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May 16, 2018

VIA ELECTRONIC MAIL (FOIARequests@uspto.gov)

USPTO FOIA Officer
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Dear FOIA Officer:

I represent Gilbert P. Hyatt and make the following request on his behalf. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, please provide me with the following records:

All email messages sent, received, stored, or otherwise obtained by Walter Briney while associated with Art Unit 2615 that contain, through embedding or attachment, one or more “Hyatt Images.” For purposes of this request, a “Hyatt Image” is a still or moving image in the AVI, BMP, FLV, GIF, JPG, MOV, MP4, MPG, MPV, PNG, TIFF, WMF, or WMV file format that depicts or otherwise refers to Mr. Hyatt, his patents, his patent applications, or Art Unit 2615. “Hyatt Images” include without limitation: photographs of Mr. Hyatt, irrespective of whether they have been edited, embellished with text, or otherwise manipulated; caricatures of Mr. Hyatt; “memes” (i.e., captioned images) depicting or referring to Mr. Hyatt; and images consisting of blocks of text referring to Mr. Hyatt.

If you determine that excluding image files smaller than 10 kb from the definition of “Hyatt Images” would speed review and production of potentially responsive records, then I request that such images be excluded from that definition.

* * *

Rolling Production: I request rolling production of responsive documents. In other words, please produce responsive records in batches, as they are identified.

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

Index of Withheld Records: In the interests of efficiency and furthering the purposes of the Freedom of Information Act, I request that you maintain and produce, on a rolling basis, an index that identifies any records withheld, in whole or in part, and the statutory basis of the withholding.

Items Determined Not To Be Agency Records: I request that you identify to me any otherwise responsive records withheld on the basis that they are not agency records.

Preservation Requirement: Pursuant to 37 C.F.R. § 102.3(d), the PTO “shall preserve...copies of all requested records” and “shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit under FOIA.” 37 C.F.R. § 102.3(d).

* * *

Lack of Commercial Use: Mr. Hyatt’s intended use of the requested records is not a commercial one. As you know, “commercial-use” designation “turn[s] on the use to which the requested information would be put, rather than on the identity of the requester,” and Mr. Hyatt’s intended use is to understand the PTO’s unusual actions on his applications, assess any violations of his rights, and inform the public of those things so as to advance public understanding, hold to account those responsible for any misconduct, and ensure that similar misconduct is averted in the future. Mr. Hyatt describes his intended use of the requested records in the attached declaration, which I ask that you consider in evaluating whether Mr. Hyatt’s intended use is commercial and (if applicable) his request for a fee waiver.

Fee Waiver: If you estimate that the fee for this FOIA request will exceed \$10,000, I request that you determine that Mr. Hyatt is entitled to a fee waiver.

Mr. Hyatt seeks to ascertain the extent and details of the violation of his constitutional and statutory rights by the PTO and PTO personnel and to inform the public, through publication, about PTO important operations that have not been meaningfully disclosed to date and about potentially serious misconduct by a government agency and its personnel.

On that basis, Mr. Hyatt is entitled to a fee waiver. As consideration of the applicable factors demonstrates, “[d]isclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

The public interest in disclosure is overwhelming. First, it is indisputable that the requested records specifically concern identifiable operations or activities of the government: the PTO’s treatment of a patent applicant, Mr. Hyatt, and his applications.

Second, the requested records are likely to contribute to an understanding of those government operations and activities, because they will be meaningfully informative with respect to them,

focusing on persons responsible for processing Mr. Hyatt's applications. This information is not already in the public domain.

Third, the disclosure of these records will contribute to public understanding because Mr. Hyatt intends and has made concrete plans to disseminate the information obtained through Internet publication, collaboration with news media, and collaboration with nonprofit organizations that work on government accountability, intellectual property, and regulatory reform issues. In particular, Mr. Hyatt is affiliated with the American Center for Equitable Treatment ("ACET"), a nonprofit group with which he has collaborated in the past to obtain and disseminate information of public interest. Both he and ACET have demonstrated expertise in these areas, such that they can help explain to the public the meaning and relevancy of the requested information. Likewise, Mr. Hyatt and his counsel have demonstrated their ability to bring matters involving government accountability and misconduct to the public attention.

Fourth, disclosure of the requested information will contribute significantly to public understanding, given the extremely limited understanding of the PTO's handling of Mr. Hyatt's applications and treatment of applicants like Mr. Hyatt. The public, of course, has an overwhelming interest in being informed about the way that the PTO treats patent applicants, about government misconduct, and about the agency's processing of long-pending patent applications. And today the public knows little or nothing about these things, as well as the PTO's handling of Mr. Hyatt's applications, which themselves implicate public rights.

By contrast, Mr. Hyatt's commercial interests are all but non-existent. The PTO has consistently maintained that any possible bad faith or misconduct on its part in the handling of Mr. Hyatt's patent applications is legally irrelevant to their merit and issuance and that its handling of his applications is guided by law and necessity alone. In particular, the PTO does not consider any of the information requested by Mr. Hyatt to be relevant to its examination or other handling of his applications, such that (in the PTO's view) any use of that information in his applications pending before the agency would not advance their prosecution or otherwise advance their issuance. Mr. Hyatt may disagree on those points, but the agency's consistent position is that the requested information is irrelevant to the issuance of any patents to Mr. Hyatt and therefore irrelevant to any commercial interest he may have their issuance. In any instance, Mr. Hyatt's principal interest is identifying and exposing the PTO's unusual treatment of him and the likely violation of his constitutional and statutory rights by the PTO, which is not at all a commercial interest.

Accordingly, the magnitude of any commercial interest is minimal at most, while the identified public interest in disclosure is overwhelming. The public interest in disclosure is therefore the primary interest. As such, Mr. Hyatt is entitled to a fee waiver.

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Sincerely,



Andrew M. Grossman
Counsel to Gilbert P. Hyatt

Attachment

DECLARATION OF GILBERT P. HYATT

Pursuant to 28 U.S.C. § 1746, I, Gilbert P. Hyatt, declare and state as follows:

1. I am an engineer, scientist, and inventor and holder of more than 70 patents issued by the United States Patent and Trademark Office (“PTO”). I have over 300 patent applications pending before the PTO (including what I believe to be unlawfully abandoned applications that I expect to get un-abandoned) covering subject matter including microcomputer structure, computer memory architecture, illumination control systems, display systems, graphics systems, image processing systems, and sound and speech processing. Most of my pending patent applications have been pending for over 22 years, with about a dozen applications pending for over 35 years.

2. Over the course of prosecuting these patent applications, I have come to believe that the PTO is not treating my patent applications fairly and that the PTO has established policies and procedures that are intended to preclude me from ever obtaining patent protection for any of my pending patent applications. I have detailed some of these concerns, and their factual bases, in the attached declaration, dated December 27, 2016, which is attached and specifically incorporated into this declaration. (Ex. A).

3. I have also been the subject of character assassination by PTO officials. For example, Mr. Richard Hjerpe sent an email in February 2003 disparaging me to numerous high-ranking (and other) PTO officials in the context of litigation that I was engaged in at the time against the State of California. PTX-124 (Ex. B). I believe that other PTO records disparaging me exist and should be publicly disclosed.

4. On February 12, 2018, I caused to be sent a Freedom of Information Act (“FOIA”) request for certain records relating to me that I believe to be under the control of the

PTO. In order to respond to concerns that the PTO has raised about the scope of that original request, I have deferred all requests except the following:

All records concerning Mr. Hyatt or his patent applications created by, sent by, or received by (a) Diego Gutierrez during 2012 and 2013 or (b) Gregory Morse from and including 2013 through 2018, excluding (1) email attachments, (2) documents contained in the file histories of Mr. Hyatt's applications, and (3) drafts of documents contained in the file histories of Mr. Hyatt's applications.

Copies of all Performance Appraisal Plans for, and signed by, Examiner Walter Briney for fiscal years 2013, 2014, 2015, 2016, 2017, and 2018.

5. The request concerns the PTO's treatment of my patent applications, which have been pending before the agency for many years. Supervisor Diego Gutierrez was the initial supervisor of Art Unit 2615, to which the PTO assigned my patent applications; Gregory Morse is his successor, serving as the supervisor of that Unit today. Walter Briney served as an examiner in that Unit working on my applications throughout the period from 2012 through 2018.

6. The purpose of the FOIA request is to ascertain and publicize the extent and details of the unusual treatment by the PTO of my applications, so as to inform the public about the agency's operations and allow the agency and its personnel to be subject to public accountability. This unusual treatment includes actions that I have reason to believe were taken in violation of my constitutional and statutory rights by the PTO and PTO personnel, and I intend to inform the public, through publication, about PTO operations and policies that have not previously been meaningfully disclosed and about potentially serious misconduct by a government agency and its personnel.

7. For example, the disclosed information will inform the public about PTO's operations and actions carrying out a previously secret program that included my applications and others'. In particular, it will reveal how the PTO and its examiners and officials treated my

applications that, by PTO's own admission, were flagged under the Sensitive Application Warning System ("SAWS") program. The SAWS program was a secret program established in 1994 for flagging applications the PTO deemed "sensitive" to ensure that they would not issue even if an examiner allowed the application. Since the public revelation in 2014 of this program's existence, it has been the subject of extensive press coverage, congressional inquiries, and controversy within the patent community. Although SAWS has been subject to widespread curiosity and interest, the PTO has refused to identify which applications it flagged under SAWS and has never disclosed the full details of the operation of SAWS, including the full range of effects and consequences of an application being flagged under SAWS and the role of senior PTO management in implementing and operating SAWS. Because there is definitive evidence that my applications were flagged under SAWS, publication of the information disclosed under this request will inform the public for the first time about certain important aspects of the PTO's treatment of SAWS applications.

8. The disclosure of the requested information will significantly contribute to, and enhance the understanding of a reasonably broad audience of persons interested in the subject. I intend to provide the records that I obtain through the FOIA request to the American Center for Equitable Treatment ("ACET"), a non-profit corporation with which I am affiliated as a member. ACET is dedicated to educating Americans about the economic and social benefits of the federal government's fair, efficient, and effective administration of technology, innovation, and intellectual property laws and policies. Through its Accountability Projects involving investigations, reports, legal filings, and ACET Blog posts, ACET promotes government accountability and transparency to protect the laws and regulations central to America's world

leadership in technology, innovation, and intellectual property protection. ACET serves as a free information resource for scholars, policy makers, journalists, and citizens.

9. One of ACET's projects is its "USPTO Accountability Project," which uses government publications and the Freedom of Information Act to gather information of potential interest to the public from the PTO and to disseminate that information to advance public understanding both of government process and of the effect such process has on technological innovation, intellectual property protection, and economic prosperity. ACET posts its information requests and the USPTO's responses for public review and also publishes analyses and commentary on such information.

10. In particular, the ACET publishes information that it obtains from FOIA requests as part of the USPTO Accountability Project on its website at <http://acet-usa.org>.

11. I also intend to publish any records obtained from this FOIA request at <http://www.ptomisconduct.com>, which I have reserved specifically for that purpose.

12. Additionally, I intend to ensure that information shedding light on the PTO's activities are extracted, synthesized, and effectively conveyed to the public through publication of analyses of any misconduct identified in the materials and through the media, both general interest and trade-specific. ACET has the capability of performing these activities, and I do, too. In particular, I have the capability of extracting, synthesizing, and effectively conveying information concerning the inner workings of the PTO to the public through my many decades of experience working with the PTO on patent examination. I am also a registered patent agent. Moreover, I intend to, and routinely do associate with individuals with expertise in extracting, synthesizing, and effectively conveying information concerning the inner workings of the PTO to the public. In sum, I am uniquely situated and involved in proceedings at the PTO on which I

seek information that has relevance to a broad segment of the public, and I have the expertise in the subject area and the ability and intention to effectively convey such information to the public.

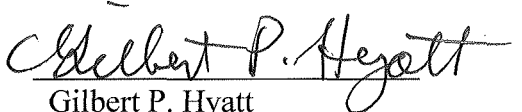
13. Although the FOIA request concerns records pertaining to me, those records are, viewed objectively, of significant interest to the public. For example, Mr. Gregory Morse, the supervisory patent examiner who heads the Hyatt Unit (Art Unit 2615) offered sworn testimony that “the PTO has expended a lot of people and resources and money in department salaries trying to examine Mr. Hyatt’s applications,” to the tune of about \$10 million just in examiners’ salaries over the past five years. Trial Tr. 57:1–25 (Oct. 12, 2017 AM) (Ex. C). The public and other users of the patent system have a legitimate interest in understanding how that money was spent, what purposes it was spent to accomplish, and whether the PTO is accomplishing those purposes. I am not aware that any information regarding these things has been made available to the public.

14. Moreover, the PTO has represented in court that my patent prosecution conduct and the prosecution of my patent applications are of interest to the public. For example, the PTO Solicitor’s Office recently represented to the United States District Court for the District of Columbia in a case concerning my patent prosecution conduct that “[i]t’s the government’s view that the particular prosecution laches issue that we have brought to the Court here is an issue that is raised in the public interest to prevent the abuse of the patent system.” Trial Tr. 5:18–21 (Oct. 6, 2017 AM) (Ex. C).

15. I do not have any commercial interest in the records that are sought by the FOIA request. The information I seek pertains to examiner practices and procedural matters, not to the merits of the technology described or claimed in my patent applications or the merits of the patent claims contained in those applications. I do not currently engage in any patent licensing

activities, and the PTO has consistently maintained (in administrative proceedings and in court) that any possible bad faith or misconduct on its part in the handling of my patent applications is legally irrelevant to their merit and issuance and that its handling of my applications is guided by law and necessity alone. In particular, the PTO's position, as it has expressed in litigation, is that it does not consider any of the information requested here to be relevant to its examination or other handling of my applications on the merits, such that (in the PTO's view) any use of that information in my applications pending before the agency would not advance their prosecution, otherwise advance their issuance, or otherwise alter the PTO's processing of them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2018.


Gilbert P. Hyatt