Circuit. *See Jordan III*, 2018 WL 5819393 at *1. Mr. Jordan asserts that the Circuit "conclusively established" that the Powers email did not contain any explicit request for legal advice, but rather that "any purported 'explicit request for legal advice' amounted (*at most*) to 'disjointed words that have 'minimal or no information content.'" Pl.'s Mot. Relief 10 (quoting *Jordan III*, 2018 WL 5819393 at *1).

This is not what the Circuit held. The Circuit made clear that "[t]o the extent [Mr. Jordan] seeks disclosure of the parts of the Powers email that read 'attorney client privilege' and seek an explicit request for legal advice, the district court did not err in declining to require disclosure of such disjointed words that have 'minimal or no information content.'" *Jordan III*, 2018 WL 5819393 at *1 (quoting *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977)). The Circuit did not find that the request for privilege consisted of disjointed words without information content, but rather held that disclosing the parts of the email that demonstrate its privileged nature would constitute the disclosure of disjointed words without information content. *Id.* Because Mr. Jordan does not meet the standard set forth by Rule 60(b)(1), his motion for relief on that ground is denied.

B. Mr. Jordan Is Not Entitled to Relief Under 60(b)(2)

Mr. Jordan next argues that he is entitled to relief under Rule 60(b)(2) because newly discovered evidence has emerged, in the form of both the Huber email and the D.C. Circuit

Court's alleged holding that the Powers email was not subject to attorney client privilege. Pl.'s Mot. Relief 21. This argument is unpersuasive as well.

Rule 60(b)(2) allows a court to grant relief from a final judgment upon a finding of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)[.]" Fed. R. Civ. P. 60(b)(2). In order to obtain relief from a final judgment under that rule, the moving party must demonstrate that "(1) the newly discovered evidence is of facts that existed at the time of the trial or merits proceeding; (2) the party seeking relief was 'justifiably ignorant of the evidence despite due diligence'; (3) the evidence is admissible and is 'of such importance that it probably would have changed the outcome'; and (4) the evidence is not merely cumulative or impeaching." *Almerfedi v. Obama*, 904 F. Supp. 2d 1, 3 (D.D.C. 2012) (quoting *Duckworth v. United States*, 808 F. Supp. 2d 2010, 210, 216 (D.D.C. 2011)).

Mr. Jordan's argument that the contents of the Huber email constitute newly discovered evidence fails both the second and the third part of the test under Rule 60(b)(2). The Huber e-mail cannot be newly discovered evidence because the Court considered it during the life of the case; it was not disclosed afterwards. And in any event, as the moving party, Mr. Jordan bears the burden of proving that "the proffered evidence is 'of such a material and controlling nature as will probably change the outcome.'" *Epps v. Howes*, 573 F. Supp. 2d 180, 185 (D.D.C. 2008) (quoting *In re Korean Airlines*, 156 F.R.D. 18, 22 (D.D.C. 1994)). Here, there is no basis for the Court to find that the Huber email would have altered its findings as to the Powers email. This Court previously conducted an *in camera* review of both the Huber and Powers emails, and found nothing to indicate that the Huber email would change its determination regarding the Powers email.

Further, Mr. Jordan's assertion that the Court of Appeals "confirm[ed] that Powers' email does not [sic] any request for legal advice," Pl.'s Mot. Relief 21, is an inaccurate representation of the D.C. Circuit's holding, which does not actually support his position. As discussed above, the Circuit found that this Court was correct in its determination that the "Powers email is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(4)" and that "the Powers email contains an explicit request for legal advice." *Jordan III*, 2018 WL 5819393 at *1; *see supra* Part IV.A. Even assuming that the D.C. Circuit's decision could be considered newly discovered evidence,[1] it would not change the outcome regarding the Powers email. Accordingly, Mr. Jordan's motion for relief from judgment pursuant to Rule 60(b)(2) is denied.

C. Mr. Jordan Is Not Entitled to Relief Under Rule 60(b)(3) or 60(d) (3)

Mr. Jordan claims that relief is warranted under Rules 60(b)(3) and 60(d)(3) because government attorneys in this case knowingly made false statements of material facts or law to this Court and failed to correct those false statements in order to sway the Court to grant summary judgment. Pl.'s Mot. Relief 22. Mr. Jordan further asserts that this Court was "lured" into assisting those attorneys in their fraud, helping them to deprive Mr. Jordan of his rights and to commit a fraud on the D.C. Circuit. *Id.* at 24. The core of these alleged falsehoods appears to hinge on Mr. Jordan's belief that the government—and this court—knew that neither the Huber nor the Powers emails were privileged and engaged in a concerted fraudulent effort to conceal

[1] A legal opinion "is law, not evidence." *See, e.g.*, *Peterson v. Flagstar Bank, FSB*, No. PWG-16-2617, 2017 WL 1020821, at *3 (D. Md. Mar. 15, 2017). Therefore, a subsequent legal opinion cannot be new evidence sufficient to support a claim in a Rule 60(b)(2) motion. In addition, newly discovered evidence "must have been in existence at the time of the disputed judgment." *Int'l Ctr. for Tech. Assessment v. Leavitt*, 468 F. Supp. 2d 200, 206 (D.D.C. 2007). Thus, a subsequent appellate judgment by its very nature cannot be newly discovered evidence.

the truth. *Id.* at 22–24. Because Mr. Jordan does not in any way substantiate this argument, he is not entitled to relief.

Rule 60(b)(3) allows a court to set aside or grant relief from a final judgment for fraud, misrepresentation, or misconduct by an opposing party. The burden falls on the party seeking relief to "prove such fraud or misrepresentation with 'clear and convincing evidence.'" *People for the Ethical Treatment of Animals v. HHS*, 226 F. Supp. 3d 39, 55 (D.D.C. 2017) (quoting *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995)). Furthermore, Rule 60(b)(3) motions will only be granted if the moving party can "show actual prejudice, that is, he must demonstrate that the defendant's conduct prevented him from presenting his case fully and fairly." *Ramirez v. DOJ*, 680 F. Supp. 2d 208, 210 (D.D.C. 2010); *see also Walsh v. Hagee*, 10 F. Supp. 3d 15, 19 (D.D.C. 2013). The moving party needs to do more than simply present allegations of fraud, it must present evidence of actual fraud that "prevented it from presenting its own case." *People for the Ethical Treatment of Animals*, 226 F. Supp. 3d at 56–57; *see also Am. Cetacean Soc. v. Smart*, 673 F. Supp. 1102, 1105 (D.D.C. 1987).

Rule 60(d)(3), which lays out a court's power to grant relief when there has been fraud on the court, *see* Fed. R. Civ. P. 60(d)(3), is much more limited in scope than Rule 60(b)(3), and only applicable in "very unusual cases." *Lane v. Fed. Bureau of Prisons*, 285 F. Supp. 3d 246, 248–49 (D.D.C. 2018). Fraud on the court is more than mere "fraud between the parties or fraudulent documents, false statements or perjury;" it must be "directed to the judicial machinery itself." *Id.* Accordingly, relief under 60(d)(3) is "rarely warranted, and is 'typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially

is directly impinged.'" *More v. Lew*, 34 F. Supp. 3d 23, 28 (D.D.C. 2014) (quoting *Great Coastal Express, Inc. v. Int'l Bhd. Of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982)).

Mr. Jordan has failed to present any evidence of fraud, either by the government or by the Court. Mr. Jordan argues that DOL and DOJ employees "violated their oaths, statutes, regulations, and rules of conduct." Pl.'s Mot. Relief 21. He further argues that these same DOJ and DOL employees actively sought to mislead this Court by certifying that both the Huber and the Powers emails contained explicit requests for legal advice, when they knew the opposite to be true. *Id.* at 1–8. He asserts that the Court in turn knowingly and willingly assisted them in their endeavors by granting summary judgment as to the Powers email and giving the government another shot at summary judgment on the Huber email in its 2017 opinion. *Id.* And he argues that the government continued its fraudulent conduct before the D.C. Circuit, where it misrepresented the facts and the law of the case. *Id.* at 9–10.

None of Mr. Jordan's arguments, all of which are based on words taken out of context from government briefs, declarations, and this Court's prior opinions, are backed by evidence of fraud. As to the Powers email, as discussed above, the D.C. Circuit explicitly held that the email *was* a protected request for legal advice. *Jordan III*, 2018 WL 5819393 at *1–2; *see supra* Part IV.A. Mr. Jordan appears to be attempting to relitigate the privilege issue, and it has long been the rule in this Circuit that "a motion for relief from judgment on the ground of misrepresentation will be denied if it is merely an attempt to relitigate the case[.]" *Am. Cetacean Soc. V. Smart*, 673 F. Supp. 1102, 1105 (D.D.C. 1987). As to the Huber email—and more generally—Mr. Jordan cannot establish fraud by simply pointing to arguments government counsel made in their briefs and that the Court rejected, or to contentions that turned out to be inaccurate. There is nothing to suggest that government counsel's representations to the Court were not made in good

faith. Finally, Mr. Jordan must show actual prejudice in order to prevail, and it is clear that nothing he alleges prejudiced him because the Powers email is privileged, as independently determined by the Court's *in camera* review.

By that same measure, Mr. Jordan has entirely failed to establish fraud upon the court under Rule 60(d)(3). Mr. Jordan asserts that the government committed fraud upon this Court by repeatedly and knowingly making false statements, and by luring the Court into assisting it in committing said fraud. Pl.'s Mot. Relief 23–24. However, the basis for this argument is, once again, Mr. Jordan's assertion that government attorneys "knowingly misrepresented that the emails were privileged" and that the Court was aware of that misrepresentation. *Id.* at 2–4. As discussed above, not only does Mr. Jordan fail to present any evidence of this supposed wrongdoing, but the Circuit explicitly held that the Powers email was exempt from disclosure and that there was no judicial bias or error on the part of this Court. *Jordan III*, 2018 WL 5819393 at *1–2. Mr. Jordan cannot assert fraud or fraud on the court simply because he disagrees with the rulings of this Court and of the D.C. Circuit. Because Mr. Jordan fails to meet the standards established by Rules 60(b)(3) and 60(d)(3), his motion for relief on those grounds is denied.

D. Mr. Jordan Is Not Entitled to Relief Under Rule 60(b)(4)

Mr. Jordan asserts that he is entitled to relied under Rule 60(b)(4) because this Court deprived him of his due process rights by failing to recuse itself, allegedly misrepresenting the contents of the Powers email, improperly reviewing the Powers email *in camera*, and using its "personal knowledge" about disputed material facts in reaching a decision. Pl.'s Mot. Relief 26–27. He also contends that the judgment is void because this Court usurped powers it did not have and assumed the role of party and witness. *Id.* at 24–25. Mr. Jordan's arguments are meritless.

Rule 60(b)(4) allows a court to provide relief from a final judgment when that judgment is void. Fed. R. Civ. P. 60(b)(4). The Supreme Court has held that this rule applies "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 261 (2010). These defects are usually limited to "defects in personal jurisdiction, subject matter jurisdiction, and due process." *U.S. v. Phillip Morris USA Inc.*, 840 F.3d 844, 850 (D.C. Cir. 2016).

Mr. Jordan's allegations run contrary to the findings of the Circuit, which found not only that this Court did "not err in concluding that the Powers email is exempt from disclosure," but also that there was no "evidence of judicial bias, despite appellant's accusations to the contrary." *Jordan III*, 2018 WL 5819393 at *1–2. The Circuit held that it was proper for the Court to decline to "require disclosure of such disjointed words that have 'minimal or no information content.'" *Id.* at *2 (quoting *Mead*, 566 F.2d at 261 n.55). And it also found that this Court did not "abuse its discretion in reviewing the emails *in camera* to determine the extent of § 552(b)(4)'s applicability." *Id.* at *1.

Furthermore, Mr. Jordan does not provide any basis for his allegations that this Court otherwise usurped its powers, aside from continuing to erroneously assert that the Powers email was not protected by privilege and that this Court is refusing to abide by what he believes to be the D.C. Circuit's holding. Pl.'s Mot. Relief 25. Mr. Jordan has had ample opportunity to litigate his case, and this particular issue, both before this Court and on appeal. Relief is therefore not warranted under Rule 60(b)(4).

E. Mr. Jordan Is Not Entitled to Relief Under Rule 60(b)(5)

In support of his claim for relief under Rule 60(b)(5), Mr. Jordan asserts that it would no longer be equitable for the judgment to be enforced against him. Pl.'s Mot. Relief 20. He maintains that "no evidence even indicated that Powers' email was sent to obtain any legal advice or services, and copious evidence indicated that it was not sent to any recipient for any such purpose." *Id.* The Court disagrees.

Similarly to Rule 60(b)(4), Rule 60(b)(5) allows a court to relieve a party from a final judgment when the judgment has been satisfied, reversed, discharged, or is no longer equitable. Fed. R. Civ. P. 60(b)(5). While the equitable provision of Rule 60(b)(5) "may not be used to challenge the legal conclusions on which a prior judgment or order rests," it may still serve as "a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992)). The party who seeks relief under Rule 60(b)(5) "bears the burden of establishing that changed circumstances warrant relief," *id.*, and must show that applying the judgment prospectively is no longer equitable by proving a change in factual conditions or the law, *Salazar v. District of Columbia*, 729 F. Supp. 2d 257, 263–64 (D.D.C. 2010).

But Mr. Jordan provides no evidence of any significant change in either law or factual conditions, merely arguing, without support, that it would be inequitable to sustain the judgment. *Id.* at 20. This argument once again appears to hinge on his belief that the Powers email is not privileged, and that this Court and the D.C. Circuit are both mistaken. *Id.* Mr. Jordan thus fails to meet the burden set forth by Rule 60(b)(5) by failing to assert, or provide any evidence for,

actually changed circumstances that may "warrant revision" of the prior judgment. *Brown*, 312 F.R.D. at 243.

F. Mr. Jordan Is Not Entitled to Relief Under Rule 60(b)(6)

Finally, Mr. Jordan contends that he is entitled to relief under Rule 60(b)(6). He argues that there are extraordinary circumstances that demand relief as a matter of justice. Pl.'s Mot. Relief 17, 36. The "extraordinary circumstances" that Mr. Jordan points to are his prior allegations of judicial misconduct by the Court. *Id.* at 17. Mr. Jordan also points to his diligence in seeking review of this Court's prior decisions, both through appellate review and Rule 60(b) relief, which he argues should be relevant in determining whether extraordinary circumstances exist. *Id.* at 45. The Court is unconvinced.

Rule 60(b)(6) is a catch-all provision, providing that a court may relieve a party from a final judgment for "any other reason that justifies relief" not encompassed by the other reasons enumerated in Rule 60(b). Fed. R. Civ. P 60(b)(6). 60(b)(6) motions "should only be granted in 'extraordinary circumstances'" in order to justify reopening a matter that would not merit reconsideration under Rules 60(b)(1)–(5). *Riley v. BMO Harris Bank, N.A.*, 115 F. Supp. 3d 87, 94 (D.D.C. 2015) (quoting *Ackerman v. U.S.*, 340 U.S. 193, 199 (1950)).

Mr. Jordan fails to establish that this is an "extraordinary circumstance" sufficient to justify relief under Rule 60(b)(6). *Ackerman*, 340 U.S. at 199. While Mr. Jordan is correct in stating that his diligence in appealing and pursuing Rule 60(b) relief is "relevant in assessing whether extraordinary circumstances are present," *Salazar v. District of Columbia*, 633 F.3d 1110, 1119 (D.C. Cir. 2011); Pl.'s Mot. Relief 54, the significance of his diligent appeals and post-judgment motions is far outweighed by the lack of adequate grounds for those very appeals and motions. Mr. Jordan's motion under Rule 60(b)(6) thus fails as well.

V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for relief from judgment (ECF No. 67) is **DENIED**. This case is over. Plaintiff may not file any further motions without first obtaining leave of court. Leave will not be granted based on the same recycled arguments that Plaintiff has repeatedly raised and this Court has repeatedly found to be meritless. Moreover, raising such arguments again may be cause for an award of fees. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: July 1, 2019

RUDOLPH CONTRERAS
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5201 **September Term, 2019**

1:16-cv-01868-RC

Filed On: March 18, 2020

Jack Jordan,

Appellant

v.

United States Department of Labor,

Appellee

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

O R D E R

Upon consideration of the motion to recall the mandate, the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the motion to recall the mandate be denied. The court's inherent authority to recall its mandate "can be exercised only in extraordinary circumstances," Calderon v. Thompson, 523 U.S. 538, 550 (1998), and appellant has shown no such circumstances in this case. Appellant's "Motion to Reconsider and Reverse All Rulings" was properly construed as a petition for panel rehearing, and the mandate was subsequently issued in accordance with this court's January 16, 2020 order, which directed the Clerk to issue the mandate "seven days after resolution of any timely petition for rehearing." See Fed. R. App. P. 41(b) ("The court may shorten or extend the time [to issue the mandate] by order."). It is

FURTHER ORDERED that the petition be denied.

The Clerk is directed to accept no further submissions from appellant in this closed case.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5128 **September Term, 2018**

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BEFORE: Rogers, Srinivasan, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the motions regarding filing of the Powers email and appellant's opening brief, the supplement thereto, the oppositions, and the reply; and the motion for summary affirmance, the opposition thereto, and the reply; and the motion for an extension of time, it is

ORDERED that the motions regarding filing of the Powers email be denied. For the reasons discussed below, the court will not compel the district court to file portions of the Powers email. It is

FURTHER ORDERED that the unopposed motion for an extension of time to file a reply to the motion for summary affirmance, construed as a motion to late-file the reply, be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not err in concluding that the Powers email is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(4). Nor did the district court abuse its discretion in reviewing the emails in camera to determine the extent of § 552(b)(4)'s applicability. See ACLU v. U.S. Dep't of Def., 628 F.3d 612, 626 (D.C. Cir. 2011); 5 U.S.C. § 552(a)(4)(B). Notwithstanding appellant's speculation to the contrary, there is no reason to doubt the district court's finding that an in camera review revealed the Powers email contains an explicit request for legal advice. Nor is there any evidence of

judicial bias, despite appellant's accusations to the contrary. To the extent appellant seeks disclosure of the parts of the Powers email that read "attorney-client privilege" and seek an explicit request for legal advice, the district court did not err in declining to require disclosure of such disjointed words that have "minimal or no information content." Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK JORDAN,	:		
	:		
Plaintiff,	:	Civil Action No.:	16-1868 (RC)
	:		
v.	:	Re Document Nos.:	10, 16, 20, 24, 25,
	:		29, 31, 33, 36
	:		
U.S. DEPARTMENT OF LABOR,	:		
	:		
Defendant.	:		

MEMORANDUM OPINION

GRANTING PLAINTIFF'S UNOPPOSED MOTION TO AMEND COMPLAINT; DENYING PLAINTIFF'S CORRECTED MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S FIRST MOTION FOR SANCTIONS UNDER RULE 11; DENYING PLAINTIFF'S MOTION TO COMPEL DEPOSITIONS OF TODD SMYTH AND DIANE JOHNSON; DENYING PLAINTIFF'S MOTION TO STRIKE THE SMYTH DECLARATION; DENYING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF EVIDENCE REGARDING SMYTH DECLARATION; DENYING PLAINTIFF'S MOTION TO STRIKE PROHIBITED EX PARTE COMMUNICATION AND VACATE OCTOBER 26 MINUTE ORDER; DENYING PLAINTIFF'S SECOND MOTION FOR SANCTIONS UNDER RULE 11; DENYING PLAINTIFF'S MOTION REGARDING THE APA AS BASIS FOR DECISIONS

I. INTRODUCTION

Plaintiff Jack Jordan, an attorney, sued under the Freedom of Information Act ("FOIA") seeking documents related to FOIA requests he previously submitted to the Office of Administrative Law Judges ("OALJ"), an agency within the United States Department of Labor ("DOL"). Mr. Jordan requested the first two emails in a continuous string of five emails ("DynCorp emails") related to Defense Base Act Case No. 2015-LDA-00030 ("DBA Proceedings"), a case in which Mr. Jordan is representing his wife, Maria Jordan, against DynCorp International, Inc. ("DynCorp").

Mr. Jordan sought the disclosure of any emails, dated July 30 or July 31, 2013, with the subject line "WPS – next steps & actions" that DynCorp's counsel had forwarded to Administrative Law Judge ("ALJ") Larry S. Merck. The DOL denied this request insofar as it related to unredacted copies of the first two emails, claiming that attorney–client privilege applied to portions of the DynCorp emails, and provided Mr. Jordan a redacted copy of the DynCorp emails in response to his initial FOIA request. Mr. Jordan sued to compel disclosure of all previously undisclosed versions of the DynCorp emails associated with his initial request on the grounds that the DOL had no legitimate basis for considering the DynCorp emails privileged and exempt from disclosure. Having reviewed the record and the DynCorp emails in camera, the Court agrees that one of the emails is privileged and thus exempt from disclosure, but orders the DOL to either disclose the other email or provide further justification for its continued withholding.

II. FACTUAL BACKGROUND

Over a period of seven months, Mr. Jordan filed five FOIA requests relating to the DynCorp emails in an effort to obtain all previously undisclosed versions of the DynCorp emails. *See* Compl. at 5 , ¶¶ 10–19, ECF No. 1. Although the first request is most relevant here—and the final two requests have no relevance at all—the Court separately describes each of Mr. Jordan's five requests for the sake of completeness.

A. FOIA Request No. F2016-806591

On June 9, 2016, Mr. Jordan submitted his first FOIA request, which was for several documents related to the DynCorp emails. *See* Answer, Ex. 4, 14–16, ECF No. 14-1.[1] Mr. Jordan

[1] The DOL's Answer is located at ECF No. 14. Exhibits attached to the DOL's answer can be located at ECF No. 14-1.

specifically requested (1) "a copy of any letter of transmittal, facsimile cover sheet or any other evidence . . . identifying the person or party who forwarded to Judge Merck's office (or to the OALJ) any documentation related to . . . the claim for disability compensation that was filed . . . by Maria Jordan," *see id.* ¶ 1; (2) "a copy of any version (regardless of whether or not any information was redacted) of certain emails that were forwarded to Judge Merck's office at any time in October through December 2015" dated "July 30 or 31, 2013[,] that had substantially the following text in the subject line: 'WPS – next steps & actions,'" *see id.* ¶ 2; and (3) "a copy of any letter of transmittal, facsimile cover sheet or any other evidence dated at any time in October through December 2015 identifying the person or party who forwarded to Judge Merck's office (or to the OALJ) any version of the [DynCorp] emails in #2, above," *see id.* ¶ 3. The first paragraph in Mr. Jordan's request included a footnote clarifying that the particular request did not "apply to the underlying documentation, *e.g.*, any motion or opposition thereto that was served by any party to the captioned case." *See id.* at 15, n.1.

On June 28, 2016, the DOL partially released and partially withheld documents responsive to Request No. 806591. Def.'s Cross-Mot. Summ. J. and Opp'n Pl.'s Corrected Mot. for Summ. J. ("Def.'s Cross-Mot."), Ex. 1, Attach. C, ECF No. 20-1.[2] In response to Mr. Jordan's first request, Acting FOIA Coordinator Diane Johnson communicated that a "search of the Administrative File in ALJ No. 2015-LDA-00030 was conducted" and revealed a "two page letter dated November 20, 2015 from the law firm of Brown Sims addressed to District Chief Judge Lee Romero in Covington, Louisiana" and forwarded to ALJ Merck. *Id.* at 21. Per footnote 1 of Mr. Jordan's request, the DOL enclosed the letter but did not include "the motion itself or the attachments to the motion." *Id.* at 21, n.2.

[2] All attachments to Def.'s Cross-Mot., Ex. 1 can be found at ECF No. 20-1.

In response to Mr. Jordan's second request, Ms. Johnson explained that ALJ Merck "reviewed [the DynCorp emails] in camera and determined that they contained privileged attorney–client communications." *Id.* at 22. Due to ALJ Merck's finding that "the unredacted versions of the requested documents [were] protected from discovery by attorney–client privilege," Ms. Johnson determined that FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," 5 U.S.C. §552(b)(4), applied and the unredacted emails would not be disclosed. *See id.* However, Ms. Johnson enclosed a 2015 letter from the law firm of Littler Mendelson, P.C. pertaining to the filings, along with redacted versions of the DynCorp emails that had been filed with ALJ Merck. *See* Def.'s Cross-Mot., Ex. 1, Attachs. D–E. The DynCorp email chain—which contains a total of five separate emails—contains two partially redacted emails, which are also the first two emails of the chain. Of those two emails, only the sender, recipients, date, and subject line were released. Def.'s Cross-Mot., Ex. 1, Attach. E. The chronologically first email ("the Powers email") spans roughly three pages. Def.'s Cross-Mot., Ex. 1, Attach. E. The second email ("the Huber email") spans roughly half of a page. Def.'s Cross-Mot., Ex. 1, Attach. E.

Littler Mendelson's letter stated that, per an October 2015 Order from ALJ Merck, the firm submitted unredacted copies of the DynCorp emails to ALJ Merck for in camera review. *See* Def.'s Cross-Mot., Ex. 1, Attach. D at 25. Littler Mendelson maintained that "the redacted portions of the at-issue email thread are privileged" and explained "the basis for asserting attorney–client privilege." *Id.* The DynCorp emails "concerned the status of operations issues in connection with the Worldwide Protective Services ('WPS') Program contract" and were transmitted to Christopher Bellomy, an in-house lawyer for DynCorp. *Id.* Littler Mendelson asserted that the DynCorp emails were transmitted to Mr. Bellomy to apprise him and other

employees[3] "of developments potentially impacting the contract." *Id.* at 26. These emails, Littler Mendelson contended, "were intended to be, and should remain, privileged among the select group of employees who received the at-issue communication." *Id.* at 25. The letter stated that the notation "Subject to Attorney Client Privilege" appeared within the DynCorp emails and that the DynCorp emails requested legal advice related to the developments discussed therein. *See id.* at 25–26. The DOL redacted "all text from the body of the initial two [e]mails," because, according to Defendant, these two emails were privileged in their entirety. Compl. ¶¶ 2, 11. Littler Mendelson's letter also satisfied Mr. Jordan's third request.[4] *See* Def.'s Cross-Mot., Ex. 1, Attach. C at 22.

B. FOIA Request No. F2016-819736

On July 5, 2016,[5] Mr. Jordan submitted "additional requests" related to the FOIA request described above. Def.'s Cross-Mot., Ex. 1, Attach. F at 34, ECF No. 20-1. The DOL labeled this supplemental request FOIA Request No. F2016-819736 ("Request No. 819736"). Def.'s Cross-Mot., Ex. 2, Attach. HH at 29, ECF No. 20-2.[6] In Request No. 819736, Mr. Jordan sought (1) "a copy of any documentation in the OALJ's records evidencing or relating to any action of, or

[3] Other employees that received the DynCorp emails include Darin Powers, Robert A. Huber, Brian J. Cox, William Imbrie, Martha Huelsbeck, and Aubrey Mitchell. *See* Def.'s Cross-Mot., Ex. 1, Attach. E.

[4] Mr. Jordan does not challenge the DOL's submission of the Littler Mendelson letter as an insufficient response to his request for "a copy of any letter of transmittal, facsimile cover sheet or any other evidence dated at any time in October through December 2015 identifying the person or party who forwarded to Judge Merck's office (or to the OALJ) any version of the [DynCorp] emails." Answer, Ex. 4, 15–16. As such, the Court considers the parties to be in agreement that the DOL's response satisfied this portion of Mr. Jordan's original request.

[5] Mr. Jordan submitted this request at 11:24 PM CST on July 5, 2016, and the DOL received this request at about 12:24 AM EST on July 6, 2016. Pl.'s Corrected Mot. Summ. J. at 8, ECF No. 16. For clarity, the Court will use July 5, 2016, as the date of this request.

[6] All attachments to Def.'s Cross-Mot., Ex. 2 can be found at ECF No. 20-2.

exemptions."). The nine FOIA "exemptions are 'explicitly exclusive.'" *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989) (quoting *FAA Adm'r v. Robertson*, 422 U.S. 255, 262 (1975)). And it is the agency's burden to show that withheld material falls within one of these exemptions. *See* 5 U.S.C. § 552(a)(4)(B); *see also Elliott*, 596 F.3d at 845.

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). When assessing a summary judgment motion in a FOIA case, the district court reviews the matter *de novo*. *See* 5 U.S.C. § 552(a)(4)(B); *Life Extension Found., Inc. v. IRS*, 915 F. Supp. 2d 174, 179 (D.D.C. 2013). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A "material" fact is one capable of affecting the substantive outcome of the litigation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if there is enough evidence for a reasonable jury to return a verdict for the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007).

In withholding documents pursuant to a FOIA exemption, "the agency must provide 'a detailed justification and not just conclusory statements to demonstrate that all reasonably segregable information has been released.'" *Gatore v. U.S. Dep't of Homeland Sec.*, 177 F. Supp. 3d 46, 51 (D.D.C. 2016) (quoting *Valfells v. CIA*, 717 F. Supp. 2d 110, 120 (D.D.C. 2010)). To satisfy this burden, "an agency may rely on detailed affidavits, declarations, a *Vaughn* index, in camera review, or a combination of these tools." *Comptel v. FCC*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012). Typically, agencies provide courts with the required information via a "combination" of a *Vaughn* index and agency declarations. *See id.* "A *Vaughn* index correlates each withheld document, or portion thereof, with a particular FOIA exemption and the

justification for nondisclosure." *Id.* (citing *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973)).

The agency "affidavits [must] describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Moreover, agency affidavits generally enjoy "a presumption of good faith." *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citing *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)). The agency should "disclose as much information as possible without thwarting the exemption's purpose." *Hall v. U.S. Dep't of Justice*, 552 F. Supp. 2d 23, 27 (D.D.C. 2008) (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). Generally, a reviewing court should "respect the expertise of an agency" and not "overstep the proper limits of the judicial role in FOIA review." *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1388 (D.C. Cir. 1979).[15]

[15] The Court ordered in camera review of the DynCorp emails. Such review is appropriate when "the district judge believes that in camera inspection is needed in order to make a responsible de novo determination on the claims of exemption." *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). Of course, in camera review does not excuse the government of its "obligation to provide detailed public indexes and justifications whenever possible." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 235–36 (D.D.C. 2013) (quoting *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)).

Johnson;[16] (2) strike in its entirety the Smyth Declaration;[17] (3) compel the production evidence related to the Smyth Declaration;[18] (4) strike the DOJ's October 25 motion requesting an

[16] Mr. Jordan seeks to compel depositions of Mr. Smyth and Ms. Johnson. *See* Pl.'s Mot. Compel Dep. at 2, ECF No. 24. Mr. Jordan claims that he "cannot verify or refute without discovery" the Smyth Declaration and the DOL's Memo and that he requires "a deposition of . . . Todd Smyth and Diane Johnson to be conducted as soon as practicable." *See id.* at 1–2.

"FOIA actions are typically resolved without discovery." *Voinche v. FBI*, 412 F. Supp. 2d 60, 71 (D.D.C. 2006) (citation omitted). Indeed, "[d]iscovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002). Though "FOIA actions are not exempted from the discovery provisions of the Federal Rules of Civil Procedure and the scope of the discovery permitted . . . lies in the [C]ourt's discretion," the Court treats further discovery in FOIA actions skeptically and prefers to permit limited discovery only when truly necessary. *Bureau of Nat'l Affairs, Inc. v. IRS*, 24 F. Supp. 2d 90, 92 (D.D.C. 1998). It is well-established in this district that "a declarant in a FOIA case satisfies the personal knowledge requirement in Rule 56(e) if in his declaration, he attests to his personal knowledge of the procedures used in handling a FOIA request and his familiarity with the documents in question." *Barnard v. U.S. Dep't of Homeland Sec.*, 531 F. Supp. 2d 131, 138 (D.D.C. 2008) (internal citation and alterations omitted); *see also Schmitz v. U.S. Dep't of Justice*, 27 F. Supp. 3d 115, 120 (D.D.C. 2014) (noting that the rule in *Barnard* is "established")

Mr. Smyth's declaration establishes that he has personal knowledge of the procedures used in handling a FOIA request and demonstrates that he is familiar with the documents in question, and thus satisfies Rule 56(e)'s personal knowledge requirement. *See* Smyth Decl. ¶¶ 1, 21–31; *Barnard*, 531 F. Supp. 2d at 138. And although Mr. Jordan implies bad faith by Mr. Smyth and states that "there is very good reason to believe that the facts asserted were not within Smyth's personal knowledge" and "[s]ome factual assertions were very clearly false," he offers no evidence to substantiate his allegations that might warrant further discovery. *See* Mem. P. & A. Supp. Pl.'s Mot. Compel Dep. ("Pl.'s Mot. Compel Deps. Mem.") at 4, ECF No. 24-1. The Court does not view Mr. Jordan's "mere assertions" as a sufficient rationale to allow discovery in this FOIA action. *See Voinche*, 412 F. Supp. 2d at 72. The Court finds the depositions sought here unnecessary and denies Mr. Jordan's motion.

[17] Mr. Jordan moves to strike the Smyth Declaration on the grounds that "[Mr.] Smyth and the DOJ clearly disregarded all safeguards to ensure that Smyth's Declaration was reliable or probative" as outlined by FRCP 56(c)(4). Pl.'s Mot. Strike Smyth Decl. at 2, ECF No. 25.

"The decision to grant or deny a motion to strike is vested in the trial judge's sound discretion." *Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2, 7 (D.D.C. 2004) (citation omitted). "[M]otions to strike are not favored," and the Court maintains "considerable discretion in disposing of motions to strike." *Cobell v. Norton*, 224 F.R.D. 1, 2 (D.D.C. 2004). Indeed,

motions to strike are "often . . . considered 'time wasters.'" *Id.* (quoting 2A Moore's Federal Practice, § 12.21 at 2419).

Mr. Jordan's only germane contention alleges that the Smyth Declaration included facts of which Mr. Smyth had no personal knowledge. *See* Mem. P. & A. Supp. Pl.'s Mot. Strike Smyth's Decl. ("Pl.'s Mot. Strike Smyth Decl. Mem.") at 5–6, ECF No. 25-1. Mr. Jordan notes that "[a]n affidavit or declaration [ ] must be made on personal knowledge . . . and show that the affiant or declarant is competent to testify on the matters stated." *Id.* at 5 (quoting Fed. R. Civ. P. 56(c)(4)); *see also Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981) (stating that the "requirement of personal knowledge by the affiant is unequivocal[] and cannot be circumvented"). The Court dealt with this concern in footnote 16 above. Mr. Smyth's job responsibilities "included advising OALJ FOIA personnel on FOIA requests that were assigned to [his] agency component." Smyth Decl. ¶ 1. Mr. Smyth's work competencies indicate that he has the personal knowledge required to submit his declaration, and the extensive record submitted by the DOL presents an exhaustive companion piece to corroborate the facts in the Smyth Declaration and ground Mr. Smyth's knowledge in the attached documents. See Def.'s Cross-Mot., Ex. 1, Attachs. A–W. The Court thus denies Mr. Jordan's motion to strike Smyth's Declaration.

[18] Mr. Jordan moves for this Court to order the DOL to produce documents regarding "(1) any draft or version of Smyth's Declaration or (2) any language that was included in Smyth's Declaration or in any draft or version of Smyth's Declaration." Pl.'s Mot. Compel Produc. at 1, ECF No. 29.

The Court reiterates that "FOIA actions are typically resolved without discovery." *Voinche*, 412 F. Supp. 2d at 71 (citation omitted). "Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Schrecker*, 217 F. Supp. 2d at 35. Typically in FOIA cases, discovery of the kind Mr. Jordan seeks is "unnecessary and impermissible" where the Court finds, as it does here, "no genuine issue of material fact" exists. *Bureau of Nat'l Affairs*, 24 F. Supp. 2d at 92. Though "FOIA actions are not exempted from the discovery provisions of the Federal Rules of Civil Procedure and the scope of the discovery permitted . . . lies in the [C]ourt's discretion," the Court treats further discovery in FOIA actions skeptically and prefers to permit limited discovery only when truly necessary. *Id*.

Granting this motion would depend on concrete evidence rebutting the "presumption of good faith" accorded to the DOL in submitting the Smyth Declaration. *See Shrecker*, 217 F. Supp. 2d at 35; *Voinche*, 412 F. Supp. 2d at 64. Rather than providing such concrete evidence, Mr. Jordan's motion is littered with speculative claims. Mr. Jordan invokes the "crime–fraud exception," Pl.'s Mot. Compel Produc. at 7, alleges "perjury," *id.* at 9, misrepresents the reason for submitting the Smyth Declaration as seeking to "influence" the Court, *id.*, and claims that the DOJ and DOL are engaged in a "cover up" of ALJ Merck's "criminal conduct," *id.* at 11. These repeated claims never rise above speculation to warrant the kind of discovery Mr. Jordan desires. The Court denies Mr. Jordan's motion to compel the production of evidence regarding the Smyth Declaration.

2. The Information in Question was Obtained from a Person

A "person," under FOIA, includes "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The OALJ received the at-issue documents "from counsel for the company [DynCorp] in the Defense Base Act hearing before the OALJ." Def.'s Mem. at 11, ECF No. 20. Mr. Jordan makes no argument to the contrary. *See generally* Pl.'s Corrected Mot. Summ. J., ECF No. 16. Thus, the sole remaining issue is whether the information in the DynCorp emails is privileged.

3. The Information in the Powers Email is Privileged

The DOL contends that the withheld information is privileged under Exemption 4. *See* Def.'s Mem. at 12–14, ECF No. 20. Specifically, the DOL claims that it contains attorney–client privileged communications. *See* Def.'s Mem. at 12. To substantiate its claim, the DOL asserts that the DynCorp emails had "been marked 'Subject to Attorney Client Privilege' and transmitted to an in-house attorney for [DynCorp] in order to apprise him of developments potentially impacting the Worldwide Protective Services Program contract and to explicitly request the attorney's input and review of the information transmitted." Smyth Decl. ¶ 31; *see also Vaughn* Index (claiming the information as privileged under Exemption 4 in nearly identical language). In conclusory terms, Mr. Jordan responds that there is no "factual basis or legal authority that support[s] the application of any FOIA exemption to Plaintiff's FOIA requests." Pl.'s Corrected Mot. Summ. J. at 28, ECF No. 16. Mr. Jordan contends that the OALJ's "denials of Plaintiff's FOIA requests [ ] were notably devoid of any explanation." *Id.* Mr. Jordan asserts that the OALJ erroneously "contended that FOIA Exemption 4 applied because ALJ Merck purportedly ruled that the [DynCorp] [e]mails were privileged" while "fail[ing] to make any rational connection between FOIA Exemption 4 and the OALJ's purported basis for invoking

such exemption." *Id.* Mr. Jordan insists that "[n]o OALJ representative made any such determination" finding the DynCorp emails privileged, and, consequently, implores the Court to make no such determination now. Def.'s Reply at 10.

"'Privileged' information is generally understood to be information that falls within recognized constitutional, statutory, or common law privileges." *Gen. Elec. Co. v. Air Force*, 648 F. Supp. 2d 95, 101 n.4 (D.D.C. 2009) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 267–68, n.50 (D.C. Cir. 1982)). Though "case law examining privilege under Exemption 4 is sparse," Def.'s Mem. at 12, courts have repeatedly found that Exemption 4's "privilege" requirement covers properly-practiced attorney–client privilege, *see Gen. Elec. Co.*, 648 F. Supp. 2d at 101 n.4; *Artesian Indus., Inc. v. HHS*, 646 F. Supp. 1004, 1007–08 (D.D.C. 1986); *Indian Law Res. Ctr. v. U.S. Dep't of Interior*, 477 F. Supp. 144, 149 (D.D.C. 1979). Though "the mere fact that an attorney is listed as a recipient . . . does not make a document protected under [attorney–client] privilege," *Vento v. I.R.S.*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010), confidential disclosures between an attorney and her client regarding factual and legal matters are certainly protected by attorney–client privilege, *see, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *Vento*, 714 F. Supp. 2d at 151 (noting that "[f]actual information provided by the client to the attorney is the essence of privilege"); *Mead Data Cent., Inc. v. Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (stating that attorney–client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice").

The DOL's justification—as set forth in the Smyth Declaration and *Vaughn* Index and confirmed by the Court's in camera *review*—is sufficiently detailed for the Court to conclude

that FOIA Exemption 4 applies to the Powers email, because it contained privileged communications between an attorney and his client. The DOL describes the DynCorp emails in a detailed manner—though obviously in such a way that does not disclose the information it seeks to protect—and there is nothing in the record to question the presumption of good faith that the Court affords the DOL in its explanation. The DOL explains that the DynCorp emails concerned DynCorp's confidential information regarding a business contract and expressly sought DynCorp's attorney's input and review. Smyth Decl. ¶ 31; *Vaughn* Index. Additionally, the DOL reiterated that the DynCorp emails are "marked 'Subject to Attorney Client Privilege.'" Smyth Decl. ¶ 31; *Vaughn* Index. This description supports the inference that the DynCorp emails concern contractual information that DynCorp wishes to protect and that this contractual information was sent to in-house attorney Christopher Bellomy for his legal advice.

However, the Court's review of the DynCorp emails in camera has revealed that the DOL's justifications are much more applicable to the Powers email than they are to the Huber email. The Powers email itself is labeled "subject to attorney–client privilege;" the Huber email is itself not. The Powers email contains an express request for legal advice; the Huber email does not. Indeed, although the Huber email responds to information in the Powers email and has Mr. Bellomy "cc-ed," it does not necessarily meet the standard for attorney–client privilege—at least as the DOL has articulated its justification to this point.[22] The Court requires further briefing focusing specifically on the DOL's justification to withhold the Huber email before it is prepared to grant summary judgment for either party.

[22] "[M]erely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney–client privilege." *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 630 (D. Nev. 2013).

The Court therefore orders the DOL to provide further justification for withholding with respect to the Huber email (or voluntarily release it). With respect to the Powers email, the Court's in camera review confirms that the content of the information and the reason it was communicated satisfy the demands of attorney–client privilege.

B. DynCorp Did Not Waive its Attorney–Client Privilege

Mr. Jordan claims that, even if the communications were privileged when originally made, DynCorp subsequently waived any claim to privilege in three ways. First, he argues that DynCorp waived the privilege by submitting the DynCorp emails to the OALJ in the DBA Proceedings.[23] *See* Pl.'s Corrected Mot. Summ. J. at 32–40, ECF No. 16. Second, Mr. Jordan contends that DynCorp waived its claim of privilege by failing to ever fully justify its invocation of privilege. *See* Pl.'s Corrected Mot. Summ. J. at 43. Mr. Jordan claims that DynCorp failed to properly "identify recipients of the [DynCorp] [e]mails in [its] [r]equired [d]isclosures" and "failed to provide information about the purpose of the [DynCorp] [e]mails that would support a finding that the [DynCorp] [e]mails were privileged." *Id.* at 43–44. Mr. Jordan asserts that this insufficient provision of information regarding the DynCorp emails waives any privilege that may be applicable to them. *See id.* Finally, Mr. Jordan argues that "[DynCorp]'s failure to show

[23] In conclusory terms, Mr. Jordan asserts that DynCorp waived its privilege when non-attorney DynCorp managers forwarded the DynCorp emails among each other, without including Mr. Bellomy in the emails. Pl.'s Corrected Mot. Summ. J. at 41. Such forwarding does not waive privilege. Mr. Bellomy was an attorney to DynCorp—not any or all of the individual employees identified by Plaintiff—giving advice to DynCorp, and thus DynCorp holds the attorney–client privilege over the documents. *See Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). Internal distribution of privileged materials among corporate managers does not automatically waive attorney–client privilege; the DynCorp managers who circulated Mr. Bellomy's advice did not disclose that advice to any "third party." *See In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 159 F.R.D. 307, 313 (D.D.C. 1994).

received "an amended privilege log to address Claimant's concerns about the [c]ompany's description of the privileged communication," *id.* at 16; DynCorp's Opposition Memorandum in the DBA Proceedings and the Littler Mendelson letter submitted to ALJ Merck for in camera review included a detailed description of the DynCorp emails and the reason for considering them privileged similar to the rationale espoused in the Smyth Declaration and *Vaughn* Index, *see id.* at 16; and DynCorp's "management-level employees expressly sought legal advice from [DynCorp]'s in-house counsel" in the DynCorp emails, *id.* at 18. In short, DynCorp consistently substantiated and maintained its claim of privilege throughout the DBA Proceedings. Thus, the Court finds that DynCorp did not waive its attorney–client privilege.

C. Defendant Provided All "Reasonably Segregable" Portions of the Powers Email

In response to Request No. 806591, the DOL disclosed a partially redacted version of the DynCorp emails that provided unredacted emails from Mr. Imbrie, Mr. Powers and Mr. Huber sent the morning of July 31, 2013, as well as email headings from the Huber email and the Powers email.[26] *See* Def.'s Cross-Mot., Ex. 1, Attach. E, ECF No. 20-1. However, the DOL completely redacted the text of the Huber email and the Powers email. *See id.* In Request No. 808886—filed in relation to the redacted emails Mr. Jordan received in response to Request No. 806591—Mr. Jordan sought the disclosure of the "notation 'Subject to Attorney Client Privilege' and non-privileged information supporting [the] contention that . . . [DynCorp] management 'expressly sought legal advice.'" Pl.'s Reply at 3, ECF No. 30; *see also* Def.'s Cross-Mot., Ex. 1, Attach. G. The DOL maintains that the redacted emails already submitted to Mr. Jordan contain everything that could be disclosed and that segregability would "not [be] applicable to the

[26] The Huber email was sent at 8:20 AM on July 31, 2013, and the Powers email was sent at 5:39 PM on July 30, 2013. Def.'s Cross-Mot., Ex. 1, Attach. E.

redacted portions" of the DynCorp emails. Smyth Decl. ¶ 27. The DOL further maintains that "any attempt at further segregating" the DynCorp emails "would provide little or no informational value," and the privileged "material is inextricably intertwined" with any unprivileged material. *Id.* Because the Court denies Defendant's motion for summary judgment with respect to the Huber email, its segregability analysis is confined to the Powers email.

FOIA requires disclosure of "any reasonably segregable portion" of an otherwise-exempt record. 5 U.S.C. § 552(b). An agency need not disclose non-exempt portions of records that "are inextricably intertwined with exempt portions." *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008); *see also Mead Data*, 566 F.2d at 260. "[T]o demonstrate that all reasonably segregable material has been released, the agency must provide a 'detailed justification' for its non-segregability," but "the agency is not required to provide so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office of U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data*, 566 F.2d at 261). Simple "conclusory assertions" that all "reasonably segregable" information has been disclosed "fall short of the specificity required for a court to properly determine whether the non-exempt information is, in fact, not reasonably segregable." *Branch v. FBI*, 658 F. Supp. 204, 210 (D.D.C. 1987) (citing *Mead Data*, 566 F.2d at 260). Additionally, the Court "has the obligation to consider the segregability issue *sua sponte*, regardless of whether it has been raised by the parties," *Johnson*, 310 F.3d at 776 (citing *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999)), and "it is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof," *Schiller v. NLRB*, 964 F.2d 1205, 1210 (D.C. Cir. 1992) (quoting *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991)).

With that said, the law of segregability does not require a court 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*, 566 F.2d at 261 n.55; *see also Brown v. U.S. Dep't of Justice*, 734 F. Supp. 2d 99, 110–11 (D.D.C. 2010) (quoting *Assassination Archives And Research Center v. C.I.A.*, 177 F. Supp. 2d 1, 9 (D.D.C. 2001), *order amended*, (Oct. 25, 2001) and *judgment aff'd*, 334 F.3d 55 (D.C. Cir. 2003)). In the context of documents exempted by the attorney–client privilege, it is sufficient for an agency's declaration to provide sufficient detail for a court "to conclude that those isolated words or phrases that might not be redacted for release would be meaningless." *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005). "If the rule were otherwise, courts would be required to parse emails, letters and general conversations on a statement-by-statement basis to determine which sentences or even clauses were protected and which were not. This would only increase the costs and lengthen the delays in litigation even beyond what they are today." *Kimberly-Clark Worldwide Inc. v. First Quality Baby Prod. LLC*, 2015 WL 13022282, at *3 (E.D. Wis. Apr. 9, 2015).

As a general matter, the DOL's *Vaughn* Index and attendant affidavits provide a sufficiently "detailed justification" for the DOL's position that it has released all non-segregable materials contained in the Powers email, or that release of stray material would be meaningless. The DOL bolsters its assertion that "[s]egregability is not applicable to the redacted portions" with an in-depth explanation for withholding the information in its entirety. *See* Smyth Decl. at 10–12, ¶¶ 27–31; *Vaughn* Index. The DOL details the precise rationale supporting FOIA Exemption 4's application to the Powers email. *See id.* The *Vaughn* Index first explains that the Powers email is "commercial" or "financial" because it "concern[s] the status of operations

issues in connection with the WPS Program contract," "the submitter of the information has a commercial interest in" the Powers email, and the Powers email "relate[s] to business or trade within the ordinary meanings of those terms." *Vaughn* Index. Finally, the *Vaughn* Index explains that the Powers email is privileged because it was "transmitted to an in-house attorney for [DynCorp] in order to apprise him of developments potentially impacting the contract," "explicitly request[ed] the attorney's input and review of the information transmitted," and was "clearly marked 'Subject to Attorney Client Privilege.'" *Vaughn* Index.

The specific materials that Mr. Jordan seeks—any statement by a DynCorp employee "that constituted an express request for legal advice" and the notation "Subject to Attorney–Client Privilege," Compl. ¶ 7—were justifiably not produced. The first category is, by its very nature, not segregable. Any "express requests for legal advice" made by DynCorp employees to DynCorp's lawyer would themselves be privileged *because they were express requests for legal advice*. *See FTC v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 30 (D.D.C. 2016) (suggesting that "express requests for or provision of legal advice" are prototypically privileged); *see also P.&B. Marina, Ltd. v. Logrande*, 136 F.R.D. 50, 53 (E.D.N.Y. 1991), *aff'd sub nom. P&B Marina Ltd. v. LoGrande*, 983 F.2d 1047 (2d Cir. 1992) (noting that attorney–client privilege "protects communications that . . . [are] express requests for legal advice").

And, assuming without deciding that it was not itself privileged, the DOL properly withheld the notation "Subject to Attorney–Client Privilege." Beyond bolstering Defendant's claim that it shows the communications were privileged, the sentence "Subject to Attorney Client Privilege" is "an isolated . . . phrase[] . . . [of which] release would be meaningless." *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005). Mr. Jordan's request for the emails with this notation unredacted is transparently not an attempt to ascertain "what [his]

government is up to," *see Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004), but is instead a fishing expedition with which he hopes to catch the government red-handed. Stated differently, after he was presented with sworn evidence that the documents contained the notation, he responded: "prove it." But the government's affiant is entitled to a presumption of good faith. *See SafeCard Servs., Inc.*, 926 F.2d at 1200. Without any evidence rebutting that presumption, the Court would have no reason to question that the privilege notation alone—which, by Mr. Jordan's own logic sheds no light on the substantive contents of the privileged conversation—is a boilerplate, "isolated" phrase in an otherwise-privileged document, of which "release would be meaningless." *See Nat'l Sec. Archive Fund, Inc.*, 402 F. Supp. 2d at 221. Indeed, the Court's in camera review confirms this to be the case. Regardless, the Court will not adopt a rule that requires agencies "to parse [privileged] emails, letters and general conversations on a statement-by-statement basis to determine which sentences or even clauses were protected and which were not" when there is no indication that the clauses have any substantive meaning. *See Kimberly-Clark Worldwide Inc.*, 2015 WL 13022282, at *3.

Taken together, the DOL "supplied a 'relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlate[ed] those claims with the particular part of [the] withheld document," and demonstrated that the release of certain portions would be meaningless. *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 90 (D.D.C. 2003) (quoting *Schiller*, 964 F.2d at 1210); *Nat'l Sec. Archive Fund, Inc.*, 402 F. Supp. 2d at 221. This justification is not "conclusory" or "vague" and represents the DOL's good faith effort to segregate privileged and non-privileged information. The DOL reviewed the DynCorp email chain, found the Powers email privileged, redacted that privileged information and disclosed all other information—except the Huber email, which will be subject to further litigation—to Mr.

Jordan. Def.'s Cross-Mot., Ex. 1, Attach. E. This precise segregation, coupled with the DOL's *Vaughn* Index, indicated to the Court that the DOL provided all meaningful, reasonably segregable information to Mr. Jordan. The Court's in camera review confirmed the DOL's justifications with respect to the Powers email. Because the DOL "show[ed] with reasonable specificity why material could not be segregated," the DOL has "[met] its burden under FOIA." *Billington v. U.S. Dep't of Justice*, 301 F. Supp. 2d 15, 24 (D.D.C. 2004) (citing *Armstrong v. Executive Office of the President*, 97 F.3d 575, 579 (D.C. Cir. 1996)).

D. Defendant Satisfactorily Responded to Request No. 819736

In Request No. 819736, submitted on July 5, 2016, Mr. Jordan sought (1) documentation evidencing or providing a factual or legal basis for "the unredacted versions of the [DynCorp] emails" being placed under seal and (2) "documentation submitted to the ALJ" opposing FOIA Request No. 806591. *See* Def.'s Cross-Mot., Ex. 1, Attach. F at 35, ECF No. 20-1. Mr. Jordan asserts that the DOL "failed to respond at all" to Request No. 819736 and that this failure to respond means that the DOL must disclose the documents at issue. *See* Pl.'s Corrected Mot. Summ. J. at 23, ECF No. 16. Furthermore, Mr. Jordan alleges that the "DOJ failed to cite any evidence establishing that the DOL actually did respond at all . . . to the July 5 [r]equest in any manner that could constitute a response under FOIA . . . ." Pl.'s Reply at 8, ECF No. 30. Mr. Jordan asserts that this failure to respond necessitates the full disclosure of the documents covered by Request No. 819736. Pl.'s Mot. Summ. J. at 23–24.

FOIA requires an agency to respond to a FOIA request within 20 business days. 5 U.S.C. § 552(a)(6)(A)(i); Pl.'s Corrected Mot. Summ. J. at 23. In the context of a federal court case, if the agency has, "however belatedly, released all nonexempt material" the court has "no further judicial function to perform under the FOIA." *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir.

* * *

The Court appreciates zealous advocacy. But Mr. Jordan's arguments for sanctions under Rule 11—most of which call directly into question the integrity of opposing counsel—are baseless, if not frivolous themselves. The Court notes that Mr. Jordan is a lawyer and an active member of the New York bar. *See* New York State Unified Court System, *Attorney Detail: Jack R.T. Jordan*, https://iapps.courts.state.ny.us/attorney/AttorneyDetails?attorneyId=5519085. The Court reminds Mr. Jordan that "Rule 11 is not a toy." *Draper & Kramer, Inc. v. Baskin-Robbins, Inc.*, 690 F. Supp. 728, 732 (N.D. Ill. 1988). Sanctioning the conduct of a litigant is a solemn endeavor. "[A]n accusation of such wrongdoing is equally serious." *Id.* The Court admonishes Mr. Jordan to "think twice" before moving for sanctions in the future. *See id.* Mr. Jordan's cavalier approach to sanctions motions could result in him being sanctioned himself. *See id.* (imposing sanctions, *sua sponte*, on a party for baselessly invoking Rule 11 in its unsuccessful merits motion).

VI. CONCLUSION

For the foregoing reasons, the Court denies Mr. Jordan's Corrected Motion for Summary Judgment and grants the DOL's Cross-Motion for Summary Judgment except as it relates to the Huber email described above. Additionally, the Court grants Plaintiff's Unopposed Motion to Amend the Complaint, denies Mr. Jordan's First Motion for Sanctions Under Rule 11, Motion to Compel Depositions of Smyth and Johnson, Motion to Strike Smyth's Declaration, Motion to Compel Production of Evidence Regarding Smyth Declaration, Motion to Strike Prohibited Ex Parte communication and Vacate October 26 Minute Order, Second Motion for Sanctions Under

Rule 11, and Motion Regarding the APA as Basis for Decisions. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: August 4, 2017

RUDOLPH CONTRERAS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACK JORDAN,	:		
	:		
Plaintiff,	:	Civil Action No.:	16-1868 (RC)
	:		
v.	:	Re Document No.:	40, 41, 43, 50, 55
	:		
U.S. DEPARTMENT OF LABOR,	:		
	:		
Defendant.	:		

MEMORANDUM OPINION

DENYING PLAINTIFF'S "MOTION TO DISQUALIFY JUDGE CONTRERAS"; DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME; DENYING PLAINTIFF'S "MOTION FOR DISCLOSURE AND INCLUSION OF PORTIONS OF THE EMAILS AND OTHER NON-PRIVILEGED EX PARTE COMMUNICATIONS"; DENYING DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT; DENYING WITHOUT PREJUDICE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

In this Freedom of Information Act ("FOIA") case, Plaintiff Jack Jordan submitted requests with the Office of Administrative Law Judges ("OALJ"), an agency within the United States Department of Labor ("DOL"), seeking unredacted versions of two emails related to Defense Base Act Case No. 2015–LDA–00030 ("DBA Proceedings"), a case in which Mr. Jordan is representing his wife, Maria Jordan, against DynCorp International, Inc. ("DynCorp"). In a prior Opinion, this Court granted summary judgment in favor of DOL with respect to one of the emails. However, finding that DOL had insufficiently justified its withholding of the other email, the Court denied both parties' motions for summary judgment with respect to that email and instructed DOL to either release it or to file a renewed motion for summary judgment with further justification. Now before the Court is DOL's renewed motion for summary judgment. Also before the Court are Mr. Jordan's "Motion for Disclosure and Inclusion of Portions of the

Emails and Other Non-Privileged Ex Parte Communications," Mr. Jordan's request that this judge recuse himself, Mr. Jordan's motion for reconsideration of an order granting DOL an extension of time to file a reply, and DOL's motion for a protective order barring Mr. Jordan from filing future motions without leave of Court and permitting DOL to disregard Mr. Jordan's requests for production. For the reasons explained below, the Court denies all five motions.

II. FACTUAL BACKGROUND

The Court presumes familiarity with its prior Opinion. *See Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214 (D.D.C. 2017). Accordingly, this Opinion will only briefly describe the facts and allegations that are particularly relevant to the pending motions.

Over a period of seven months, Plaintiff Jack Jordan submitted a series of FOIA requests to DOL, including a request seeking disclosure of any emails, dated July 30 or July 31, 2013, with the subject line "WPS—next steps & actions" that DynCorp's counsel had forwarded to Administrative Law Judge Larry S. Merck. *See Jordan*, 273 F. Supp. 3d at 219–20. DOL found that a string of five separate emails (the "DynCorp emails") fit the bill. *See id.* at 220–21. According to DOL, the DynCorp emails had been reviewed *in camera* by ALJ Merck, who determined that they contained privileged attorney–client communications. *See id.* at 221. DOL concluded that FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," 5 U.S.C. § 552(b)(4), applied to the unredacted version of the email chain and declined to release it. *Id.* at 221 (alteration in original).

However, DOL disclosed to Mr. Jordan a 2015 letter from the law firm Littler Mendelson, P.C.—which represented DynCorp in the DBA Proceedings—and a redacted version of the DynCorp email thread. *See Jordan*, 273 F. Supp. 3d at 221. The redacted version of the

DynCorp emails disclosed the full contents of three emails in the five-email chain, but revealed only the sender, recipients, date, and subject line of the other two emails. *See id.* at 221. Of the two partially redacted emails, the chronologically first email ("the Powers email") spans roughly three pages, and the second ("the Huber email") spans roughly half a page. *See id.*

The letter from Littler Mendelson stated that it had submitted to ALJ Merck unredacted versions of the emails for *in camera* inspection. Def.'s Cross–Mot. Summ. J. and Opp'n to Pl.'s Corrected Mot. for Summ. J. ("Def.'s Cross–Mot."), Ex. 1, Attach. D at 25, ECF No. 20–1. In the letter, Littler Mendelson maintained that the redacted portions of the email thread "concerned the status of operations issues in connection with the Worldwide Protective Services ('WPS') Program contract, which were transmitted to Christopher Bellomy, Esq.—an in-house lawyer for [DynCorp]—in order to apprise him (and other DI employees with responsibility for the administration and management of the WPS Program contract) of developments potentially impacting the contract." *Id.* Littler Mendelson explained that one redacted email in the chain included the notation "Subject to Attorney Client Privilege." *Id.* Littler Mendelson asserted that the emails "were intended to be, and should remain, privileged among the select group of employees who received the at-issue communication." *Id.*

Mr. Jordan later submitted additional requests related to the Powers and Huber emails. *See Jordan*, 273 F. Supp. 3d at 222–23. Specifically, Mr. Jordan sought documentation in the OALJ's records justifying the decision to withhold the unredacted emails; any documents submitted to OALJ opposing release of records responsive to Mr. Jordan's FOIA request; and any segregable portions of the Powers and Huber emails, including the notation "Subject to Attorney Client Privilege" and any language that constituted an express request for legal advice. *See id.* Mr. Jordan also contended that, for myriad reasons, DynCorp had waived any claim to

privilege. *See id.* at 223. Chief ALJ Stephen R. Henley denied Mr. Jordan's request for purportedly segregable portions of the Powers and Huber emails, reiterating ALJ Merck's ruling that the redacted portions of the DynCorp emails are covered by attorney–client privilege and agreeing with DOL that FOIA Exemption 4 applied to the unredacted version of the email chain. *See id.*

Mr. Jordan commenced this litigation in September 2016. *See* Compl., ECF No. 1. In his complaint, Mr. Jordan sought "[i]njunctive relief ordering the DOL to disclose to [Mr. Jordan] all previously undisclosed versions of the [DynCorp] [e]mails covered by [his request]" and "[j]udgment for reasonable attorneys' fees, if any, expenses, and costs." Compl. at 10–11; Pl.'s Unopposed Mot. Leave Amend Compl., ECF No. 19. Mr. Jordan and DOL each moved for summary judgment, with the primary dispute being whether FOIA Exemption 4 applied to the Powers and Huber emails.[1] *See Jordan*, 273 F. Supp. 3d at 224.

Following *in camera* inspection of the disputed emails, the Court denied in full Mr. Jordan's Corrected Motion for Summary Judgment and granted the DOL's Cross–Motion for Summary Judgment, except with respect to the Huber email. *Id.* at 226–27. The Court concluded that DOL had "describe[d] the DynCorp emails in a detailed manner" and that there was "nothing in the record to question the presumption of good faith that the Court affords the DOL in its explanation." *Id.* at 232. In assessing whether FOIA Exemption 4 applies to the emails, the Court considered whether (1) the information at issue is "commercial or financial," (2) whether the information was obtained from a person, and (3) whether the information was privileged or confidential. *Id.* at 229–30.

[1] The Court also resolved a litany of other motions that Mr. Jordan had filed. *See Jordan*, 273 F. Supp. 3d at 224–25, 239–46.

The Court found that both emails were "commercial" or "financial," concluding that DOL had sufficiently justified its contention that the emails pertained to the "status of operations issues in connection with a business contract." *Id.* at 230–31. The Court also determined that both emails were obtained from a person. *Id.* at 231. However, based on DOL's proffered justifications and the Court's *in camera* review, the Court concluded that only one email visibly qualified as privileged. *See id.* at 231–32. Specifically, the Court observed that the justifications for withholding are "much more applicable to the Powers email than they are to the Huber email." *Id.* at 232. The Court explained that the Powers email itself is labelled "subject to attorney–client privilege"; the Huber email is not. *Id.* Likewise, the Powers email contained an express request for legal advice, while the Huber email did not. *Id.* Finding that the Huber email did not necessarily meet the standard for attorney–client privilege—at least based on DOL's justifications—the Court instructed DOL to either release the Huber email or to provide further justification for withholding it. *Id.* In addition, the Court concluded, as relevant here, that DynCorp had not waived its claim to privilege, that DOL had provided all reasonably segregable portions of the Powers email, and that DOL had sufficiently responded to Mr. Jordan's requests for additional information about the DynCorp emails. *See id.* at 232–39.

Since the Court issued its August 4, 2017 Opinion, the parties have filed a number of motions. Mr. Jordan has filed (1) a "Motion for Disclosure and Inclusion of Portions of the Emails and Other Non-Privileged Ex Parte Communications" (ECF No. 40), (2) "Plaintiff's Motion to Reconsider DOL Motion for Extension of Time to File Reply Purporting to Support Summary Judgment" (ECF No. 50) and (3) a "Motion to Disqualify Judge Contreras" (ECF No. 55). DOL has filed (1) a Renewed Motion for Summary Judgment (ECF No. 41) and (2) a

that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," unless the parties waive the grounds for disqualification. Section 455(b) enumerates additional grounds under which a judge must recuse. One such reason is "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b)(1). To compel recusal under Section 455(a), "the moving party must demonstrate the court's reliance on an 'extrajudicial source' that creates an appearance of partiality or, in rare cases, where no extrajudicial source is involved, the movant must show a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 34 (D.D.C. 2000) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). "The standard for disqualification under § 455(a) is an objective one." *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001). "The question is whether a reasonable and informed observer would question the judge's impartiality." *Id.* To compel recusal under Section 455(b)(1), the moving party must "demonstrate actual bias or prejudice based upon an extrajudicial source." *Tripp*, 104 F. Supp. 2d at 34.

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* (quoting *Liteky*, 510 U.S. at 555). Likewise, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at

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in his motion do not satisfy the "exacting" standards of § 144. *See United States v. Haldeman*, 559 F.2d 31, 134–35 (D.C. Cir. 1976) (explaining that to satisfy § 144, allegations in an affidavit "must be definite as to time, place, persons, and circumstances" and may not be "merely of a conclusionary nature"). Accordingly, the Court does not assess Mr. Jordan's request under that standard.

Court by the parties, no error of apprehension, and no significant or controlling change in the law that might justify reconsideration of this Court's reasoned prior determinations. He has likewise failed to identify any other good reason for revisiting these arguments. Mr. Jordan apparently hopes to reargue factual and legal contentions that this Court has already rejected. He ignores, however that "[i]n this Circuit, it is well-established that 'motions for reconsideration,' whatever their procedural basis, cannot be used as 'an opportunity to reargue facts and theories upon which a court has already ruled." *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 10 (D.D.C. 2011) (quoting *Secs. & Exch. Comm'n v. Bilzerian*, 729 F. Supp. 2d 9, 14 (D.D.C. 2010)).

Though the Court will not revisit the fine details of its decision again here, it bears briefly explaining that Mr. Jordan appears to misapprehend the applicable legal burden in FOIA cases. Yes, the agency has the burden of proving the applicability of any claimed FOIA exemption. *See Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). But it need not marshal incontrovertible evidence to do so, as Mr. Jordan apparently supposes. Rather, to meet its burden, an agency must "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)). DOL has done so here. Accordingly, even if this Court were to reconsider the myriad aspects of its Opinion that Mr. Jordan contests, this Court's ruling would not change. To the extent that Mr. Jordan's motion requests reconsideration of aspects of this Court's prior Opinion, it is denied.

b. Motion for Disclosure

In addition to asking this Court to revisit aspects of its prior Opinion, Mr. Jordan asks the Court to disclose certain information. Specifically, Mr. Jordan requests (1) a version of the Powers email that shows any attorney-client privilege notation and any non-commercial words stating an express request for advice; (2) any non-public verbal or written communication in or with which the Court received any factual information about the redacted content of the emails or Mr. Bellomy's status as an attorney and whether he was employed in advising DynCorp; and (3) any non-commercial words in the DOL's communication with the Court in or with which the DOL submitted any version of the Powers email or the Huber email. Mr. Jordan contends that Federal Rule of Evidence 106, the District of Columbia Code of Judicial Conduct, and notions of fairness require this Court to disclose such information. The Court disagrees and denies Mr. Jordan's motion.

First, Mr. Jordan relies on Federal Rule of Evidence 106, which provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Rule 106 partially codifies the common law "rule of completeness," which holds that "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988); *see also* Advisory Comm. Notes on Fed. R. Evid. 106 (explaining that the Rule is based on the "misleading impression created by taking matters out of context" and on "the inadequacy of repair work when delayed to a point later in the trial"). Other Circuits have applied the rule of

completeness "when it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) (quoting *United States v. Lewis*, 641 F.3d 773, 785 (7th Cir. 2011)); *see also United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007); *United States v. Hoffecker*, 530 F.3d 137, 192 (3d Cir. 2008). "The application of the rule of completeness is a matter for the trial judge's discretion." *United States v. Washington*, 12 F.3d 1128, 1137 (D.C. Cir. 1994).

It is abundantly clear that neither Federal Rule of Evidence 106 nor general notions of fairness require a government agency or a court to release to a FOIA requester portions of a partially released record that the agency contends are protected by a FOIA exemption. The language of the FOIA statute establishes that portions of an agency record may be properly withheld even if other portions must be released. *See* 5 U.S.C. § 552(B) (instructing courts to "determine whether such [agency] records or *any part thereof* shall be withheld under any of the exemptions set forth in subsection (b) of this section"). Indeed, the application of Rule of Evidence 106 that Mr. Jordan requests would wholly undermine the purpose of these proceedings—which is to assess whether DOL has properly withheld, in whole or in part, any disputed records. Furthermore, the D.C. Circuit has rejected similar "fairness" arguments for disclosure of redacted portions of partially released records. In *Public Citizen v. Department of State*, 11 F.3d 198, 201 (D.C. Cir. 1993), for example, the Circuit rejected "contentions that it is unfair, or not in keeping with FOIA's intent, to permit [an agency] to make self-serving partial disclosures of classified information," explaining that such an argument is "properly addressed to Congress, not to this court." *Id.* at 204. And, in *Williams & Connolly v. SEC*, 662 F.3d 1240 (D.C. Cir. 2011), the Circuit rejected an argument that because the Department of Justice had

released 11 of 114 sets of notes during criminal proceedings, the Department was required to release the remaining notes during subsequent FOIA proceedings that sought documents related to the criminal proceedings. *Id.* at 1244–45. Among other things, the Circuit explained that upholding the FOIA requester's waiver theory would "impinge on executive discretion and [would] deter agencies from voluntarily honoring FOIA requests." *Id.* 1245. These same concerns appear under the circumstances of this case. Federal Rule of Evidence 106 and fairness considerations do not mandate release of the purportedly exempted portions of the partially released email thread.

Second, Mr. Jordan argues that under various provisions of the Code of Judicial Conduct of the District of Columbia, "the [disputed] Emails were received by the Court in an *ex parte* communication that was prohibited" and, thus, the emails—or, at least portions of the emails—must be released to him. Mot. for Disclosure at 33–43. As an initial matter, the Code of Judicial Conduct of the District of Columbia applies to the local courts of the District of Columbia, not to federal courts located in the District of Columbia. *See* J. Comm. on Judicial Admin. Res., D.C. Courts (Feb. 15, 2018) (adopting "the 2018 Edition of the Code of Judicial Conduct for the District of Columbia Courts"); J. Comm. on Judicial Admin. Res., D.C. Courts (Nov. 15, 2011) (adopting an amended version of the 2007 American Bar Association Model Code of Judicial Conduct as the "Code of Judicial Conduct for the District of Columbia Courts"); *see also* Application, Code of Judicial Conduct, D.C. Courts, https://www.dccourts.gov/sites/default/files/divisionspdfs/Code-of-Judicial-Conduct_2018.pdf. Thus, this Court will instead look to the Code of Conduct for United States Judges, which applies to federal court judges, to assess Mr. Jordan's arguments. In pertinent part, Canon 3 of the Code of Conduct for United States Judges states that "[e]xcept as set out below, a judge should not

initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Canon 3(A)(4), Code of Judicial Conduct for United States Judges. The provision goes on to state that "[a] judge may initiate, permit, or consider ex parte communications as authorized by law." *Id.* As the Court explained in detail above, courts are plainly authorized to view and inspect disputed documents *in camera* in FOIA cases. *See* 5 U.S.C. § 552 ("In such a case the court . . . may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions."). Furthermore, the decision whether to review documents *in camera* is left to "the broad discretion of the trial judge." *American Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 626 (D.C. Cir. 2011). Because the law plainly authorized *in camera* review of the disputed documents at the heart of this case, the Code of Judicial Conduct for United States Judges certainly does not obligate this Court to release any portion of the disputed documents to Mr. Jordan. Accordingly, Mr. Jordan's motion is denied.

B. Motions Filed by DOL

The Court next considers the two pending motions filed by DOL: (1) a renewed motion for summary judgment, which asserts that the Huber email is properly withheld pursuant to FOIA Exemption 4, and (2) a motion for a protective order. For the reasons explained below, the Court denies both motions.

1. Renewed Motion for Summary Judgment

DOL renews its request for summary judgment with respect to the Huber email, arguing once again that FOIA Exemption 4 exempts that document from disclosure.[6] Def.'s MSJ Mem. at 6–13. Mr. Jordan disagrees, asserting that (1) DOL has failed to show the absence of any genuine dispute of material fact, (2) DOL "relied on false and misleading factual contentions" in its renewed motion, (3) FOIA Exemption 4 does not trump an agency's duty to disclose information under the APA, (4) DOL failed to timely determine whether this email was properly withheld, (5) DOL cannot carry its burden of showing that Exemption 4 applies, (6) the Court must disclose the emails received as a result of ex parte communications, (7) a declaration submitted by Mr. Huber in support of DOL's motion should not be given credence, and (8) DOL has failed to establish that it had released reasonably segregable information from the Huber email. Pl.'s Opp'n to DOL's Renewed Mot. for Summ. J. at 6–37, ECF No. 46. Because the Court finds that the attorney–client privilege does not protect the Huber email, DOL's renewed motion for summary judgment is denied.[7]

As the Court explained in its prior Opinion, FOIA Exemption 4 exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential"

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[6] DOL also argues that this Court should not permit Mr. Jordan to use a FOIA lawsuit as an end-run around the Office of Administrative Law Judges' determination that the disputed documents were protected by privilege. *See* Def.'s MSJ Mem. at 3 n.1. Though this Court is sympathetic to DOL's position, DOL has failed to provide a legal basis to avoid such a situation. For example, DOL has not argued—and certainly has not demonstrated—that collateral estoppel applies to any determination made by the ALJ. Likewise, DOL has failed to provide any authority supporting the proposition that the Court can ignore the requirements of FOIA based on such equitable considerations.

[7] Because the Court finds that the attorney–client privilege does not protect the Huber email, the Court does not address Mr. Jordan's other arguments for release of that record. Moreover, the Court does not address arguments for reconsideration of the Court's prior Opinion that appear in Mr. Jordan's opposition to DOL's motion for summary judgment. As the Court explained in detail above, Mr. Jordan has not shown that reconsideration is warranted.

matters from disclosure. 5 U.S.C. § 552(b)(4). In non-trade secret cases, the "agency must establish that the withheld records are '(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.'" *Pub. Citizen v. Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 98 (D.D.C. 2013) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F. 2d 1280, 1290 (D.C. Cir. 1983)). In this Court's prior Opinion, it determined that the information in the Huber email is "commercial" or "financial" and that the information in question was obtained from a person. *See Jordan*, 273 F. Supp. 3d at 230–31. The Court advised, however, that it "require[d] further briefing focusing specifically on the DOL's justification to withhold the Huber email." Specifically, the matter of whether the Huber email contains privileged or confidential information remains.

DOL's renewed motion for summary judgment argues that information in the Huber email is protected by attorney–client privilege because "the Huber email was specifically conveyed to DynCorp's in-house attorney, Mr. Bellomy, for his review so that he would be able to form a legal basis for advising on and advocating for DynCorp's position regarding the business contract." Def.'s MSJ Mem. at 8. DOL includes a declaration from Mr. Huber. *See* Decl. of Robert A. Huber ("Huber Decl."), ECF No. 41-1. That declaration explains that Mr. Huber worked as Senior Contracts Director for DynCorp at the time of the email exchange. *Id.* ¶ 2. According to Mr. Huber, the DynCorp emails pertained to a situation in which the State Department had "short paid invoices [DynCorp] submitted for processing." *Id.* ¶ 3. Mr. Huber asserts that he copied Mr. Bellomy on the Huber email, which was specifically addressed to Darin Powers, "purposefully" to "keep [Mr. Bellomy] apprised of the [company's] ongoing discussions as they related to the short paid invoices." *Id.* ¶ 4. Mr. Huber contends that he knew from his experience at the company that "[DynCorp's] in-house lawyers would be involved in

any potential claims process with the State Department and, therefore, Mr. Bellomy needed to have a complete understanding of the facts underlying any future claim in order to form a legal basis for advocating [DynCorp's] position with the State Department." *Id.*

The Court disagrees with DOL and concludes that the Huber email is not protected by attorney–client privilege. As the Court explained in its prior Opinion, attorney–client privilege protects "confidential disclosures between an attorney and [its] client regarding factual and legal matters." *Jordan*, 273 F. Supp. 3d at 231 (citing *Fisher v. United States*, 425 U.S. 391, 403 (1976)). But, "the mere fact that an attorney is listed as a recipient . . . does not make a document protected under [attorney–client] privilege." *Jordan*, 273 F. Supp. 3d at 231 (quoting *Vento v. IRS*, 714 F. Supp. 2d 137, 151 (D.D.C. 2010)); *see also Neuder v. Battelle Pacific Nw. Nat'l Lab.*, 194 F.R.D. 289, 293 (D.D.C. 2000) ("[A] corporate client should not be allowed to conceal a fact by disclosing it to the corporate attorney."). Rather, as the D.C. Circuit explained in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), "the privilege applies to a confidential communication between an attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *Id.* at 757. The Circuit has clarified that the proper inquiry for district courts is "[w]as obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 760. Importantly, "the attorney–client privilege 'exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 757 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981)). Equally important, though, is the fact that the D.C. Circuit has emphasized that the "attorney-client privilege must be strictly confined

within the narrowest possible limits consistent with the logic of its principle." *In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) (quoting *In re Sealed Case*, 676 F.2d 793, 807 n.44).

Here, DOL seems to argue that the Huber email qualifies for protection under the attorney–client privilege because it was sent as part of DynCorp's broader efforts to address a legal issue and because it was sent to an in-house attorney to provide him "with a complete understanding of the facts relevant to the matter that was being discussed in the email." Def.'s MSJ Mem. at 10. The Court disagrees and concludes that, contrary to DOL's contentions, the Huber email is not protected by attorney–client privilege and must be produced.[8]

Several factors buttress this conclusion. First, it is difficult to say, under the circumstances of this case, that one of the primary purposes of the Huber email was to obtain legal advice. The email is specifically directed to another person—a non-attorney—and the email specifically (and only) seeks information from that person. It is not at all apparent from DOL's submissions how Mr. Huber's request that Mr. Powers provide certain information might in any way shape Mr. Bellomy's legal advice on the business contract or any other legal matter. DOL's contention that some broader legal problem existed in the background is insufficient to

[8] Although Mr. Jordan did not move for summary judgment, the Court concludes that *sua sponte* entry of summary judgment in his favor with regard to the Huber email is warranted. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that [it] had to come forward with all of [its] evidence." *Bayala v. U.S. Dep't of Homeland Security*, 264 F. Supp. 3d 165, 177 (D.D.C. 2017) (first alteration in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). Here, DOL has apparently brought forward all of the evidence that it has. Indeed, DOL has had two opportunities to convince this Court that the disputed document is covered by a FOIA exemption. Having rejected DOL's arguments, no issues remain for this Court to resolve. *See Shipman v. Nat'll R.R. Passenger Corp.*, 76 F. Supp. 3d 173, 181–84 (D.D.C. 2014) (concluding that an agency's claimed FOIA exemptions did not apply and granting *sua sponte* summary judgment in favor of the FOIA requestor). Accordingly, the Court orders DOL to release the Huber email to Mr. Jordan.

connect this specific communication to that legal problem or to any prospective legal problem.[9] Second and relatedly, the Huber email does not appear to contain any factual information on which Mr. Bellomy might rely to form a legal judgment. Rather, it appears to contain a discrete request—directed to one person—that exposes little to nothing about the factual circumstances underlying the problem of the "short paid invoices" or any other legal issue. Third, protection of this document does little to promote the purpose of the attorney–client privilege, which is "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administrative of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*, 449 U.S. at 389). Fourth, the Huber email's topic and distribution list appears to be nearly identical to that of the final email in the chain, which was not withheld on the basis of attorney–client privilege. The only difference between the two emails is that the Huber email was copied to an attorney while the final email in the chain was not. As set forth above, simply copying an attorney on a communication does not make that communication privileged. In sum, DOL's arguments that the attorney–client privilege applies to the Huber email are unavailing. DOL's renewed motion for summary judgment is denied, and DOL is ordered to release the Huber email.

[9] DOL argues that Mr. Huber copied in-house attorney Mr. Bellomy on the email to keep him apprised of business communications because, *if* a legal dispute arose, Mr. Bellomy would need to "have a complete understanding of the facts underlying any future claim in order to form a legal basis for advocating [DynCorp's] position." Def.'s MSJ Mem. at 8–9 (quoting Huber Decl. ¶ 4). But this concept is virtually limitless—nearly all business communications have some vague connection to a possible, future legal dispute. Sending all business-related communications to an attorney does not render those communications protected under attorney–client privilege.

In assessing whether a protective order is appropriate and—if so, how to limit the conditions, time, place, or topics of discovery—the Court is to "undertake an individualized balancing of the many interests that may be present in a particular case." *Id.* (quoting *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898 (D.C. Cir. 2006)).

Defendant has neglected to satisfy one of the requirements for seeking a protective order. Namely, Defendant has not "include[d] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action," as Rule 26 requires. Fed. R. Civ. P. 26(c). Defendant attached along with its motion, a series of email communications between counsel. But none of these communications involve any attempt to narrow the focus of any discovery request or any request that Mr. Jordan cease filing further motions. *See* Def.'s Ex. 2, ECF No. 42-2. Because certification of either good faith or attempts to confer is mandatory, the Court denies Defendant's motion without prejudice. However, Defendant may submit a renewed motion for a protective order, if it wishes and if warranted, that satisfies the requirements of Rule 26(c). But regardless, given that this Court has now ruled on the appropriateness of DOL's withholding pursuant to FOIA of the only two emails at issue in this case, this case is near completion and the necessity for a protective order is—this Court hopes—greatly diminished.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Mr. Jordan's "Motion for Disclosure and Inclusion of Portions of the Emails and Other Non-Privileged Ex Parte Communications," Mr. Jordan's request that this judge disqualify himself, Mr. Jordan's motion for reconsideration of an order granting DOL an extension of time to file a reply, DOL's renewed motion for summary judgment, and DOL's motion for a protective order. DOL must release to Mr. Jordan an

unredacted version of the Huber email. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: March 30, 2018

RUDOLPH CONTRERAS
United States District Judge

1. The U.S. Constitution, Article III, in relevant part, provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.1

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

2. The U.S. Constitution, Article VI, in relevant part, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

3. The U.S. Constitution, Amendment I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4. The U.S. Constitution, Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. The U.S. Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

6. 5 U.S.C. 552(a)(4)(B) provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

7. 5 U.S.C. 702 (Right of review) in pertinent part provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

8. 5 U.S.C. 703 (Form and venue of proceeding) provides:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is

provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

9. 5 U.S.C. 704 (Actions reviewable) provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

10. 5 U.S.C. 706 (Scope of review) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Huber, Robert A.

From: Huber, Robert A.
Sent: Wednesday, July 31, 2013 8:46 AM
To: Powers, Darin
Cc: Imbrie, William; Cox, Brian J; Mitchell, Aubrey
Subject: RE: WPS next steps & actions

Good! Now we need to focus on what Will needs in the way of "facts" to support his meeting. He and I and Brian will be talking...

Bob Huber
Contracts Sr Director,
DynLogistics
DynCorp, International
571 722 0206
robert.huber@dyn-intl.com

From: Powers, Darin
Sent: Wednesday, July 31, 2013 8:42 AM
To: Imbrie, William
Cc: Huber, Robert A.
Subject: Re: WPS - next steps & actions

Yes we are in agreement, the issues are in the outline I presented below.
Darin

Darin Powers
Vice President, Intelligence & Security
DynCorp International LLC

On Jul 31, 2013, at 8:21, "Imbrie, William" <William.Imbrie@dyn-intl.com> wrote:

> Bob,
>
> I will come down later today and talk. I think Darin and I are in agreement.
>
> will
>
> **From:** Huber, Robert A.
> **Sent:** Wednesday, July 31, 2013 8:20 AM
> **To:** Powers, Darin
> **Cc:** Imbrie, William; Huelsbeck, Martha; Cox, Brian J; Bellomy, Christopher; Mitchell, Aubrey
> **Subject:** RE: WPS - next steps & actions
>
> Darin,

Any chance you could talk to Will and get some insight on the specific issues he thinks he'd like to talk to the CoS about...and also the kind of "facts" he would like to have to get ready (e.g. stacks of e-mails, position papers, Power Point charts, etc)?

Bob Huber
Contracts Sr. Director,
DynLogistics
DynCorp, International
571 722 0206
robert.huber@dyn-intl.com

From: Powers, Darin
Sent: Tuesday, July 30, 2013 5:39 PM
To: Cox, Brian J; Huber, Robert A.; Bellomy, Christopher
Cc: Imbrie, William; Huelsbeck, Martha
Subject: WPS - next steps & actions

Redacted

Redacted

Redacted