



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

May 25, 2018

VIA E-MAIL

Mr. Andrew Grossman
Baker Hostetler
Washington Square
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Washington, DC 20036-5304
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RE: *Freedom of Information Act (FOIA) Request No. FP-18-00014 (Modification and Fee Waiver Request)*

Dear Mr. Grossman:

This is in response to your correspondence dated, April 27, 2018, pursuant to the Freedom of Information Act (5 U.S.C. § 552), requesting a copy of:

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.

In this letter you requested a fee waiver and, in the event that this fee waiver request is not granted, that this request not be considered a commercial use request. For the reasons set forth below, the request for a fee waiver and for this request not to be considered a commercial use request are denied.

Multitrack Processing

As a preliminary matter, we wanted to inform you that the USPTO uses multitrack processing, as described in 37 C.F.R §102.6 (d), and assigns FOIA requests to simple or complex tracks. As discussed via telephone and in our correspondence, your request, even as modified and narrowed in your communication of April 27th, asks for a voluminous amount of records. Given the amount of anticipated records involved in this request and the amount of work and time needed to search for and review these records, this request has been assigned to the complex track.

Fee Waiver Request

The request for a fee waiver is denied. In order for fees to be waived or reduced, a requester must demonstrate that disclosure of the requested information: (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government (“public understanding requirement”), and (2) not primarily in the commercial interest of the requester (“noncommercial interest requirement”). *See* 5 U.S.C. § 552(a)(4)(A)(iii) and 37 C.F.R. § 102.11(k)(1).

1. Public Interest Requirement

To determine whether the public understanding requirement is met, the FOIA Officer considers four factors: (1) the subject of the request, (2) the informative value of the information to be disclosed, (3) the contribution to an understanding of the subject by the public likely to result from disclosure, and (4) the significance of the contribution to public understanding. *See* 37 C.F.R. § 102.11(k)(2). In this case, the fee waiver request fails to satisfy factors (2), (3), and (4).

With respect to factor (2), a requester needs to demonstrate that disclosure of the requested records are “likely to contribute” to an understanding of Government operations or activities. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to “likely to contribute” to an increased public understanding of those operations or activities. 37 C.F.R. § 102.11(k)(2)(ii). However, Mr. Hyatt’s request, on its face, only concerns (a) Mr. Hyatt and (b) Mr. Hyatt’s patent applications.

While Mr. Hyatt claims that this disclosure will contribute to the public’s understanding, given the “extremely limited understanding of these operations or activities as a result of the PTO’s lack of public disclosure,” it is difficult to ascertain how records concerning Mr. Hyatt and his applications would actually contribute to an increased public understanding of Government operations and activities. This request is so narrowly tailored and focused on Mr. Hyatt, it is unlikely disclosure of this information would be meaningfully informative about government operations and activities. Simply because Mr. Hyatt asserts that the disclosure of the requested records would “likely contribute” to an understanding of Government operations or activities, does not make it true, especially here where the evidence presented is solely focused on Mr. Hyatt and Mr. Hyatt’s applications.

Pursuant to factor (3), a requester must show that:

[D]isclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a requester who merely provides information to media sources does not satisfy this consideration.

Mr. Hyatt claims that he intends to disseminate the information concerning (a) Mr. Hyatt and (b) Mr. Hyatt’s patent applications through internet publication. Specifically, he cites to the American

Center for Equitable Treatment (ACET) website (<http://acet-usa.org>) as his intended means of distribution. However, The ACET website appears to be a single issue website and the sole subject of its content is Mr. Hyatt.

The evidence presented in Mr. Hyatt's fee waiver request claims that the information he seeks in these records would be disseminated to a broad audience of persons interested in the subject – other than himself – also fails. For instance, while some FOIA requests are posted on the ACET website, there is no information about how many people have viewed materials on the website. Additionally, the ACET blog only has four entries which suggests interest on this matter is quite limited. Also, the ACET website appears to be a single issue website and that subject is Mr. Hyatt. Moreover, the fact that Mr. Hyatt's litigation against the USPTO and his FOIA request are either directly or indirectly related to the prosecution of only his patent applications suggests that Mr. Hyatt's fee waiver request fails to demonstrate that the requested records would be disseminated to a broad audience of persons interested in the subject.

The words from Mr. Hyatt's own declaration suggest that many if not all of the "300 patents pending" are unpublished, but Mr. Hyatt has made no indication that he would disclose information about these unpublished patent applications to the public. Thus, again making it unlikely that Mr. Hyatt will ever disseminate the records he seeks to the public. Much of the information he has requested would logically concern unpublished patent applications, but there doesn't appear to be anything on the ACET website about unpublished patent application information. Nor is there anything in Mr. Hyatt's fee waiver request that suggests he would publically post information about unpublished patent applications.

The fee waiver request states that Mr. Hyatt's "commercial interests are all but non-existent," but he has failed to demonstrate this. While his request states that "Mr. Hyatt's principal interest is identifying and exposing the PTO's unusual treatment of him, its secret policies and procedures, and the likely violation of his constitutional and statutory rights by the PTO, which is not at all a commercial interest." Again merely stating this argument does not make it so, but it would be potentially more persuasive if Mr. Hyatt actually had posted or disseminated information about his unpublished patent applications, but to date, according to what has been presented in this request, he has not provided such information and there is no actual evidence that he intends to do so in the future. Arguably, Mr. Hyatt has not disseminated this information because of the "commercial interest" he has in protecting any potential unpublished patent applications, and there is no evidence to suggest this position would change. Mr. Hyatt's continued pursuit of patent prosecution is directed towards securing patents and he has failed to present any other reason for obtaining these patents other than for commercial interest.

Last but not least, Mr. Hyatt's claim that he would publically disseminate the requested information to a broad audience is more than questionable, because the <http://www.ptomisconduct.com> website cited in Mr. Hyatt's fee waiver request as an intended place of distribution contains only what appears to be a black and white picture of a drunk and falling cat. There is no proof that information about the records requested will actually be posted on this website. Additionally, nothing in the content of this URL supports the notion that disclosure of the requested information will contribute to the understanding of a reasonably

broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.

Finally, to satisfy factor (4), a requester must show that disclosure of the requested records “is likely to contribute ‘significantly’ to public understanding of Government operations or activities. The public’s understanding of the subject in question must be significantly enhanced by the disclosure.”

Mr. Hyatt’s request fails this factor as well. While he states that through the requested records he will “ensure that information shedding light on the activities are extracted, synthesized, and effectively conveyed to the public through publication...” and that “[a]lthough, the FOIA request concerns records pertaining to me, those records are, viewed objectively, of significant interest to the public,” his assertions are still problematic. Merely focusing on issues that directly affect oneself is not indicative of information that that would necessarily contribute significantly to the public understanding of Government operations or activities. Based on the arguments presented in this request, there may be information distributed about Mr. Hyatt’s specific interactions with the USPTO, but these arguments fail to illustrate exactly how Mr. Hyatt’s specific interactions shed light on Government operations and activities and in turn how these individual interactions would significantly contribute to the public’s understanding thereof.

2. Disclosure of the Information Is Primarily in the Commercial Interest of Mr. Hyatt

To determine whether the second fee waiver requirement is met, the FOIA Officer considers two factors: (1) the existence and magnitude of a commercial interest and (2) the primary interest in disclosure. *See* 37 C.F.R. § 102.11(k)(3). Neither of these factors has been satisfied with this fee waiver request.

Under the first factor, a FOIA Officer considers “whether a requester has a commercial interest that would be furthered by the requested disclosure.” Mr. Hyatt’s interest is purely commercial, as Mr. Hyatt currently has several pending lawsuits against the USPTO. *See Rozet v. Dep’t of Housing and Urb. Development*, 59 F. Supp. 2d 55, 57 (D. D.C. 1999) (holding that the timing of plaintiff’s lawsuit demonstrated the FOIA request sought to advance his commercial, rather than public, interest).

Commercial Requester Status – Mr. Hyatt is a Commercial Requester

Under 37 C.F.R. § 102.11(b)(1), commercial use request “means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation.” The USPTO regulation continues, mandating that the “FOIA Officer shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the FOIA Officer has reasonable cause to doubt the requester’s stated use, the FOIA Officer shall provide the requester a reasonable opportunity to submit further clarification.” *Id.*

It is highly unlikely and unreasonable to conclude that this request for records “lacks a commercial use.” Merely because the author suggests that the requested records intended use is not for commercial use does not make it so. Rather, as previously explained, the complete set of facts suggests that the commercial interest at stake far outweighs any persuasive public interest argument.

As previously mentioned, Mr. Hyatt has been and is currently engaged in litigation with the USPTO for years. The fact that Mr. Hyatt is a commercial requester is substantiated by the notion that if the requester is engaged in litigation with the USPTO, then “the FOIA Officer shall determine, whenever reasonably possible, the use to which a requester will put the requested records.” 37 C.F.R. § 102.11(b)(1). Accordingly, based on his litigation alone, Mr. Hyatt has a commercial interests in the records sought.

In this request, Mr. Hyatt claims that he 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.” Mr. Hyatt claims that his intended use is to understand the PTO’s unusual actions on his applications, among other uses. He also spends a considerable amount of time discussing the Sensitive Application Warning System (SAWS) program in his declaration. Of note, this program was terminated over three years ago; thus, it is hard to fathom how information about the program today would really inform the public about “important operations that have not been meaningfully disclosed.”

In short, Mr. Hyatt’s litigation against the USPTO almost completely focuses on getting patents issued. At the most basic level, one pursues a patent for one major reason: to protect his or her rights to an invention -- *a commercial interest*. Therefore, his statement is given little weight, and there is reasonable cause to doubt his stated use. Furthermore, it is difficult to envision a non-commercial purpose for pursuing patent rights. Hence, the evidence supports the determination that Mr. Hyatt is a commercial requester.

This denial is firmly based on the fact that the commercial interest in this matter far exceeds any public interest use as asserted in this specific request for fee waiver.

Summary of Denial of Requests for Fee Waiver and Noncommercial Status

While your request asserts many things, it lacks the sufficient proof of warranting a fee waiver and being deemed a non-commercial requester. Accordingly, your request for a public interest fee waiver and to be deemed a non-commercial requester is denied for the aforementioned reasons above.

This denial of the requests for a fee waiver request and status as a noncommercial use requester constitutes an adverse initial determination under the FOIA. The undersigned is the denying official. You have the right to appeal this initial decision to the General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450. An appeal must be received within 90 calendar days from the date of this letter. See 37 C.F.R. § 102.10(a). The

appeal must be in writing. You must include a copy of your original request, this letter, and a statement of the reasons why the information should be made available and why this initial denial is in error. Both the letter and the envelope must be clearly marked "Freedom of Information Appeal."

Fee Estimate

Commercial Use Request: As an initial matter, the USPTO has designated your request a commercial use request, which includes, for example, requests intended to further interests through litigation. 37 C.F.R. § 102.11(b)(1). This means you are responsible for all search, review, and duplication fees. 37 C.F.R. § 102.11(c)(1)(i).

Amount: Preliminary estimates indicate that the approximate processing cost for paragraph one of your FOIA request is **\$131, 019.00**. This estimate includes estimated search and review time based on a preliminary assessment of the volume of records potentially responsive to paragraph one of your request and the expected review of these records.

This estimate does not necessarily represent the final cost. Estimates are inherently imprecise, and the final cost could be higher or lower than the amount provided here. However, the estimate provided herein is reasonably calculated to represent search and review costs required to adequately respond to your request. As the search, review, and potential release(s) continue, the USPTO will reassess accurate fees.

Please note that fees are chargeable even when no responsive records are found, or when the records requested are determined to be partially or totally exempt from disclosure. 37 C.F.R. § 102.11(c)(3)(i).

If you are interested in reducing your fees and targeting the USPTO search, we welcome additional discussions about narrowing the scope of your request within the next 30 calendar days.

Payment: Because your estimate exceeds \$250.00, you must pay the entire anticipated fee before the Agency begins processing your request. 37 C.F.R. § 102.11(i)(2).

Please remit, within 30 calendar days of the date of this letter, a check made payable to the "**Department of Treasury**" in the amount of **\$131, 019.00**. The payment must be sent to:

United States Patent and Trademark Office
Freedom of Information Act Officer
Office of the General Counsel
P.O. Box 1450
Alexandria, VA 22313-1450

If payment in the full amount of the initial estimate is not received by **June 25, 2018**, this request will be considered withdrawn and closed. Please contact us before that date, however, if you would like to discuss your request in order to reformulate it to meet your needs at a reduced cost.

Right to Appeal

You may contact the FOIA Public Liaison at (571) 272-0512 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

As stated above, you have the right to appeal this decision to the Deputy General Counsel, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450. An appeal must be received within 90 calendar days from the date of this letter. See 37 C.F.R. § 102.10(a). The appeal must be in writing. You must include a copy of your original request, this letter, and a statement of the reasons why the information should be made available and why this initial denial is in error. Both the letter and the envelope must be clearly marked "Freedom of Information Appeal."

Sincerely,



Louis J. Boston, Jr.
USPTO FOIA Officer
Office of General Law