United States Court of Appeals
For the Eighth Circuit

No. 20-2430

Robert Campo

Plaintiff – Appellant

v.

U.S. Department of Justice

Defendant – Appellee

No. 20-2439

Ferissa Talley

Plaintiff – Appellant

v.

U.S. Department of Labor

Defendant – Appellee

No. 20-2494

Ferissa Talley

Plaintiff

App. 2

Jack R. T. Jordan

Contemnor – Appellant

v.

U.S. Department of Labor

Defendant – Appellee

Appeals from United States District Court
for the Western District of Missouri – Kansas City

Submitted: June 17, 2021
Filed: July 30, 2021
[Unpublished]

Before GRUENDER, BENTON, and STRAS, Circuit Judges.

PER CURIAM.

For quite a while, Jack Jordan has been trying to get various emails that the United States government has in its possession. Rather than suing on his own behalf, as he did previously, he now represents others who seek them. Each of the cases ended at summary judgment, and the district court[1] imposed sanctions in one based on Jordan's litigation abuses. We affirm.

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[1] The Honorable Beth Phillips, Chief Judge, United States District Court for the Western District of Missouri, and the Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

First, we agree with the district court that no genuine issue of material fact remained for trial. *See* 8th Cir. R. 47B; *Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) ("We review a grant of summary judgment de novo."). In each case, the United States fully complied with the Freedom of Information Act, *see* 5 U.S.C. § 552, and in one of them, res judicata provided an alternative basis for summary judgment.

Second, the district court had good reason to sanction Jordan for his abusive conduct, including by imposing $1,500 in fines, setting filing restrictions, and alerting the bar disciplinary authorities to his behavior. The court had the power to take these actions, *see, e.g.,* Fed R. Civ. P. 11(c); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46, 50 (1991), which did not violate his First or Fifth Amendment rights, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071–74 (1991); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983); Coonts v. Potts, 316 F.3d 745, 753 (8th Cir. 2003).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ROBERT CAMPO, Plaintiff, vs. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 19-00905-CV-W-ODS (DATE: Jul. 13, 2020)

ORDER AND OPINION (1) DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND (2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pending are Plaintiff Robert Campo's Motion for Judgment on the Pleadings (Doc. #13), and Defendant United States Department of Justice's Motion for Summary Judgment (Doc. #24). For the following reasons, the Court denies Plaintiff's Motion for Judgment on the Pleadings and grants Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. Campo's FOIA Request

In February 2019, Plaintiff Robert Campo submitted a Freedom of Information Act ("FOIA") request to Defendant United States Department of

Justice ("DOJ"). Doc. #24-1, at 2, 8.[1] His FOIA request referred to the following:

> [E]mails sent by Darin Powers on July 30, 2013 with the subject "WPS – next steps & actions" ("**Powers' emails**") that were included in three cases involving attorneys employed by the U.S. Department of Justice ("**DOJ**"): *Jordan v. U.S. Dep't of Labor*, (D.D.C. No. 1:16-cv-0868-RC) (and . . . appeal to the D.C. Circuit No. 18-5128); *Jordan v. U.S. Dep't of Justice*, (D.D.C. No. 17-cv-02702-RC); *Jordan v. U.S. Dep't of Labor*, (WDMO No. 5:18-cv-05129-ODS).

Doc. #24-1, at 2, 8 (emphasis in original). Campo asked DOJ to "promptly email . . . an electronic (PDF) copy of any record maintained by the DOJ that satisfies the following criteria: a copy of Powers' emails in any form that was transmitted to or from any DOJ employee by any person at any time in or after June 2016 along with any record establishing the date or manner of such transmission." *Id.* at 8.

On February 27, 2019, DOJ, through its component Executive Office for United States Attorneys (EOUSA), advised Campo that it had received his FOIA request. Doc. #24-1, at 2, 9. DOJ also informed Campo of the following:

> You have requested records concerning a third party (or third parties). Records pertaining to

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[1] Page references are taken from the pagination ECF applies to filings, not the parties' pagination.

> a third party generally cannot be released absent express authorization and consent of the third party, proof that the subject of your request is deceased, or a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records. Since you have not furnished a release, death certificate, or public justification for release, the release of records concerning a third party would result in an unwarranted invasion of personal privacy and would be in violation of the Privacy Act, 5 U.S.C.§ 552a. These records are also generally exempt from disclosure pursuant to sections (b)(6) and (b)(7)(C) of the Freedom of Information Act, 5 U.S.C. § 552.

Doc. #24, at 2; Doc. #24-1, at 2-3, 9; Doc. #27, at 6. Campo appealed the decision. DOJ affirmed the original decision:

> To the extent that non-public responsive records exist, disclosure of such records concerning a third-party individual would constitute a clearly unwarranted invasion of personal privacy, and could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(6), (7)(C). Further, it is reasonably foreseeable that releasing any non-public records, to the extent such records exist, would harm the interests protected by these exemptions. Because any non-public records responsive to your client's request would be categorically exempt from disclosure, EOUSA properly asserted these

> exemptions and was not required to conduct a search for the requested records.

Doc. #24, at 2; Doc. #24-1, at 3, 10-11; Doc. #27, at 6. DOJ has no record of receiving a third-party authorization from Campo. Doc. #24-1, at 3. Campo admits he "never provided DOJ with any third-party release or death certificates." Doc. #27, at 6.

B. The Powers Email

Before addressing this lawsuit and the pending motions, the Court must provide background information about the Powers email and briefly discuss the administrative and judicial proceedings that have addressed the Powers email.

(1) Maria Jordan's DBA Claim

In September 2012, Maria Jordan was injured while employed by DynCorp International, Inc. ("DynCorp") at the United States Consulate in Erbil, Iraq. Doc. #24, at 3; Doc. #27, at 8. Maria Jordan, represented by her husband, Jack Jordan (who is also Campo's counsel), filed a claim under the Defense Base Act ("DBA"), which provides coverage for injuries sustained by certain employees working on military bases and embassies outside the United States. Doc. #24, at 3-4; Doc. #27, at 8.

During discovery in the administrative proceeding, a dispute arose regarding the discoverability of the Powers email. Doc. #24, at 4; Doc. #27, at 8. DynCorp

resisted production of the Powers email, arguing it was protected by the attorney-client privilege. *Id.* In October 2015, DynCorp submitted the Powers email to the administrative law judge ("ALJ") for an *in camera* inspection. Doc. #24, at 4; Doc. #27, at 8. In February 2016, the ALJ issued an order finding the Powers email was privileged.

> [DynCorp]'s management-level employees expressly sought legal advice from [DynCorp]'s in-house counsel, and the statements themselves were confidential between the employees and the attorney at the time they were made. These emails were received by the in-house counsel and a select group of upper-level employees, and there has been no evidence submitted to this Court that these communications were not kept confidential.

Doc. #24, at 4; Doc. #24-2, at 35 (internal citations omitted); Doc. #27, at 9; *see also* Doc. #1, ¶ 12. Maria Jordan unsuccessfully appealed the ALJ's and BRB's decisions, which culminated in her petition for certiorari with the Supreme Court being denied. Doc. #24, at 4-5; Doc. #27, at 7; *Jordan v. Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 138 S. Ct. 1609 (Mem.) (2018).

(2) Jack Jordan's District of Columbia Lawsuit

Beginning in June 2016, Jack Jordan,[2] Maria Jordan's husband and Campo's counsel, submitted FOIA requests to the United States Department of Labor ("DOL") and DOJ related to, among other things, the Powers email. *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 220-24 (D.D.C. 2017). In September 2016, Jordan, proceeding pro se, filed a FOIA lawsuit against DOL in the United States District Court for the District of Columbia ("D.C. District Court") seeking "to compel" the Powers email and other emails "with the subject line: 'WPS – next steps & actions,' which were sent by and to members of management of DynCorp International, Inc." *Id.* at 219-20; *Jordan*, No. 16-CV-1868 (D.D.C. Sept. 19, 2016) (Doc. #1, ¶ 1).

In the D.C lawsuit, DOL was represented by attorneys employed by DOJ. DOL sought summary judgment on Jordan's claims and submitted the Powers email to the D.C. District Court for in camera review. In August 2017, after conducting an in camera review, the D.C. District Court determined DOL "properly withheld the unredacted version of the Powers email under FOIA Exemption 4 based on its attorney-client privilege nature." 273 F. Supp. 3d at 227. The Honorable Rudolph Contreras stated:

> The DOL's justification – as set forth in the Smyth Declaration and *Vaughn* Index and confirmed by the Court's in camera review –

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[2] For the remainder of this Order, the Court refers to Jack Jordan as Jordan.

> 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.

Id. at 232. "With respect to the Powers email, the [D.C. District] 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." *Id.*[3]

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[3] In November 2017, Jordan submitted two FOIA requests to DOJ. In December 2017, Jordan filed suit against DOJ in the D.C. District Court related to those requests. *Jordan v. Dep't of Justice*,

Jordan appealed the D.C. District Court's decision to the United States Court of Appeals for the District of Columbia ("D.C. Court of Appeals"). In October 2018, the D.C. Court of Appeals affirmed the D.C. District Court's decision:

> 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

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No. 17-CV-2702-RC (D.D.C.) (Doc. #1). During the lawsuit against DOJ, Jordan asked the D.C. District Court to release, among other things, the non-confidential information in the Powers email. In denying Jordan's request, the D.C. District Court noted Jordan's motion "retread[ed] grounds already covered" in the first FOIA lawsuit, and the Court previously rejected Jordan's arguments. *Jordan*, No. 17-CV-2702-RC (D.D.C. Oct. 11, 2018) (Doc. #33). Jordan's subsequently filed motions – including his Motion for Reconsideration, Motion for Relief from Judgment, Motion for Release of Evidence, Motion to Reconsider, and Motion to Compel – were denied. *Id.* (Docs. #43-44, 50, 63-64). In April 2020, the D.C. District Court entered a Minute Order, denying another motion for reconsideration filed by Jordan and warning "any additional pleadings . . . concerning the Powers and Huber e-mails may be met with sanctions and/or a referral to the State bar of which Mr. Jordan is a member." *Id.* (Apr. 1, 2020).

> 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).

Jordan v. U.S. Dep't of Labor, No. 18-5128, 2018 WL 5819393, *1 (D.C. Cir. Oct. 19, 2018). Jordan's ensuing Motion to Clarify Order, Motion Regarding Publication, and Petition for Reconsideration by the Panel or by the Full Court were denied in January 2019. No. 18-5128 (D.C. Cir. Jan. 24, 2019). Jordan then sought reconsideration of the order denying his motions. His motions were denied, and the Clerk was "directed to accept no further pleadings from appellant in this closed case." No. 18-5128 (D.C. Cir. Apr. 15, 2019).

After the D.C. Court of Appeals affirmed the D.C. District Court's decision, Jordan asked the D.C. District Court to set aside its ruling, which was affirmed by the appellate court, and hold the Powers email was not protected by attorney-client privilege. In July 2019, the D.C. District Court denied Jordan's motion, stating, among other things:

> 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.

331 F.R.D. 444, 54 (D.D.C. 2019).

Jordan again appealed and filed several motions with the D.C. Court of Appeals. *Jordan v. U.S. Dep't of Labor*, No. 19-5201 (D.C. Cir.). In January 2020, the D.C. Court of Appeals denied Jordan's Motion to Require the D.C. District Court to Include Powers' Email in the Record, Motion for Ruling, and Motion for Summary Disposition. No. 19-5201, 2020 WL 283003, at *1 (D.C. Cir. Jan. 16, 2020). The D.C. Court of Appeals also affirmed the D.C. District Court's decision denying Jordan's motion to set aside. *Id.* Jordan then filed his Motion to Reconsider and Reverse all Rulings, Motion to Recall Mandate, and Petition for Rehearing En Banc, which were all denied by the D.C. Court of Appeals. No. 19-5201 (D.C. Cir. Feb. 18, 2020, and Mar. 18, 2020). Again, the D.C. Court of Appeals directed the Clerk "to accept no further submissions from appellant in this closed case." *Id.* (D.C. Cir. Mar. 18, 2020).

(3) Jordan's Sarbanes-Oxley Matters

Also, in 2016, Jordan filed an action against DynCorp under the Sarbanes-Oxley Act of 2002. *Jordan v. DynCorp Int'l LLC*, 2016-SOX-00042 (Dep't of Labor). During this administrative proceeding, Jordan filed several motions asking ALJ Paul Almanza to find emails (including the Powers email) were not privileged, sanction respondents for making false statements about the emails, and direct DOL to produce the

emails. In January 2018, ALJ Almanza sanctioned Jordan. *Jordan v. DynCorp Int'l LLC*, No. 2016-SOX-00042 (Dep't of Labor Jan. 15, 2018).

> The evidence overwhelmingly supports a finding that [Jordan] has again made statements without evidentiary support. A reasonable and competent attorney would know, and should know, that such statements were objectively without evidentiary support. The plain text of ALJ Merck's rulings speaks for itself. I have explained to Complainant, multiple times, the difference between stating that a ruling was incorrect and stating that the ruling was never made. E.g., May 15 Order at 51. Complainant's continued failure to grasp this simple concept is highly disconcerting.
>
> Moreover, Complainant appears to have engaged in sanctionable conduct for which he was already sanctioned. For him to have continued to engage in sanctionable conduct, even after being specifically sanctioned for doing so, suggests that the initial sanctions were insufficient.

Id. at 90-91. ALJ Almanza prohibited Jordan from filing additional motions for sanctions and directed Jordan to show cause why he should not be sanctioned. *Id.* at 92.

In February 2018, ALJ Almanza stated ALJ Merck, who presided over the DBA matter, issued rulings on "the privileged status of the Emails," and ALJ Almanza did "not have the authority to overturn, vacate, modify, or determine the veracity of another ALJ's

ruling." *Jordan v. DynCorp Int'l*, No. 2016-SOX-00042 (Dep't of Labor Feb. 28, 2018). ALJ Almanza also sanctioned Jordan for making statements about ALJ Merck and ALJ Almanza that were "without evidentiary support." *Id.* at 82-84.

In the meantime, Jordan filed another action against DynCorp and others[4] under the Sarbanes-Oxley Act. *Jordan v. DynCorp Int'l LLC*, 2017-SOX-00055 (Dep't of Labor). In February 2018, ALJ William Barto dismissed Jordan's complaint. *Id.* (Feb. 18, 2018). In April 2018, ALJ Barto issued an order admonishing and sanctioning Jordan. *Id.* (Apr. 9, 2018). Jordan was "ADMONISHED against making legal contentions that are unwarranted by either existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, in violation of 29 C.F.R. § 18.35(b)(2)." *Id.* at 9 (emphasis in original). In addition, Jordan was directed to "PAY to Respondent [DynCorp] the sum of $1,000.00, as reasonable attorneys' fees. . . ." *Id.* at 10.

C. Jordan's FOIA Lawsuit in this Court

In August 2018, Jordan, proceeding pro se, filed a FOIA lawsuit in this Court. *Jordan v. Dep't of Labor*, No. 18-6129 (W.D. Mo.). Jordan's lawsuit pertained to

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[4] Jordan also named as respondents: four attorneys who represented DynCorp in prior administrative proceedings, the law firms that employed the attorneys, and the judges who presided over the cases. *Jordan v. DynCorp Int'l LLC*, No. 2017-SOX-00055, at 1-2 (Dep't of Labor Feb. 15, 2018).

two FOIA requests. FOIA Request F2018-850930 sought (1) letters from the OALJ to Jordan regarding his FOIA requests, (2) "[t]he letter from Chief ALJ Henley to [Jordan] dated May 15, 2017 regarding how to address ALJ misconduct through official channels," and (3) "[t]he letter from Chief ALJ Henley to [Jordan] dated February 2, 2018 refusing to meet with [Jordan] regarding ALJ misconduct." No. 18-6129 (Doc. #1, ¶ 2). FOIA Request F2018-858557 sought "emails sent by employees of DynCorp International LLC ("DI") on July 30 or 31, 2013 with the subject line: 'WPS – next steps & actions.'" *Id.* ¶ 4. These emails include the Powers email. *Id.*[5]

In December 2018, the Court granted DOL's motion to dismiss Jordan's claims arising from FOIA Request F2018-858557. *Id.* (Doc. #24, at 4-6); *Jordan v. U.S. Dep't of Labor*, No. 18-6129, 2018 WL 6591807 (W.D. Mo. Dec. 14, 2018). The Court found Jordan's lawsuit was "parallel or duplicative of the matter litigated in the D.C. District Court." *Id.* (Doc. #24, at 5). Because "the conservation of judicial resources, comprehensive disposition of litigation, and the progress of that action weigh in favor of this Court deferring to the D.C. District Court," the Court, deferring to D.C. lawsuit, dismissed Jordan's claims related to FOIA Request F2018-858557. *Id.* at 5-6. In April 2019, this Court granted DOL's summary judgment motion. No. 18-6129 (Doc. #55).

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[5] In May 2018, DOJ emailed the Powers email with all text redacted Jordan. Doc. #1, ¶ 8; Doc. #7, ¶ 8.

Jordan appealed to the United States Court of Appeals for the Eighth Circuit. *Jordan*, No. 18-6129 (Docs. #57, 76, 79). On February 21, 2020, the Eighth Circuit issued its decision, affirming this Court's decision to dismiss some claims as duplicative of another pending litigation and grant summary judgment on the remaining claims. *Jordan v. U.S. Dep't of Labor*, 794 F. App'x 557 (8th Cir. 2020). On May 5, 2020, the Eighth Circuit issued its mandate.

D. Talley's Lawsuit

In June 2019, Ferissa Talley, represented by Jordan, filed a lawsuit against DOL in this Court seeking production of the Powers email. No. 19-493 (Doc. #1). The Court stayed Talley's lawsuit until the Eighth Circuit disposed of Jordan's appeal. Once the stay was lifted, the parties filed dispositive motions. The Court will not examine the specifies of Talley's lawsuit in this Order. Instead, the Court refers to its Order entered on July 13, 2020, wherein the Court denied Talley's Motions for Judgment on the Pleadings and granted DOL's Motion for Summary Judgment. No. 19-493 (Doc. #102).

E. Campo's Lawsuit

In November 2019, Campo, represented by Jordan, filed this lawsuit. Doc. #1. In Count I, Campo alleges DOJ "failed to 'make' each Requested Record and all reasonably segregable information therein 'promptly available' to [Campo] 'except' to the extent FOIA

'specifically stated' that the DOJ was authorized to fail to do so." Doc. #1, ¶ 37. In Count II, Campo contends DOJ "withheld Requested Records or segregable information therein even though no DOJ employee 'reasonably' foresaw that disclosure of each such record or information would harm any interest protected by a FOIA 'exemption' or 'disclosure is prohibited by law.'" *Id.* ¶ 39. In Count III, Campo asserts DOJ "failed to 'take reasonable steps necessary to segregate and release nonexempt information' in each Requested Record" and failed to release "any privilege notation and any non-commercial words in any express request for advice, input or review." *Id.* ¶¶ 41-42. In Count IV, Campo claims DOJ failed to search or make reasonable efforts to search for requested records in electronic format. *Id.* ¶ 44. Finally, in Count V, Campo alleges DOJ failed to include the "names and titles or positions of each person" who was responsible for the denial of his FOIA request. *Id.* ¶ 46. Campo asks the Court to order DOJ to "produce any copy of Powers' emails located in any EOUSA office in Washington, D.C., Kansas City, Missouri, or Brooklyn, New York without any redaction or modification thereto." *Id.*

In February 2020, the Court granted DOJ's motion to stay this litigation pending the Eighth Circuit's disposition of Jordan's appeal. Doc. #14. In addition to noting Campo specifically identified Jordan's lawsuit in his FOIA request, the Court found Campo's lawsuit – similar to Talley's and Jordan's lawsuits – sought the production of the same Powers email. *Id.* at 7-9. No. 18-6129 (Doc. #1, ¶ 4); No. 19-493 (Doc. #1, ¶ 2);

No. 19-905 (Doc. #1, ¶ 5). Campo's allegations replicated many of the same assertions in the lawsuits filed by Talley and Jordan. Compare No. 18-6129 (Doc. #1, ¶¶ 4-7, 11, 22-31, 36, 39), with No. 19-493 (Doc. #1, ¶¶ 2-6, 8-10, 17, 20-22, 24), and No. 19-905 (Doc. #1, ¶¶ 5, 7-14, 16, 18-22, 24). And all three lawsuits attached the same redacted emails and a January 2018 brief filed with the DOL's Benefits Review Board that discusses the emails. No. 18-6129 (Doc. #1-2; Doc. #1-5); No. 19-493 (Doc. #1-1; Doc. #1-2); No. 19-905 (Doc. #1-1; Doc. #1-4).

After the Eighth Circuit issued its mandate in Jordan's appeal in early May 2020, the Court lifted the stay and directed the parties to file dispositive motions. Doc. #21. Now pending are Campo's Motion for Judgment on the Pleadings and DOJ's Motion for Summary Judgment. Docs. #13, 24.

II. CAMPO'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Legal Standard

"Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002) (citations omitted); Fed. R. Civ. P. 12(c). In considering a motion for judgment on the pleadings, the court "accept[s] as true all facts pleaded by the non-moving party and grant[s] all reasonable inferences from the pleadings in favor of the non-moving party."

Id. (citations omitted). The Court reviews a motion for judgment on the pleadings under the same standard governing motions to dismiss for failure to state a claim. *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

To survive a motion to dismiss, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The claim for relief must be "'plausible on its face,'" meaning it must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007)). Mere "'labels and conclusions,'" "'formulaic recitation[s] of the elements of a cause of action,'" and "'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

B. Discussion

Campo contends DOJ's purported admissions in its Answer entitle him to judgment on the pleadings. Doc. #13-1, at 8-15. He argues DOJ's "representation that every DOJ employee 'lacks sufficient information' . . . was a judicial admission of such fact" and DOJ has told "a story that is blatantly contracted by the record." *Id.* at 12, 22. Campo also claims DOJ failed to comply with FOIA in that DOJ failed to identify an employee "at least partially responsible for the denial in the DOJ's July 2 letter," "never asserted *any* justification

for withholding any Requested Record other than Powers' email," and "admitted that it failed to take any required step or make *any* of the . . . required determinations." *Id.* at 12-15. He also maintains "DOJ admitted that no DOJ employee even *possessed* a copy of Powers' email or any other information that would enable them to contend in good faith that any information in Powers' email *could* be protected by FOIA Exemptions 6 or 7(C)." *Id.* at 15.

As explained *supra*, judgment on the pleadings is only appropriate when no material issues of fact remain to be resolved. *Faibisch*, 304 F.3d at 803; *see also Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 51 (1941) (holding "denials and allegations of the answer which are well pleaded must be taken as true."). Also, because DOJ is the nonmovant, the Court is required to accept DOJ's assertions as true and draw reasonable inferences in its favor. *Id.* This affords the nonmovant "the benefit of all possible favorable assumptions." 5C Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, Federal Practice and Procedure § 1368 (3d ed. 2020).

Campo's dispute with the veracity of DOJ's denials and assertions demonstrates material issues of fact are unresolved. In addition, when accepting DOJ's denials and assertions as true, the Court is unable to conclude whether DOJ properly or improperly withheld documents that Campo requested. Thus, the Court denies Campo's motion for judgment on the pleadings.

III. DOJ'S MOTION FOR SUMMARY JUDGMENT

A. Standard

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) (quotation omitted). Inadmissible evidence may not be used to support or defeat a summary judgment motion. *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005) (citation omitted). The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984).

B. Discussion

(1) FOIA

FOIA "ensure[s] that government is conducted in the open" and "provide[s] wide-ranging public access to government documents." *Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 262 (8th Cir. 1993); *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985). "FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material." *Milner v. Dep't of Navy*, 562 U.S. 562, 564 (2011). The nine exemptions "are 'explicitly made exclusive,' and must be 'narrowly construed.'" *Id.* (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

This Court reviews an agency's FOIA decision *de novo.* 5 U.S.C. § 552(a)(4)(B) (2016). "[S]ummary judgment is available to a defendant agency where 'the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'" *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F. 3d 1204, 1209 (8th Cir. 2008) (quoting *Miller*, 779 F.2d at 1382). To discharge this burden, the agency "must prove that each document that falls within the class requested either has been produced, is unidentifiable,

or is wholly exempt from [the FOIA's] inspection requirements." *Miller*, 779 F.2d at 1382-83 (citation omitted); 5 U.S.C. § 552(a)(4)(B).

If an agency withholds a document, it carries its burden of proof by providing declarations or affidavits explaining why documents are subject to an exemption. *Mo. Coal. For Env't Found.*, 542 F.3d at 1210 (citing *Miller*, 779 F.2d at 1387). Agency affidavits and declarations receive "substantial weight," but "they must include more than 'barren assertions' that a document is exempt." *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015). "If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents." *Quiñon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (citations omitted).

(2) Search for Records

Campo argues DOJ, in violation of FOIA, never searched for the documents he requested. But Campo disregards that DOJ expressly informed him that the requested records presumptively fell within Exemption 7(C) in that the records pertained to a third party. Doc. #24-1, at 2-3, 9. To obtain the requested records, DOJ instructed Campo to provide an authorization executed by Jordan (whose records Campo sought), proof that Jordan had passed away, or "a clear

demonstration that the public interest in disclosure outweighs" Jordan's "personal privacy interest" and "significant public benefit would result from the disclosure of the requested records." *Id.*

According to the Supreme Court, "[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake." *Id.* "Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted." *Id.*

Campo provided nothing in response to DOJ's communication. Doc. #24-1, at 3, 5. Moreover, Campo's request was limited to investigative files. That is, Campo specifically requested documents maintained by DOJ that pertained to the transmission of the Powers email to or from any DOJ employee in relation to Jordan's three FOIA lawsuits. His FOIA request sought documents dating back to June 2016, which is when Jordan filed his first FOIA enforcement lawsuit involving the Powers email. In all three lawsuits identified in Campo's FOIA request, DOJ's involvement was limited to serving as DOL's counsel. In these particular circumstances, DOJ's decision not to perform a search for responsive documents unless and until it received a death certificate, privacy waiver, or showing

that the public interest in disclosure outweighs the third party's privacy interest is lawful under Exemption 7(C). *See Graff v. F.B.I.*, 822 F. Supp. 2d 23, 34 (D.D.C. 2011). In addition, the only records sought by Campo were protected by Exemptions 6 and 7(C), as explained below.

(3) Exemptions 6 and 7(C)

Campo's FOIA request asked DOJ to provide him with "any records maintained by the DOJ" that is "a copy of Powers' email in any form that was transmitted to or from any DOJ employee by any person at any time in or after June 2016 along with any record establishing the date or manner of such transmission." Doc. #24-1, at 8. In response to Campo's FOIA request, DOJ invoked Exemptions 6 and 7(C) and claimed the production of records would violate the Privacy Act, 5 U.S.C. § 552a(b). *Id.* at 3, 9.

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) protects "records or information complied for law enforcement purposes, only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . ." § 552(b)(7)(C).

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6

> requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.

U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 756 (1989). "Exemption 7 applies to records compiled for both civil and criminal law enforcement purposes." *Nishnic v. U.S. Dep't of Justice*, 671 F. Supp. 776, 798-99 (D.D.C. 1987)

According to DOJ's declaration, EOUSA invoked Exemption 7(C), in conjunction with Exemption 6, "to withhold any records pertaining to the third party named in the FOIA request, Mr. Jordan." Doc. #24-1, at 4, 9. EOUSA "determined that any records responsive to [Campo's] request would be contained in the investigative files pertaining to [Jordan]." *Id.* at 4. According to EOUSA, "investigatory files are the type of law enforcement records where the balance characteristically tips in one direction due to the strong privacy interest

of the individual named in these records." *Id.* "In the absence of an overriding public interest in disclosure, consent from [Jordan] or proof of death, EOUSA denied access to the third-party law enforcement information requested by [Campo] . . . because disclosure of the requested information could reasonably be expected to constitute an unwarranted invasion of these individuals' privacy." *Id.* at 5, 9.

DOJ's declaration states EOUSA involved Exemption 6, in conjunction with Exemption 7(C), because Jordan "has strong privacy interests" in the information contained in his "investigatory law enforcement records," and Campo "failed to establish an overriding public interest in disclosure. *Id.* at 6, 9. As mentioned above, Campo did not provide an authorization executed by Jordan or proof that he was deceased. *Id.* at 6. Consequently, EOUSA determined the "third-party individual's privacy interests in the requested law enforcement information outweigh[ed] the non-existent public interest in disclosure." *Id.* EOUSA concluded "to release any requested information would constitute a clearly unwarranted invasion of privacy." *Id.* EOUSA's concerns about Jordan's privacy were communicated to Campo. *Id.* at 4-5, 9.

But Campo did not provide EOUSA with an authorization signed by Jordan. And Campo did not establish there was any public interest in disclosure that outweighed Jordan's strong privacy interests. Accordingly, the Court finds DOJ properly withheld the requested documents pursuant to Exemptions 6 and 7(C).

(4) Exemption 4[6]

Even if the requested records were not exempt from disclosure under Exemptions 6 and 7(C), DOJ maintains the requested records are exempt from disclosure under Exemption 4. Campo's FOIA request sought "any records maintained by the DOJ" that is "a copy of Powers' email in any form that was transmitted to or from any DOJ employee by any person at any time in or after June 2016 along with any record establishing the date or manner of such transmission." Doc. #24-1, at 8. As demonstrated in Talley's lawsuit (No. 19-493) and Jordan's previous lawsuit, the Powers email is exempt from disclosure pursuant to Exemption 4.

Exemption 4 prevents disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "Information other than trade secrets falls within the second prong of the exemption if it is shown to be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citation omitted); *Madel*, 784 F.3d at 452 (citations and internal quotations marks omitted).

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[6] Contrary to Campo's argument, DOJ did not waive this FOIA exemption by not raising it during the administrative process. *See Young v. C.I.A.*, 972 F.2d 536, 538-39 (4th Cir. 1992).

(a) Commercial or Financial

"Information is 'commercial' under this exemption if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations omitted). According to D.C. District Court, when examining the email in Jordan's lawsuit, the Powers email is an internal DynCorp communication that "bears directly upon the 'commercial fortunes' of DynCorp as a company," and "this information addresses a business contract of the company." *Jordan*, 273 F. Supp. 3d at 230. The D.C. District Court found "the information in question is 'commercial' or 'financial' because it regards DynCorp's commercial interest in the administration and management of the WPS Program contract." *Id.* at 230-31.

(b Obtained from a Person

Under FOIA, a "person" is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The D.C. District Court found the Powers email was obtained from a person. *Id.* at 231.

(c Privileged

Privileged information includes "information that falls within recognized constitutional, statutory, or common law privileges." *Gen. Elec. Co. v. Dep't of Air Force*, 648 F. Supp. 2d 95, 101 n.4 (D.D.C. 2009) (citing *Wash. Post Co. v. U.S. Dep't of Health & Human*

Servs., 690 F.2d 252, 267-68 n.50 (D.C. Cir. 1982)). The attorney-client privilege has been recognized under Exemption 4. *See Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 945 (10th Cir. 1990) (citations omitted). The attorney-client privilege "applies broadly to communications made by corporate employees to counsel to secure legal advice from counsel." *Paine-Webber Grp., Inc. v. Zinsmeyer Trs. P'ship*, 187 F.3d 988, 991 (8th Cir. 1999) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

In Jordan's D.C. lawsuit, the District Court determined the Powers email was privileged. Judge Contreras found the email concerned DynCorp's confidential information regarding a business contract and expressly sought DynCorp's attorney's input and review." *Jordan*, 273 F. Supp. 3d at 232. Additionally, the email was sent to an in-house attorney and was marked "Subject to Attorney Client Privilege." *Id.* (citations omitted). Further, the D.C. Court of Appeals affirmed the D.C. District Court's decision. *Jordan*, 2018 WL 5819393, *1. Finally, this Court has also determined the Powers email is exempt from disclosure pursuant to Exemption 4. *Talley v. U.S. Dep't of Labor*, No. 19-493 (W.D. Mo. July 13, 2020) (Doc. #102).[7]

For all the foregoing reasons, the Court, when construing the underlying facts in the light most

[7] Because the Court finds the requested records are exempt from production pursuant to Exemptions 7(C), 6, and 4, it is unnecessary for the Court to address DOJ's alternative argument that the Powers email is exempt from production pursuant to Exemption 5.

favorable to Campo, finds DOJ has established it fully discharged its FOIA obligations. The Court grants DOJ's motion for summary judgment.[8]

IV. CONCLUSION

For the foregoing reasons, Campo's Motion for Judgment on the Pleadings is denied, and DOJ's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

DATE: July 13, 2020

/s/ Ortrie D. Smith
ORTRIE D. SMITH,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

[8] To the extent the Court did not address arguments raised in Campo's opposition to DOJ's motion for summary judgment, the Court overrules those arguments.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

FERISSA TALLEY, Plaintiff, vs. U.S. DEPARTMENT OF LABOR, Defendant.	)	Case No. 19-00493-CV-W-ODS (DATE: Jul. 13, 2020)

ORDER AND OPINION (1) DENYING PLAINTIFF'S MOTIONS FOR JUDGMENT ON THE PLEADINGS, (2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, (3) FINDING AS MOOT DEFENDANT'S MOTION TO STRIKE JURY DEMAND AND PLAINTIFF'S MOTION FOR LEAVE TO FILE NOTICE OF APPEAL, AND (4) STRIKING PLAINTIFF'S NOTICE OF APPEAL

Pending are Plaintiff Ferissa Talley's Motions for Judgment on the Pleadings (Docs. #67, 69), Defendant United States Department of Labor's Motion to Strike Jury Demand and Motion for Summary Judgment (Docs. #72, 75), and Plaintiff's Motion for Leave to File Notice of Appeal (Doc. #94). For the following reasons, the Court denies Talley's Motions for Judgment on the Pleadings, grants Defendant's Motion for Summary Judgment, and finds as moot Defendant's Motion to Strike Jury Demand and Plaintiff's Motion for Leave to File Notice of Appeal. In addition, the Court strikes Plaintiff's Notice of Appeal.

I. BACKGROUND

A. Talley's FOIA Request

In January 2019, Plaintiff Ferissa Talley submitted a Freedom of Information Act ("FOIA") request to Defendant United States Department of Labor. Doc. #75-1, at 2, 8-9.[1] Her FOIA request referred to "emails sent by Darin Powers at about 5:39 p.m. on July 30, 2013 and the emails sent by Robert Huber at about 8:20 a.m. [on] July 31, 2013, with the subject 'WPS – next steps & actions' (respectively, '**Powers' emails**' and '**Hubers's emails**') that were included in the records of ALJ Case No. 2015-LDA00030." Doc. #75-1, at 8 (emphasis in original).[2] Talley requested "an electronic (PDF) copy of any record maintained by the BRB[3] that satisfies the following criteria":

1. a copy of Powers' emails in any form that was transmitted to the BRB by any person at any time after January 2, 2018 along with any documentation establishing the date of transmission to and receipt by the BRB (e.g., a letter of transmittal or entry in any computer system);

2. a copy of Huber's emails in any form that was transmitted to the BRB by any person at any time after January 2, 2018

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[1] Page references are taken directly from the pagination ECF applies to filings, not the parties' pagination.

[2] "ALJ Case No. 2015-LDA-00030" is discussed *infra*, section I(B)(1).

[3] "BRB" is the Benefits Review Board, which is part of Defendant's Adjudicatory Boards. Doc. #1, ¶ 16; Doc. #75-1, at 1.

> along with any documentation establishing the date of transmission to and receipt by the BRB (e.g., a letter of transmittal or entry in any computer system).

Doc. #1, ¶ 3; Doc. #68, ¶ 3; Doc. #75-1, at 2, 4, 8-9; Doc. #81, at 6.[4]

On February 4, 2019, Defendant responded via email to Talley's FOIA request. Doc. #1, ¶¶ 4, 25; Doc. #1-1; Doc. #68, ¶¶ 4, 25; Doc. #75, at 2; Doc. #75-1, at 2-6, 10-11; Doc. #81, at 6.[5] Defendant provided a copy of the Huber email but informed Talley's counsel, Jack Jordan, that the Powers email was being withheld under FOIA Exemption 4:

> As I am sure you are aware, on 04 August 2017, the United States District Court for the District of Columbia granted summary judgment in favor of the DOL with respect to the Powers email – the first email in the DynCorp email chain. The Court held that "[t]he DOL properly withheld the unredacted version of the Powers email under FOIA Exemption 4 based on its attorney-client privileged nature. *Jordan v. U.S. Dep't of Labor*, 273 F.Supp. 3d 214, 227 (D.D.C. 2017), *reconsideration denied*, 308 F.Supp. 3d 24 (D.D.C. 2018), *aff'd sub nom. Jordan v. United States Dep't of*

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[4] The Huber and Powers emails are discussed *infra*, section I(B).

[5] The email to Jack Jordan also responded to FOIA requests filed by other individuals he represented: B. Donaldson, J. Campo, L. Magdangal, and C. Purchase. Doc. #75-1, at 10-11, 15-16.

> *Labor*, No. 18-5128, 2018 WL 5819393 (D.C. Cir. Oct 19, 2018)[.]
>
> On 19 October 2018, in reviewing the decision of the District Court, [t]he United States Court of Appeals for the District of Columbia Circuit held that "[t]he district court did not err in concluding that the Powers email is exempt from disclosure pursuant to 5 U.S.C. 552(b)(4)." *Jordan v. United States Dep't of Labor*, No. 18-5128, 2018 WL 5819393, at *1 (D.C. Cir. Oct. 19. 2018).

Doc. #75, at 2; Doc. #75-1, at 3, 10-11; Doc. #81, at 6. On February 6, 2019, Talley appealed Defendant's FOIA response. Doc. #75-1, at 3, 12-14; Doc. #81, at 6.

On March 5, 2019, Defendant sent an email to Talley's counsel, Jack Jordan, providing supplemental information in response to Talley's request for "documentation establishing the date of transmission to and receipt by the BRB." Doc. #75-1, at 3-4, 15-16.[6] Defendant informed Talley's counsel that "the BRB has no documentation that specifically addresses the receipt of the Powers or Huber-emails." *Id*. "[H]owever, in an effort to be as responsive as possible," Defendant provided "the Docket Sheet and UPS shipping label that documents the receipt. . . ." *Id.* at 15-21. Defendant asked Jack Jordan to "forward this documentation as a supplementary response to the FOIA requests from

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[6] Talley purports to deny Defendant's Facts 9 and 10. Doc. #81, at 6-7. However, Talley does not controvert these facts or the exhibits supporting the facts. *Id.* Thus, Talley is deemed to have admitted these facts. L.R. 56.1(b)(1); Fed. R. Civ. P. 56(e).

your clients," including Talley. *Id*. On March 6, 2019, Talley's counsel acknowledged receipt of the email and supplemental records. Doc. #75-1, at 4, 15.

B. The Powers and Huber Emails

Before addressing this lawsuit or considering the pending motions, the Court must provide background information about the Huber and Powers emails and briefly discuss the administrative and judicial proceedings that have addressed these emails.

(1) Maria Jordan's DBA Claim

In September 2012, Maria Jordan was injured while employed by DynCorp International, Inc. ("DynCorp") at the United States Consulate in Erbil, Iraq. Doc. #75, at 4; Doc. #81, at 7. Maria Jordan, represented by her husband, Jack Jordan (who is also Talley's counsel), filed a claim under the Defense Base Act ("DBA"), which provides coverage for injuries sustained by certain employees working on military bases and embassies outside the United States. Doc. #75, at 3-4; Doc. #75-1, at 17-18; Doc. #81, at 6-7. Maria Jordan's DBA claim is the "ALJ Case No. 2015-LDA-00030" referenced in Talley's FOIA request.

During discovery in the administrative proceeding, a dispute arose regarding the discoverability of the Powers email. Doc. #75, at 4; Doc. #81, at 7. DynCorp resisted production of the Powers email, arguing it was protected by the attorney-client privilege. *Id*. In

October 2015, DynCorp submitted the Powers email to the administrative law judge ("ALJ") for an in camera inspection. Doc. #75, at 4; Doc. #81, at 8. In February 2016, the ALJ issued an order finding the emails were privileged.

> [DynCorp]'s management-level employees expressly sought legal advice from [DynCorp]'s in-house counsel, and the statements themselves were confidential between the employees and the attorney at the time they were made. These emails were received by the in-house counsel and a select group of upper-level employees, and there has been no evidence submitted to this Court that these communications were not kept confidential.

Doc. #75, at 4; Doc. #75-2, at 35 (internal citations omitted); Doc. #81, at 7. Maria Jordan unsuccessfully appealed the ALJ's and BRB's decisions, which culminated in her petition for certiorari with the Supreme Court being denied. Doc. #75, at 5; Doc. #81, at 8; *Jordan v. Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 138 S. Ct. 1609 (Mem.) (2018).

(2) Jack Jordan's District of Columbia Lawsuit

Beginning in June 2016, Jack Jordan,[7] Maria Jordan's husband and Talley's counsel, submitted FOIA requests to Defendant related to the Huber and Powers emails. *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d

[7] For the remainder of this Order, the Court refers to Jack Jordan as Jordan.

214, 220-24 (D.D.C. 2017); Doc. #75, at 6; Doc. #81, at 8. In September 2016, Jordan, proceeding pro se, filed a FOIA lawsuit against Defendant in the United States District Court for the District of Columbia ("D.C. District Court") seeking "to compel the Defendant to disclose the entirety of the first two emails in a continuous string of five emails that were dated July 30 or 31, 2013, with the subject line: 'WPS – next steps & actions,' which were sent by and to members of management of DynCorp International, Inc." *Id.* at 219-20; *Jordan*, No. 16-CV-1868 (D.D.C. Sept. 19, 2016) (Doc. #1, ¶ 1); Doc. #75, at 6; Doc. #81, at 9.

In August 2017, after conducting an in camera review of the DynCorp emails, the D.C. District Court determined Defendant "properly withheld the unredacted version of the Powers email under FOIA exemption 4 based on its attorney-client privilege nature." 273 F. Supp. 3d at 227. The Honorable Rudolph Contreras stated the following:

> 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.

Id. at 232.[8] "With respect to the Powers email, the [D.C. District] Court's in camera review confirms that the

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[8] Talley attempts to dispute the District Court "reviewed the Powers email in camera and determined it was 'privileged and thus exempt from disclosure.'" Instead of citing to evidence in the record, Talley presents arguments. Among other things, she argues "Judge Contreras knowingly violated Jordan's rights under federal law (most obviously FOIA and Rules 43 and 56 of the Federal Rules of Civil Procedure ("**FRCP**")) and asserted contentions that he *knew* were false (each a "**Lie**") to help DOL and DOJ employees conceal relevant evidence and material facts." Doc. #81, at 9 (emphasis in original). Talley's counsel, Jordan, includes these arguments in his declaration to refute Defendant's stated fact. *Id*. Simply including an argument in a declaration does not render the argument a fact. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."); *see also Johnson Tr. of Operating Eng'rs Local #49 Health & Welfare Fund v. Charps Welding & Fabricating, Inc.*, 950 F.3d 510, 523 (8th Cir. 2020) (stating "[c]onclusory assertions and citations to one's own arguments are

content of the information and the reason it was communicated satisfy the demands of attorney-client privilege." *Id*. The D.C. District Court found additional briefing was required to ascertain whether the Huber email met the standard for attorney-client privilege. *Id*.[9] In May 2018, Defendant produced the unredacted Huber email to Jordan. Doc. #75-1, at 29-33.

Jordan appealed the D.C. District Court's decision to the United States Court of Appeals for the District of Columbia ("D.C. Court of Appeals"). In October 2018, the D.C. Court of Appeals affirmed the D.C. District Court's decision:

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insufficient to survive summary judgment.") (citation omitted). Because Talley failed to dispute these facts by citing evidence in the record, they are deemed uncontroverted. Fed. R. Civ. P. 56(e); L.R. 56.1(b)(1).

[9] In November 2017, Jordan submitted two FOIA requests to the United States Department of Justice, and in December 2017, he filed suit in the D.C. District Court related to those requests. *Jordan v. Dep't of Justice*, No. 17-CV-2702-RC (D.D.C.) (Doc. #1). During his second FOIA lawsuit, Jordan asked the D.C. District Court to release the Huber email and the non-confidential information in the Powers email. In denying Jordan's request, the D.C. District Court noted Jordan's motion "retread[ed] grounds already covered" in the first FOIA lawsuit, and the Court previously rejected Jordan's arguments. *Jordan*, No. 17-CV-2702-RC (D.D.C. Oct. 11, 2018) (Doc. #33). Jordan's subsequently filed motions – including his Motion for Reconsideration, Motion for Relief from Judgment, Motion for Release of Evidence, Motion to Reconsider, and Motion to Compel – were denied. *Id*. (Docs. #43-44, 50, 63-64). In April 2020, the D.C. District Court entered a Minute Order, denying another motion for reconsideration filed by Jordan and warning "any additional pleadings . . . concerning the Powers and Huber e-mails may be met with sanctions and/or a referral to the State bar of which Mr. Jordan is a member." *Id*. (Apr. 1, 2020).

> 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).

Jordan v. U.S. Dep't of Labor, No. 18-5128, 2018 WL 5819393, *1 (D.C. Cir. Oct. 19, 2018). Jordan's ensuing Motion to Clarify Order, Motion Regarding Publication, and Petition for Reconsideration by the Panel or by the Full Court were denied in January 2019. No. 18-5128 (D.C. Cir. Jan. 24, 2019). Jordan then sought reconsideration of the order denying his motions. His motions were denied, and the Clerk was "directed to accept no further pleadings from appellant in this closed case." No. 18-5128 (D.C. Cir. Apr. 15, 2019).

After the D.C. Court of Appeals affirmed the D.C. District Court's decision, Jordan asked the D.C. District Court to set aside its ruling, which was affirmed by the appellate court, and hold the Powers email was not protected by attorney-client privilege. In July 2019, the D.C. District Court denied Jordan's motion, stating, among other things:

> 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.

331 F.R.D. 444, 54 (D.D.C. 2019).

Jordan again appealed and filed several motions with the D.C. Court of Appeals. *Jordan v. U.S. Dep't of Labor*, No. 19-5201 (D.C. Cir.). In January 2020, the D.C. Court of Appeals denied Jordan's Motion to Require the District Court to Include Powers' Email in the Record, Motion for Ruling, and Motion for Summary Disposition. No. 19-5201, 2020 WL 283003, at *1 (D.C. Cir. Jan. 16, 2020). The D.C. Court of Appeals also affirmed the D.C. District Court's decision denying Jordan's motion to set aside. *Id*. Jordan then filed his Motion to Reconsider and Reverse all Rulings, Motion to Recall Mandate, and Petition for Rehearing En Banc, which were all denied by the D.C. Court of Appeals. No. 19-5201 (D.C. Cir. Feb. 18, 2020, and Mar. 18, 2020). Again, the appellate court directed the Clerk "to accept

no further submissions from appellant in this closed case." *Id*. (D.C. Cir. Mar. 18, 2020).

(3) Jordan's Sarbanes-Oxley Matters

Jordan also filed an action against DynCorp under the Sarbanes-Oxley Act of 2002 ("SOX") in 2016. *Jordan v. DynCorp Int'l LLC*, 2016-SOX-00042 (Dep't of Labor). During this administrative proceeding, Jordan filed several motions asking ALJ Paul Almanza to find the Huber and Powers emails were not privileged, sanction respondents for making false statements about the emails, and direct Defendant to produce the emails. In January 2018, ALJ Almanza sanctioned Jordan. *Jordan v. DynCorp Int'l LLC*, No. 2016-SOX-00042 (Dep't of Labor Jan. 15, 2018) (Order Sanctioning Complainant; Denying Complainant's Motions to Reconsider the Motion to Compel; to Declare the Emails Not Privileged; and for Declarations, Clarifications, and Production and Notice; and Ordering Complainant to Show Cause).

> The evidence overwhelmingly supports a finding that [Jordan] has again made statements without evidentiary support. A reasonable and competent attorney would know, and should know, that such statements were objectively without evidentiary support. The plain text of ALJ Merck's rulings speaks for itself. I have explained to Complainant, multiple times, the difference between stating that a ruling was incorrect and stating that the ruling was never made. E.g., May 15 Order at 51.

> Complainant's continued failure to grasp this simple concept is highly disconcerting.
>
> Moreover, Complainant appears to have engaged in sanctionable conduct for which he was already sanctioned. For him to have continued to engage in sanctionable conduct, even after being specifically sanctioned for doing so, suggests that the initial sanctions were insufficient.

Id. at 90-91. ALJ Almanza prohibited Jordan from filing additional motions for sanctions and directed Jordan to show cause why he should not be sanctioned. *Id*. at 92.

In February 2018, ALJ Almanza stated ALJ Merck, who presided over the DBA matter, issued rulings on "the privileged status of the Emails," and ALJ Almanza did "not have the authority to overturn, vacate, modify, or determine the veracity of another ALJ's ruling." *Jordan v. DynCorp Int'l*, No. 2016-SOX-00042 (Dep't of Labor Feb. 28, 2018) (Decision and Order of Dismissal and Order Sanctioning Complainant). ALJ Almanza also sanctioned Jordan for making statements about ALJ Merck and ALJ Almanza that were "without evidentiary support." *Id*. at 82-84.

In January 2019, Jordan appealed ALJ Merck's decision to Defendant's Administrative Review Board ("ARB"). In his Second Petition for Review, Jordan informed the ARB of the following:

> [Jordan] is already pursuing Powers' emails in FOIA suits in the D.C. Circuit, as

> well as in a second case in D.C. District Court and in a third case in the Western District of Missouri (Eighth Circuit). In addition, in January 2019, six additional individuals (residing in areas under the Second, Sixth, Eighth, Ninth, and Tenth Circuits) each filed his or her own FOIA request for Powers' emails. Each request that is denied will be pursued in a separate suit.

Doc. #75, at 7-8; Doc. #75-3, at 27 n.5; Doc. #81, at 11.

In the meantime, Jordan filed another action against DynCorp and others[10] under the Sarbanes-Oxley Act of 2002 ("SOX"). *Jordan v. DynCorp Int'l LLC*, 2017-SOX00055 (Dep't of Labor). In February 2018, ALJ William Barto dismissed Jordan's complaint. *Id*. (Feb. 18, 2018). In April 2018, ALJ Barto issued an order admonishing and sanctioning Jordan. *Id*. (Apr. 9, 2018). Jordan was "ADMONISHED against making

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[10] Jordan identified additional respondents: Littler Mendelson, P.C.; Ethan Balsam; Jason Branciforte; Edward T. Ellis; Vorys, Sater, Seymour, and Pease LLP; Pamela A. Bresnahan; Honorable Larry Merck; and the Honorable Paul Almanza. *Jordan v. DynCorp Int'l LLC*, No. 2017-SOX-00055, at 1 n.1 (Dep't of Labor Feb. 15, 2018). As explained by ALJ William Barto:

> [Jordan] originally sued DynCorp in the LDA case. He then sued DynCorp in the SOX case and added as respondents the two counsel who had represented DynCorp in the LDA case. In the instant case, Complainant again sues DynCorp and the counsel who represented DynCorp in the LDA case, but now adds as respondents the two counsel who defended DynCorp in the SOX case, the law firms that employ the attorney respondents, as well as the judges who presided over each case.

Id. at 2.

legal contentions that are unwarranted by either existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, in violation of 29 C.F.R. § 18.35(b)(2)." *Id*. at 9 (emphasis in original). In addition, Jordan was directed to "PAY to Respondent [DynCorp] the sum of $1,000.00, as reasonable attorneys' fees. . . ." *Id*. at 10.

C. Jordan's FOIA Lawsuit in this Court

In August 2018, Jordan, proceeding pro se, filed a FOIA lawsuit in this Court. *Jordan v. Dep't of Labor*, No. 18-6129 (W.D. Mo.). Jordan's lawsuit pertained to two FOIA requests. FOIA Request F2018-850930 sought (1) letters from the OALJ to Jordan regarding his FOIA requests, (2) "[t]he letter from Chief ALJ Henley to [Jordan] dated May 15, 2017 regarding how to address ALJ misconduct through official channels," and (3) "[t]he letter from Chief ALJ Henley to [Jordan] dated February 2, 2018 refusing to meet with [Jordan] regarding ALJ misconduct." No. 18-6129 (Doc. #1, ¶ 2). FOIA Request F2018-858557 sought "emails sent by employees of DynCorp International LLC ("DI") on July 30 or 31, 2013 with the subject line: 'WPS – next steps & actions.'" *Id*. ¶ 4. These emails include the Huber and Powers emails. *Id*.

In December 2018, the Court granted Defendant's motion to dismiss Jordan's claims arising from FOIA Request F2018-858557. *Id*. (Doc. #24, at 4-6); *Jordan v. U.S. Dep't of Labor*, No. 18-6129, 2018 WL 6591807 (W.D. Mo. Dec. 14, 2018). The Court found Jordan's

lawsuit was "parallel or duplicative of the matter litigated in the D.C. District Court." *Id.* (Doc. #24, at 5). Because "the conservation of judicial resources, comprehensive disposition of litigation, and the progress of that action weigh in favor of this Court deferring to the D.C. District Court," the Court deferred to the D.C. lawsuit and dismissed Jordan's claims related to FOIA Request F2018-858557. *Id*. at 5-6.

In February 2019, Jordan moved to add Ferissa Talley, who is the plaintiff in this matter, as a party to his lawsuit. *Id.* (Doc. #37). Although the Court had already dismissed Jordan's claims related to the Powers email, Jordan sought to add Talley because she requested the Powers email. Doc. #37-3. In support, Jordan argued:

> The DOL clearly is subject to substantial risk of incurring double obligations because of Ms. Talley's interest. If Ms. Talley must file suit separate, the DOL will be required to litigate all the issues that the DOL attempted to avoid with its Motion to Dismiss regarding Powers' emails. Such a result would be a waste of judicial and agency resources. Moreover, the arbitrariness of the DOL's efforts to conceal all text of Powers' emails is even more obvious now than it was previously. . . .

Doc. #37, at 8. Jordan also maintained joining Talley as a party to his lawsuit "would ensure that judicial and administrative resources are not wasted by other courts readdressing the issues that already have been addressed in this case." *Id*. at 17. Accompanying the

motion was Talley's declaration wherein she stated she "retained Jack Jordan to join in the on-going litigation" in Jordan's lawsuit. *Jordan*, No. 18-6129 (Doc. #37-1, at 2). Jordan's declaration, also attached to the motion, stated he was representing Ferissa Talley, Mr. Campo, Mr. Magdangal, Mr. Purchase, and Mr. Donaldson with respect to their FOIA requests, which sought the Huber and Powers emails. *Id.* (Doc. #37-2, at 1-2).

In April 2019, this Court granted Defendant's summary judgment motion and found Jordan's motion to add Talley as a party was rendered moot. *Jordan*, No. 18-6129 (Doc. #55).[11] Jordan appealed to the United States Court of Appeals for the Eighth Circuit. *Jordan*, No. 18-6129 (Docs. #57, 76, 79). On February 21, 2020, the Eighth Circuit issued its decision, affirming this Court's decision to dismiss some claims as duplicative of another pending litigation and grant summary judgment on the remaining claims. *Jordan v.*

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[11] In this lawsuit, Jordan argues Talley's joinder in his lawsuit was "mandatory," and the undersigned knew joinder was mandatory. Doc. #43-1, at 23.

> Judge Smith merely refused to comply with FRCP and join Talley. Without any stated (or even any possible) justification, Judge Smith merely contended that *mandatory* joinder under clear and controlling federal law was 'moot.' Judge Smith Lied. He knew mandatory joinder was not moot. The evidence of his Lie included his and the DOL's complete silence about any potential justification for disregarding or violating FRCP 19.

Doc. #43-1, at 24 (citations omitted) (emphasis in original); *seealso* Doc. #44, at 2-4 (arguing FRCP "19 and the relevant facts made Talley's joinder mandatory" and "Judge Smith merely refused to comply with FRCP 19 and join Talley."); Doc. #86, at 10.

U.S. Dep't of Labor, 794 F. App'x 557 (8th Cir. 2020). On May 5, 2020, the Eighth Circuit issued its mandate.

D. Talley's Lawsuit

On June 19, 2019, Jordan sent an email to Defendant's counsel stating, "my client, Ms. Talley, submitted a FOIA request for Powers' email, which was denied on February 4, 2019." Doc. #75-4. "The DOL has given no reason to believe that the DOL will release Powers' email without being ordered to do so by a court. As a result, on Monday Ms. Talley will file suit in the WDMO to obtain Powers' email if the DOL continues to refuse to release it voluntarily." *Id*. Jordan further stated, "Ms. Talley will be requesting an award of costs and fees. . . . Ms. Talley will be represented by me, as well as by local counsel. . . ." *Id*.

On June 26, 2019, Talley filed this lawsuit. Doc. #1. Talley asks the Court to order Defendant to release "all responsive records containing Powers' emails" and "all other records responsive" to her FOIA request. *Id*. Both Jordan's FOIA Request F2018-858557 and Talley's FOIA request sought emails sent by DynCorp's employees on July 30 and July 31, 2013, and certain emails sent to the BRB after January 2, 2018. Doc. #1, ¶¶ 2-3; No. 18-6129, Doc. #1, ¶¶ 4, 15. Both Complaints contained the same allegations, sought similar relief, and attached the same exhibits. *Compare* Doc. #1, ¶¶ 2-6, 8-10, 12, 17, 20-22, 24, and p.8; Doc. #1-1; Doc. #1-2; *with* No. 18-6129, Doc. #1, ¶¶ 4-7, 10-11, 15-18, 23, 25, 31, 33, 36, 39, and p.15; Doc. #1-2, Doc. #1-5.

Consequently, in July 2019, the Court stayed this matter pending the Eighth Circuit's disposition of Jordan's appeal. Doc. #7.

Jordan was not an attorney of record when Talley filed her lawsuit. However, while this matter was stayed, Jordan entered his appearance on Talley's behalf in October 2019. Doc. #8. Since that time, Jordan has been Talley's only counsel of record. Docs. #9, 11. Ever since, Jordan has filed numerous motions. In those filings, Jordan presented arguments about the contentions presented and determinations made with regard to the Powers email in Maria Jordan's DBA Claim, Jack Jordan's Sarbanes-Oxley claims, and his D.C. lawsuit. *See*, *e.g.*, Doc. #15, at 13, 16-17; Doc. #26, at 6-12, 14, 16-18; Doc. #28, at 11-12; Doc. #32, at 6-10, 14; Doc. #43-1, at 11-14; Doc. #43-3, at 6-11; Doc. #50, at 3-6; Doc. #53, at 7-8, 10; Doc. #58, at 10; Doc. #61, at 11-14; Doc. #69, at 2-5; Doc. #69-1, at 7-9; Doc. #69-2; Doc. #69-3; Doc. #69-4; Doc. #81, at 11-13, 15-16, 19, 22, 30; Doc. #81-2; Doc. #81-3, at 1-4; Doc. #86, at 7-14, 22, 31-34.[12]

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[12] In addition, Jordan continuously stated the undersigned committed and was continuing to commit crimes, including conspiring with Defendant and its counsel; violating federal law and the Constitution; setting forth "false and illegal contentions"; engaging in "criminal misconduct"; asserting "Lies"; issuing "blatantly unconstitutional and illegal" orders; and was "willfully blind." *See*, *e.g.*, Doc. #17, at 6-20; Doc. #20, at 11; Doc. #26, at 10; Doc. #28, at 5-8, 11-12, 15, 18; Doc. #29, at 10; Doc. #32, at 4, 6, 10-12, 14, 19-20; Doc. #39, at 13-14, 16-17; Doc. #41, at 9, 16; Doc. #43, at 3, 6-8, 16, 22, 27-28; Doc. #43-1; Doc. #43-2. Regarding these filings, on March 4, 2020, the Honorable Beth Phillips

After the Eighth Circuit issued its mandate in Jordan's appeal in early May 2020, the Court lifted the stay and directed the parties to file dispositive motions. Doc. #62. Now pending are Talley's Motions for Judgment on the Pleadings (Docs. #67, 69), Defendant's Motion to Strike Jury Demand (Doc. #72), Defendant's Motion for Summary Judgment (Doc. #75), and Talley's Motion for Leave to File Notice of Appeal (Doc. #94).

II. TALLEY'S MOTIONS FOR JUDGMENT ON THE PLEADINGS

A. Legal Standard

"Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002) (citations omitted); Fed. R. Civ. P. 12(c). In considering a motion for judgment on the pleadings, the court "accept[s] as true all facts pleaded by the non-moving party and grant[s] all reasonable inferences from the pleadings in favor of the non-moving party." *Id.* (citations omitted). The Court reviews a motion for judgment on the pleadings under the same standard

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concluded Jordan violated Rule 11 of the Federal Rules of Civil Procedure, sanctioned Jordan in the amount of $1,000, and referred the matter to the Kansas Bar Association. Doc. #47. Although he was sanctioned, Jordan has continued to assert the undersigned and now Judge Phillips have engaged in criminal conduct. *See* Docs. #48-49, 52-54, 57-58, 61, 64-65, 76, 86, 94, 99-100. Recently, the Court prohibited Jordan from filing anything further in this matter due to his disregard of the Court's Orders and again referred him to the Kansas Bar Association. Docs. #92, 97.

governing motions to dismiss for failure to state a claim. *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

To survive a motion to dismiss, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The claim for relief must be "'plausible on its face,'" meaning it must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007)). Mere "'labels and conclusions,'" "'formulaic recitation[s] of the elements of a cause of action,'" and "'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

B. Discussion

(1) First Motion for Judgment on the Pleadings

Talley's first motion for judgment on the pleadings largely focuses on Defendant's answer, or rather, Defendant's failure to file an answer. Talley argues Defendant "entirely failed to address" and "admitted" her allegations because Defendant "failed to show . . . good cause for failing to serve an Answer within 30 days that were not (even partially) subject to any stay, *i.e.*, June 27 through July 24, 2019 (28 days) and May 6, 2020 to present (14 days so far)." Doc. #67-1, at 13-14.[13]

[13] Talley's motion was filed on May 19, 2020. Doc. #67.

Defendant filed its answer on May 28, 2020, admitting some allegations but denying other allegations. Doc. #68. In addition, Defendant asserted several affirmative defenses. *Id*. at 1-2.

Pursuant to FOIA, Defendant has thirty days to file its answer or otherwise respond. 5 U.S.C. § 552(a)(4)(C). This matter, however, was stayed before Defendant's deadline to file its answer. Then, once the stay was lifted, Defendant filed its answer in less than thirty days. Talley does not cite any authority supporting her argument that Defendant admitted her allegations even though it filed its answer within thirty days of the stay being lifted. Accordingly, Talley's first judgment for motion on the pleadings is denied.

(2) Second Motion for Judgment on the Pleadings

After Defendant filed its answer, Talley filed a second motion for judgment on the pleadings. Doc. #69. Therein, Talley concedes Defendant denied many allegations but maintains Defendant's denials to Paragraphs 5, 6, and 24 are "false" or "asserted falsehoods." Doc. #69-1, at 11-13.

As explained *supra*, judgment on the pleadings is only appropriate when no material issues of fact remain to be resolved. *Faibisch*, 304 F.3d at 803; *see also Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 51 (1941) (holding "denials and allegations of the answer which are well pleaded must be taken as true."). Also, because Defendant is the nonmovant, the Court is required to

accept Defendant's assertions as true and draw reasonable inferences in its favor. *Id*. This affords the nonmovant "the benefit of all possible favorable assumptions." 5C Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, Federal Practice and Procedure § 1368 (3d ed. 2020).

Talley's dispute with the veracity of Defendant's denials and assertions demonstrates material issues of fact are unresolved. In addition, when accepting Defendant's assertions as true, the Court is unable to conclude whether Defendant properly or improperly withheld documents requested by Talley. Thus, the Court denies Talley's second motion for judgment on the pleadings.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of

summary judgment." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) (quotation omitted). Inadmissible evidence may not be used to support or defeat a summary judgment motion. *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005) (citation omitted). The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984).

B. Discussion

(1) FOIA

FOIA "ensure[s] that government is conducted in the open" and "provide[s] wide-ranging public access to government documents." *Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 262 (8th Cir. 1993); *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985). "FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material." *Milner v. Dep't of Navy*, 562 U.S. 562, 564 (2011). The nine exemptions "are 'explicitly made exclusive,' and must be 'narrowly construed.'" *Id.* (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

This Court reviews an agency's FOIA decision *de novo*. 5 U.S.C. § 552(a)(4)(B) (2016). "[S]ummary judgment is available to a defendant agency where 'the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'" *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F. 3d 1204, 1209 (8th Cir. 2008) (quoting *Miller*, 779 F.2d at 1382). To discharge this burden, the agency "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements." *Miller*, 779 F.2d at 1382-83 (citation omitted); 5 U.S.C. § 552(a)(4)(B).

If an agency withholds a document, it carries its burden of proof by providing declarations or affidavits explaining why documents are subject to an exemption. *Mo. Coal. For Env't Found.*, 542 F.3d at 1210 (citing *Miller*, 779 F.2d at 1387). Agency affidavits and declarations receive "substantial weight," but "they must include more than 'barren assertions' that a document is exempt." *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015). "If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents." *Quiñon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (citations omitted).

(2) Res Judicata

Defendant argues it is entitled to summary judgment because Talley's FOIA claims are barred by res judicata. Doc. #75, at 16-18. "[R]es judicata, or claim preclusion, applies when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." *Elbert v. Carter*, 903 F.3d 779, 782 (8th Cir. 2018) (citation and quotation marks omitted).[14] "By 'preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,' [claim preclusion and issue preclusion] protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). Generally, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id*. at 893 (citations omitted). But there are exceptions to this general rule, including, but not limited to, when "a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to

[14] When the prior suit was litigated in federal court and arose under federal law, the effect of res judicata is decided by federal law. *See Poe v. John Deere Co.*, 1103, 1105 (8th Cir. 1982); *see also Taylor*, 553 U.S. at 891.

the prior adjudication," or "when a nonparty later brings suit as an agent for a party who is bound by a judgment." *Id*. at 895 (citation omitted).

Talley does not dispute or present evidence refuting Jordan's D.C. lawsuit was based on proper jurisdiction or resulted in a final judgment on the merits. *See* Doc. #81, at 34-36. In addition, Talley does argue her lawsuit brings different claims or asserts causes of action that are different than those asserted in Jordan's D.C. lawsuit. *Id*. Thus, for res judicata bar this lawsuit, Jordan must be relitigating by proxy, or Talley and Jordan are in privity. *See Taylor*, 553 U.S. at 894; *Elbert*, 903 F.3d at 782.

(a) Relitigation by Proxy

According to the Supreme Court, a party dissatisfied with the outcome of a lawsuit is barred from bringing another lawsuit in the name of another to seek redetermination of an issue already resolved. *Montana*, 440 U.S. at 154. "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Id.* (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910)). As demonstrated by the filings in this matter, Jordan is dissatisfied with the outcome of his administrative proceedings, his D.C. lawsuit, and the lawsuit filed in this Court. *See supra*, section I(B)-(D). Jordan, although a

licensed attorney, represented himself in those matters.

Now, Talley, represented by Jordan, brings the matter currently before this Court, seeking the same relief Jordan sought in his administrative and judicial proceedings. Talley asks this Court to decide something that ALJs and the D.C. District Court have already determined. Nothing in the record demonstrates any controlling facts or legal principles have changed significantly since those determinations were made. *See Montana*, 440 U.S. at 155. Instead, the record demonstrates Talley merely serves as Jordan's proxy in this matter.

First, while his FOIA lawsuit was pending in this Court, Jordan moved to add Talley as a plaintiff. Jordan argued if the Court denied his motion and did not add Talley as a plaintiff, "the DOL will be required to litigate all the issues that the DOL attempted to avoid with its Motion to Dismiss regarding Powers' emails. Such a result would be a waste of judicial and agency resources." No. 18-6129 (Doc. #37, at 8). Jordan also argued joining Talley to his lawsuit "would ensure that judicial and administrative resources are not wasted by other courts re-addressing the issues that already have been addressed in this case." *Id*. at 17. In her declaration attached to Jordan's motion, Talley declared she "retained Jack Jordan to join in the on-going litigation" in Jordan's lawsuit. No. 18-6129 (Doc. #37-1, at 2).

Jordan also submitted a declaration in support of his motion to add Talley as a plaintiff to his lawsuit. Therein, Jordan declared that Talley sought the same records that Jordan sought in FOIA Request F2018-858557. No. 18-6129 (Doc. #37-2, at 1). Jordan informed the Court that he represented Talley and five other individuals – i.e., Campo, Magdangal, Purchase, Donaldson, and "a person who resides in New York" – who submitted FOIA requests in January 2019 for the same records Jordan requested in his FOIA request. *Id*. at 1-2; *see also* Doc. #37, at 2. This declaration reiterates Jordan's statement in one of his Sarbanes-Oxley matters, where he represented, "six additional individuals (residing in areas under the Second, Sixth, Eighth, Ninth, and Tenth Circuits) each filed his or her own FOIA request for Powers' emails. Each request that is denied will be pursued in a separate suit." Doc. #75, at 7-8; Doc. #75-3, at 27 n.5; Doc. #81, at 11. More recently, in this lawsuit, Jordan stated: "I have represented myself or other clients seeking Powers' email . . . in additional legal proceedings in U.S. District Courts for the District of Washington, D.C., Western District of Missouri and the Eastern District of New York and the Courts of Appeals for the D.C. Circuit and the Eighth Circuit." Doc. #81-3, ¶1.

Before Talley filed this lawsuit, Jordan emailed Defendant's counsel demanding the production of the Powers email. Doc. #75-4. Jordan informed Defendant's counsel that Talley would file suit if the email was not produced. *Id*. Jordan also stated he would be representing Talley in the lawsuit. *Id*. Talley's Complaint

also revealing. First, her Complaint (and FOIA Request) specifically reference Maria Jordan's DBA case number. Doc. #1, ¶ 2. Her allegations recite much of the history about Jordan's administrative and judicial proceedings. *Id*. ¶¶ 4-10, 16-24. Talley seeks "all responsive records containing Powers' email." *Id.* at 8. Attached to her Complaint are the redacted Powers email and a filing from Maria Jordan's DBA proceeding. Docs. #1-1, 1-2.

Significantly, Talley's lawsuit has focused, almost exclusively, on the arguments presented and determinations made in Jordan's administrative and judicial proceedings. *See*, *e.g.*, Doc. #15, at 13, 16-17; Doc. #26, at 6-12, 14, 16-18; Doc. #28, at 11-12; Doc. #32, at 6-10, 14; Doc. #43-1, at 11-14; Doc. #43-3, at 6-11; Doc. #50, at 3-6; Doc. #53, at 7-8, 10; Doc. #58, at 10; Doc. #61, at 11-14; Doc. #69, at 2-5; Doc. #69-1, at 7-9; Doc. #69-2; Doc. #69-3; Doc. #69-4; Doc. #81, at 11-13, 15-16, 19, 22, 30; Doc. #81-2; Doc. #81-3, at 1-4; Doc. #86, at 7-14, 22, 31-34. These filings are rife with arguments about the D.C. District Court and ALJs making erroneous decisions and determinations, according to Talley and Jordan, and the representations made by Defendant and its attorneys.

Also, Talley raises arguments about whether Jordan had a fair opportunity to be heard in his D.C. lawsuit. By way of example, Talley, in a filing signed by Jordan, argues she "must be permitted to demonstrate . . . Jordan did not have a fair opportunity procedurally, substantively and evidentially to pursue his claim in the D.C. courts." Doc. #15, at 13 (citation and internal

quotations omitted). This argument disregards the fact that the D.C. Court issued its judgment, which was affirmed by the D.C. Court of Appeals. To the extent he did not have a "fair opportunity procedurally, substantively and evidentially," Jordan should have raised that issue during that litigation.

Based on the record before the Court, which includes but is not limited to Talley's and Jordan's foregoing declarations and representations, Jordan, as Talley's attorney, is assisting in, if not controlling, the prosecution of this matter in Talley's name. This lawsuit seeks to relitigate an issue already resolved in Jordan's D.C. lawsuit, which was appealed and affirmed twice, and Jordan's administrative proceedings. Because Jordan, at a minimum, is "assist[ing] in the prosecution" of this lawsuit "in aid of some interest of his own," he is barred from bringing this lawsuit in Talley's name. The Court finds Talley is serving as a proxy in this matter, and therefore, the Court grants Defendant's motion for summary judgment is granted.

(b Privity

In addition to Talley serving as Jordan's proxy, Talley and Jordan are in privity, which bars Talley from bringing this matter. The Eighth Circuit "long ago recognized that claim preclusion is not limited to cases involving the same parties or parties who are in traditional 'privity' with [a party] in a first action." *Elbert*, 903 F.3d at 783. Although the parties do not cite an Eighth Circuit case on point, several other courts have

determined an attorney and client are privies. *See*, *e.g.*, *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1169 (10th Cir. 2000) (citation omitted); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n.6 (7th Cir. 1986) (citation omitted); *Martell v. Cohen Clair Lans Greifer Thorpe & Rottenstreich, LLP*, No. 18 CIV. 9692 (ER), 2019 WL 4572196, at *3 (S.D.N.Y. Sept. 20, 2019); *Hansen v. U.S. Bank, Nat'l Ass'n*, No. 4:15-CV-00085-BLW, 2015 WL 5190749, at *7 (D. Idaho Sept. 4, 2015); *Iseley v. Talaber*, No. CIVA 1:05-CV-444, 2008 WL 906508, at *3 n.1 (M.D. Pa. Mar. 31, 2008) (citation omitted).

In addition, the Missouri Court of Appeals has determined an attorney and client are privies. *Kinsky v. 154 Land Co.*, 371 S.W.3d 108, 113 (Mo. Ct. App. 2012). The Missouri Court of Appeals noted Missouri did not have a "long-established test for determining whether privity exists" between an attorney and a client but determined "control is the qualifying element" when determining whether parties are privies. *Id*. at 113, 115. Finding "control is the 'inescapable consequence' of legal representation," the Missouri Court of Appeals determined an attorney was in privity with the client when counsel made most procedural decisions and determined what evidence and arguments to present. *Id*. at 115; *see also Clements v. Pittman*, 765 S.W.2d 589, 591 (Mo. banc 1989) (finding "[w]hether parties are in privity depends mostly on their relationship to the subject matter of the litigation."). As discussed above, the record establishes the parties' relationship to one another, the relationship to the subject matter of the litigation, and the control exercised by Jordan in this

matter. Thus, the Court finds Jordan and Talley are privies. For this additional reason, the Court grants Defendant's motion for summary judgment.

(c) Abusive Lawsuit with More Than "a Mere Whiff of Tactical Maneuvering"

When considering the record before it, the Court is mindful of the Supreme Court's guidance to courts when faced with determining whether "a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case." *Taylor*, 553 U.S. at 906.

> [C]ourts should be cautious about finding preclusion on this basis. A mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication.

Id. (citation omitted). Similar to the matter before this Court, *Taylor* was a subsequent FOIA lawsuit for documents previously requested and litigated in prior lawsuit. However, because the record before the Supreme Court was unclear, it could not determine whether the party pursuing the subsequent FOIA lawsuit was "acting as" the agent of the person who was a party to a prior FOIA lawsuit. *Id*. at 905. Thus, the matter was remanded.

Unlike *Taylor*, the record is clear in this matter. There is not simply a "whiff" of "tactical maneuvering."

As discussed above, Talley, represented by Jordan, filed this matter to relitigate issues decided in Jordan's prior lawsuit. Jordan, as Talley's attorney and as demonstrated by the filings in this matter and Jordan's previous lawsuits, controls the lawsuit. Talley is simply Jordan's proxy.

Additionally, the Court recognizes, as the Supreme Court did, FOIA does not preclude other individuals from seeking the same documents someone else sought. The Supreme Court acknowledged it was "theoretically possible that several persons could coordinate to mount a series of repetitive [FOIA] lawsuits." *Taylor*, 553 U.S. at 903. But the Supreme Court was "not convinced that this risk justifies departure from the usual rules governing nonparty preclusion" because (1) "*stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit," and (2) "even when *stare decisis* is not dispositive, 'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others.'" *Id*. at 903-04. The Supreme Court noted its "intuition seem[ed] to be borne out by experience" since the "FAA has not called our attention to any instances of abusive FOIA suits in the Circuits. . . ." *Id*. at 904.

The Court is aware of at least four lawsuits Jordan has filed on behalf of himself or others that seek the same relief Jordan sought in his D.C. lawsuit: (1) Jordan's lawsuit in this Court; (2) this lawsuit; (3) a lawsuit filed in this Court by Robert Campo, who is represented by Jordan (No. 19-905); and (4) a lawsuit

filed by another individual represented by Jack Jordan, which is pending in the United States District Court for the Eastern District of New York.[15] In addition, according to Jordan's filings and declarations, there are at least three other individuals represented by Jordan – i.e., Magdangal, Purchase, and Donaldson – who intend to file lawsuits to obtain the Powers email. No. 18-6129 (Doc. #37-2, at 1-2).

Contrary to the Supreme Court's belief, this Court cannot dispose of this matter based on *stare decisis*. And "the human tendency not to waste money" mentioned by the Supreme Court did not deter Jordan from filing his lawsuit in this Court, representing Talley in her lawsuit, or representing others who bring suits "based on claims or issues that have already been adversely determined against others.' " *Id*. at 903-04. This is an abusive FOIA lawsuit.

(3) The Powers Email

Even if Talley's claims were not barred by res judicata, Defendant would still be entitled to summary judgment because Defendant properly responded to Talley's FOIA request, produced responsive documents, and appropriately redacted portions of documents exempt from disclosure under FOIA.

Talley's FOIA request sought the Huber and Powers emails and records establishing the date the Huber and Powers emails were transmitted to and received

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[15] *Immerso v. U.S. Dep't of Labor*, No. 19-Civ.3777 (E.D.N.Y).

by the BRB. Doc. #75, at 1-2; Doc. #75-1, at 4, 8-9; Doc. #81, at 6. In response, Defendant released four pages with redactions applied to the "Powers email" portion of the record pursuant to Exemption 4, 5 U.S.C. § 552(b)(4). Doc. #75, at 2; Doc. #75-1, at 2-3, 10-11, 30-33; Doc. #81, at 6. Defendant conducted a search for records showing when the Huber and Powers emails were transmitted to and received by the BR, but the search revealed no responsive records. Doc. #75, at 3; Doc. #75-1, at 4; Doc. #81, at 6. When conducting a further review of the request, Defendant located transmission records for the case file – to wit, a docket sheet and a UPS shipping label – which were provided to Jordan on Talley's behalf. Doc. #75, at 3; Doc. #75-1, at 4, 15-21; Doc. #81, at 6. Jordan acknowledged receipt of the additional records. Doc. #75, at 3; Doc. #75-1, at 4, 15; Doc. #81, at 6.

The parties disagree as to whether Defendant properly withheld the Powers email pursuant to Exemption 4. Exemption 4 prevents disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "Information other than trade secrets falls within the second prong of the exemption if it is shown to be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citation omitted); *Madel*, 784 F.3d at 452 (citations and internal quotations marks omitted).

(a Commercial or Financial Information

"Information is 'commercial' under this exemption if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.' " *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations omitted). According to Defendant's declaration, the Powers email is an internal DynCorp communication about a DynCorp business contract and reveals commercial operations. Doc. #75-1, at 6. Talley does not dispute the information is commercial or financial.[16] Moreover, upon conducting an in camera review of the email, the Court finds the email contains information about business operations.[17] Thus, the first prong of Exemption 4 is met. *See also Jordan*, 273 F. Supp. 3d at 230-31.

(b) Obtained from a Person

Under FOIA, a "person" is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C.

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[16] Talley argues Defendant failed to cite evidence showing the Powers email included trade secrets or commercial or financial information. Doc. #81, at 16. Defendant submitted a declaration in support of its summary judgment motion, which is entitled to "substantial weight," that provided more than "barren assertions" that the Powers email was exempt. *Madel*, 784 F.3d at 452. The information contained in the declaration is not contradicted in the record, and although Talley contends Defendant acted in bad faith, there is no evidence in the record of agency bad faith.

[17] Although the Court did not request an in camera review of the Powers email, Defendant provided the unredacted Powers email to the Court on June 8, 2020.

§ 551(2). According to Defendant's declaration, the Powers email was obtained from DynCorp, which is considered a "person" under FOIA. Doc. #75-1, at 6. Talley does not dispute the Powers email was obtained from a person. Thus, the second prong is met. *See also Jordan*, 273 F. Supp. 3d at 231.

(c) Privileged[18]

Privileged information includes "information that falls within recognized constitutional, statutory, or common law privileges." *Gen. Elec. Co. v. Dep't of Air Force*, 648 F. Supp. 2d 95, 101 n.4 (D.D.C. 2009) (citing *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 267-68 n.50 (D.C. Cir. 1982)); *see also Jordan*, 273 F. Supp. 3d at 231 (citations omitted). The attorney-client privilege has been recognized under Exemption 4. *See Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 945 (10th Cir. 1990) (citations omitted). The attorney-client privilege "applies broadly to communications made by corporate employees to counsel to secure legal advice from counsel." *PaineWebber Grp., Inc. v. Zinsmeyer Trs. P'ship*, 187 F.3d 988, 991 (8th Cir. 1999) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Defendant withheld the Powers email because it determined the information was privileged. Doc. #75-1, at 6. Defendant's declaration states the DynCorp

[18] Defendant does not argue the information in the Powers email is confidential, so the Court limits its discussion to whether the information is privileged.

emails were marked "Subject to Attorney Client Privilege" and were sent by a DynCorp email to DynCorp's in-house attorney "to apprise him of developments potentially impacting a DynCorp contract and to explicitly request the attorney's input and review of the information transmitted." Doc. #75-1, at 6. In response, Talley argues: "No evidence in the record in any proceeding shows that Judge Contreras determined that the DOL presented evidence showing *any* fact necessary to establish that Powers' email was protected by the attorney-client privilege consistent with Supreme Court precedent. . . ." Doc. #81, at 9 (emphasis in original). She also argues Judge Contreras "knowingly violated Jordan's rights under federal law . . . and asserted contentions that he *knew* were false (each a "**Lie**") to help DOL and DOJ employees conceal relevant evidence and material facts." *Id.* (emphasis in original).

The Powers email was sent by Darin Powers, DynCorp's Vice President, to Brian Cox, Robert Huber, and Christopher Bellomy, and William Imbrie and Martha Huelsbeck are copied on the email. Doc. #75-1, at 30-33. The subject of the email is "WPS – next steps & actions." *Id*. Bellomy was DynCorp's in-house counsel. Doc. #75, at 15; *Jordan*, 273 F. Supp. 3d at 232. As set forth in Defendant's declaration and confirmed by the Court's in camera review, the email is marked "Subject to Attorney Client Privilege" and seeks counsel's advice and input on the information contained in the email. Accordingly, the Court finds the Powers email is protected by the attorney-client privilege, and the

Defendant properly withheld the email pursuant to Exemption 4. *See also Jordan*, 273 F. Supp. 3d at 231-32.

(d Segregability

Talley argues Defendant failed to provide the non-exempt segregable portions of the Powers email. "In a FOIA action, the focus is on the information sought, not the documents themselves." *Mo. Coal. for Env't Found.*, 542 F.3d at 1211-12. This is because "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Id.* at 1212 (quoting 5 U.S.C. § 552(b)). An agency may not withhold an entire document if some of the information contained therein is subject to an exemption. *Id*. (citation omitted). "Rather, non-exempt portions of documents must be disclosed unless they are 'inextricably intertwined' with exempt portions." *Id*. (citation omitted).

Defendant declares all reasonably segregable portions of the record were released to Talley after Exemption 4 was applied to the record. Doc. #75-1, at 6. The Powers email is part of a chain of emails dated July 30 and 31, 2013. *Id*. at 30-33. Other than the Powers email, which begins the chain of emails, Defendant produced the other emails in the chain to Talley. *Id*. Regarding the Powers email specifically, the Court finds the Exemption 4 attorney-client privilege applies to the entire Powers email. That is, Powers sought

counsel's advice about the information in his email. Therefore, the Court finds Defendant produced all reasonably segregable portions of the requested record.[19]

For all the foregoing reasons, the Court, when construing the underlying facts in the light most favorable to Talley, finds Defendant has established it fully discharged its FOIA obligations. The Court grants Defendant's motion for summary judgment.[20]

IV. OTHER PENDING MOTIONS

Because the Court grants Defendant's Motion for Summary Judgment, Defendant's Motion to Strike Talley's Jury Demand and Talley's Motion for Leave to File a Notice of Appeal are rendered moot.

V. TALLEY'S NOTICE OF APPEAL

On June 26, 2020, the Court warned Talley and Jordan that additional frivolous motions would be met with additional sanctions, another referral to the Kansas Bar Association, and referrals to other jurisdictions wherein counsel is licensed to practice law. Doc. #83. On July 1, 2020, Talley filed two motions, which were "frivolous, unprofessional, and scurrilous, if not defamatory, in tone and content." Docs. #90-93. The Court

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[19] *See also Jordan*, 273 F. Supp. 3d at 235-37; *Jordan v. U.S. Dep't of Justice*, No. Civil Action No. 17-2702(RC), 2019 WL 2028399, at *4-5 (D.D.C. May 8, 2019).

[20] To the extent the Court did not address arguments raised in Talley's opposition to Defendant's motion for summary judgment, the Court overrules those arguments.

struck Talley's motions and prohibited Talley and Jordan from filing anything further in this matter without the Court's approval.

On July 2, 2020, Talley's counsel sent an email to Chambers requesting, among other things, leave to file a Notice of Appeal and attaching said motion. The Court filed Talley's motion and reminded Talley and her counsel that they were prohibited from filing anything further in this matter without the Court's approval.

Nevertheless, on July 9, 2020, Talley, without the Court's approval, filed a Notice of Appeal. Doc. #100. Because the Notice of Appeal was filed in violation of the Court's Orders, the Court strikes the Notice of Appeal. The Clerk's Office is directed to retain a copy of the Notice of Appeal under seal.

VI. CONCLUSION

For the foregoing reasons, Talley's Motions for Judgment on the Pleadings are denied, Defendant's Motion for Summary Judgment is granted, Defendant's Motion to Strike and Talley's Motion for Leave to File a Notice of Appeal are denied as moot, and Talley's Notice of Appeal is struck. With the exception of filing a Notice of Appeal, Talley and her counsel are prohibited from filing anything further in this matter without prior approval from the Court. In addition, Talley and her counsel are prohibited from sending emails to the undersigned's staff.

IT IS SO ORDERED.

DATE: July 13, 2020

/s/ Ortrie D. Smith
ORTRIE D. SMITH,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2430

Robert Campo

Appellant

v.

U.S. Department of Justice

Appellee

No: 20-2439

Ferissa Talley

Appellant

v.

U.S. Department of Labor

Appellee

Appeal from U.S. District Court for the
Western District of Missouri - Kansas City
(4:19-cv-00905-ODS)
(4:19-cv-00493-ODS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 02, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

ROBERT CAMPO, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 4:19-cv-00905

DECLARATION OF VINAY J. JOLLY

I, Vinay J. Jolly, declare the following to be a true and correct statement of facts:

1. I am an Attorney Advisor with the Executive Office for United States Attorneys ("EOUSA"), United States Department of Justice ("DOJ"). I am assigned to the component of EOUSA designated to administer the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, amended by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the Privacy Act of 1974 ("PA"), 5 U.S.C. §552a. In that capacity, my responsibilities include the following: acting as liaison with other divisions and offices of the DOJ in responding to requests and litigation filed under both the FOIA/PA; reviewing FOIA/PA requests for access to records located in this office and the ninety-four United States Attorney's Offices ("USAO's") and the case files arising therefrom; reviewing correspondence related to requests; reviewing of searches conducted in response to requests; locating responsive records; and

preparing EOUSA responses thereto to ensure that determinations to withhold or release such responsive records are in accordance with FOIA, PA, and Department of Justice regulations (28 C.F.R. §§16.3 et seq. and §§16.40 et seq.).

2. As an Attorney Advisor of the FOIA/PA Unit, EOUSA, I have the authority to release and withhold records requested under the FOIA/PA. The statements I make in this Declaration are based upon my review of the official files and records of EOUSA, my own personal knowledge, and information acquired by me through the performance of my official duties.

3. Due to the nature of my official duties, I am familiar with the procedures followed by this office in responding to the FOIA request made to EOUSA by Plaintiff Robert Campo. This Declaration is being submitted in support of Defendant's Motion for Summary Judgment for records withheld by EOUSA.

BACKGROUND

4. On February 21, 2019 via routing from the Justice Management Division's Mail Referral Unit, EOUSA first received a FOIA/PA request letter from requester, Robert Campo, expressly seeking email records of Darin Powers in three cases relating to a litigant Jordan. (**See Exhibit A**.)

5. By electronic notification dated February 27, 2019 sent through its online FOIA portal, EOUSA

advised the Plaintiff that it had received his request and assigned it a number of 2019001917. (**See Exhibit B**.)

6. In this same letter, EOUSA further advised that the requested material seeking the files of the third parties could not be released absent express authorization and consent from the named third parties (Mr. Jordan), proof that the third party was deceased, or a clear demonstration that the public interest in disclosure outweighs the personal privacy interest of the third party. EOUSA enclosed a form for Plaintiff to obtain the release authorization from the third party named in the request. (**See id.**)

7. In the same letter, EOUSA advised Plaintiff that to release the material without an authorization would result in an unwarranted invasion of personal privacy and would be in violation of the Privacy Act and generally exempt under FOIA. Accordingly, EOUSA denied Plaintiff's request pursuant to 5 U.S.C. §§ 552(b)(6) and (b)(7)(C), and the Privacy Act, 5 U.S.C. § 552a(b).[1] EOUSA further informed Plaintiff that, if requested, any responsive public records would be released without express authorization or public justification for release. Finally, Plaintiff was notified of his appeal rights and provided with contact information

[1] EOUSA's response in this case is typically asserted to deny access to a third party's law enforcement records in the absence of a receipt of a privacy waiver or proof of death pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), 5.U.S.C. §§ 552(b)(6) and (b)(7)(C), and the Privacy Act of 1974, 5 U.S.C. § 552a(b). See also 28 C.F.R. § 16.3.

for the Office of Information Policy ("OIP"), and was informed that after the appeal has been decided, Plaintiff may have judicial review by filing a complaint.[2] [3] (**See id.**)

EXEMPTION 5 U.S.C. §552(b)(7)(C)
UNWARRANTED INVASION
OF PERSONAL PRIVACY

8. Exemption (B)(7)(C) protects from disclosure records or information compiled or law enforcement purposes, if such release could reasonably expected to constitute an unwarranted invasion of personal privacy. Exemption 7(C) requires a balancing of private and public interests for an appropriate type of law enforcement records or information.

9. The subject request seeks investigatory files relating to third parties. It is well-recognized that individuals have a strong privacy interest in law enforcement records and that the mention of an individual's name and identifying information in connection with a law enforcement will engender comment and speculation, and carries a stigmatizing connotation. Moreover, the fact that an event is not completely private does not mean that an individual has no interest in limiting disclosure or dissemination of the information. Likewise, an individual mentioned in law enforcement

[2] EOUSA has no record of receiving the third-party authorization from Plaintiff, and this request was subsequently closed.

[3] Following Plaintiff's appeal to OIP, OIP fully affirmed EOUSA's action. (**See Exhibit C**.)

records does not lose all rights to privacy merely because his or her name has been disclosed. Even public figures do not surrendered all rights to privacy by placing themselves in the public eye.

10. In this case, EOUSA invoked Exemption b(7)(C), in conjunction with Exemption (b)(6), to withhold any records pertaining to the third party named in the FOIA request, Mr. Jordan. Plaintiff is seeking these files of Mr. Jordan. In making this decision, EOUSA determined that any records responsive to Plaintiff's request would be contained in the investigative files pertaining to a third party individual. EOUSA has determined that investigatory files are the type of law enforcement records where the balance characteristically tips in one direction due to the strong privacy interest of the individual named in these records. See United States Dep't of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989). For this reason, in the absence of an overriding public interest in disclosure, consent from the third parties or proof of death, EOUSA denied access to the third-party law enforcement information requested by Plaintiff pursuant to Exemption (b)(7)(C) because disclosure of the requested information could reasonably be expected to constitute an unwarranted invasion of these individuals' privacy.[4] This action is

[4] EOUSA also routinely invokes Exemption (b)(6), in conjunction with Exemption (b)(7)(C), to deny access to third-party information for the reasons stated infra at ¶¶ 13-14.

consistent with EOUSA's handling of the third-party requests and is well-recognized by the courts.

11. As stated above, the Plaintiff has not provided EOUSA with authorization from the subject third party to release any privacy and other protected information that might be contained in the responsive files. Moreover, Plaintiff failed to meet its burden of establishing that there is any public interest in disclosure that outweigh the strong privacy interests of Mr. Jordan. Accordingly, "whether defendants actually searched for records . . . is 'immaterial . . . because that refusal deprived [plaintiff] of nothing to which he is entitled.'" Lewis v. U.S. Department of Justice, 609 F.Supp.2d 80 (D.D.C.0 (2009) (Huvellle, J.).

12. EOUSA applied this exemption to any third-party information in conjunction with Exemption (b)(6).

EXEMPTION 5 U.S.C. §552(b)(6)
CLEARLY UNWARRANTED INVASION
OF PERSONAL PRIVACY

13. Exemption (b)(6) permits the withholding of information contained in personnel, medical, and similar files, which if disclosed would constitute a clearly unwarranted invasion of personal privacy. This exemption protects from disclosure information that applies to a particular, identifiable individual.

14. EOUSA invoked Exemption (b)(6), in conjunction with Exemption (b)(7)(C), to deny access to

information pertaining to the named third-party individual because this individual has strong privacy interests in this information, and Plaintiff has failed to establish an overriding public interest in disclosure. In addition, Plaintiff has failed to provide EOUSA with consent from Mr. Jordan or proof that the person is deceased. Consequently, the third-party individual's privacy interests in the requested law enforcement information outweigh the non-existent public interest in disclosure; therefore, to release any requested information would constitute a clearly unwarranted invasion of personal privacy.[5] In light of the fact that any and all records responsive to the third-party request are exempt under Exemptions 6 and 7 (C), a document-by-document search and review of the responsive material is not conducted. It is under these circumstances in the instant matter that EOUSA denied access to Mr. Jordan's investigatory law enforcement records in response to Plaintiff's request.

CONCLUSION

15. Each step in the handling of Plaintiff's request has been entirely consistent with the EOUSA's procedures adopted to ensure an equitable response to all persons seeking access to third-party records under the FOIA/PA. Thurs, the EOUSA has properly

[5] EOUSA's balancing of the privacy and public interest in determining whether to withhold third-party information under Exemption (b)(7) (C), as set forth in Paragraphs 8-12, supra, applies equally to the balancing of interests under Exemption 6.

responded to Plaintiff's FOIA request for third-party records.

I declare under penalty of perjury that the foregoing is true and correct and that Exhibits A-C attached hereto are true and correct copies.

Executed on June 1, 2020.

/s/ Vinay J. Jolly
Vinay J. Jolly
Attorney Advisor
EOUSA, FOIA/PA Unit

EXHIBIT A

Robert Campo
10606 Askew
Kansas City, Missouri 64137
816-761-7055
robertcampo@live.com

February 19, 2019

VIA EMAIL AT MRUFOIA.REQUESTS@USDOJ.GOV

U.S. Department of Justice
FOIA/PA Mail Referral Unit
Room 115
LOC Building
Washington, DC 20530-0001

Re: FOIA Request re: Powers' emails and Related Correspondence

Dear Sir or Ma'am:

Reference is made to the emails sent by Darin Powers on July 30, 2013 with the subject "WPS – next steps & actions" ("**Powers' emails**") that were at issue in three cases involving attorneys employed by the U.S. Department of Justice ("**DOJ**"): *Jordan v. U.S. Dep't of Labor*, (D.D.C. No. 1:16-cv-01868-RC) (and the related appeal to the D.C. Circuit No. 18-5128); *Jordan v. U.S. Dep't of Justice*, (D.D.C. No. 1:17-cv-02702-RC); *Jordan v. U.S. Dep't of Labor*, (WDMO No. 5:18-cv-06129-ODS). The signature pages on the filings in such cases included the local U.S. Attorney, one or more Deputy or Assistant U.S. Attorneys, and the local Civil Division Chief.

I respectfully request that the DOJ kindly promptly email to me an electronic (PDF) copy of any record maintained by the DOJ that satisfies the following criteria:

> a copy of Powers' emails in any form that was transmitted to or from any DOJ employee by any person at any time in or after June 2016 along with any record establishing the date or manner of such transmission.

Please also note that [respectfully request that the DOJ communicate with me by email regarding this request, including in providing any response to or denial of this request.

Thank you for your prompt attention to this request.

Sincerely,

/s/ Robert D. Campo