



Legal Counsel.

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September 6, 2016

FREEDOM OF INFORMATION APPEAL
Certified mail-return receipt requested

Office of the General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
ATTN: Deputy General Counsel, FOIA Appeal

Re: USPTO Constructive Denial Of FOIA Request No. F-16-00215

Dear Sir/Madam:

We represent the American Center for Equitable Treatment, Inc., a 501(c)(3) corporation ("American Center").

Pursuant to 37 C.F.R. 102.10 we hereby appeal the United States Patent and Trademark Office's ("USPTO") constructive denial of the American Center's FOIA Request No. F-16-00215.

Background

The American Center's Freedom of Information Act ("FOIA") request was filed on June 10, 2016 (Exhibit 1) and acknowledged by USPTO on June 13, 2016 (Exhibit 2).

On July 19, 2016, USPTO emailed the American Center's counsel to advise that it anticipated completion of the request by Friday, July 22, 2016, or "sooner if possible."

On July 26, 2016, in response to a query from the American Center's counsel, USPTO advised that there had been a delay due to "a technical issue involving the electronic delivery of responsive records to the FOIA Office..." and that the records would be delivered to the American Center "before the weeks [sic] end."

On July 28, 2016, USPTO advised that “Although the data transfer issues have been resolved, the employee in patents responsible for providing the responsive records is out of the office until August 3. I was just notified of this today. As a result, this won’t be complete until August 8 at the earliest.” Also on July 28, 2016, and in response to a query from the American Center, USPTO stated: “We will waive all fees. I won’t know whether there will be exemptions until I have had a chance to review the documents.”

On August 9, 2016, USPTO advised: “The documents are all uploaded and I have begun my review....There are about 1100 pages. I was made aware (today) that there is one other person that may have documents responsive to the request but they [sic] are out of the office for the next week and a half. I am proposing a rolling release. I give what I have now and the rest to follow over the next few weeks.”

On August 31, the American Center contacted USPTO, advised that it was “ready for the rolling release” and asked “When will we begin to see records?” There has been no response since.

Currently, the American Center’s FOIA is listed as “In Process” on USPTO’s website (Exhibit 3).

Argument

USPTO is obliged to provide responsive records “promptly.” 5 U.S.C. § 552(a)(3)(A). Contrary to law, the American Center’s request has been pending for nearly ninety days without either the production of a single record or an articulation of a colorable excuse for not doing so. *CREW v. FEC*, 711 F.3d 180, 189 (D.C. Cir. 2013)(“As to actual production, FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years”) *citing* 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(i).

Government agencies often attempt to justify delayed FOIA production based on significant backlogs of FOIA requests or because the breadth of the underlying request required an unusually “considerable amount of time and effort” in processing same. *Compare* 5 U.S.C. § 552(a)(6)(C)(ii)-(iii); *CREW*, 711 F.3d at 185; *Calypso Cargo, Ltd. v. U.S. Coast Guard*, 850 F. Supp. 2d 1, 5-6 (D.D.C. 2012). However, USPTO has made no such claims here. Instead, USPTO has identified, collected, and withheld production of at least 1100 pages of responsive records. Consequently, USPTO may not rely on a functional bar to block or delay immediate disclosure.

Furthermore, the FOIA requires that, within the relevant time period, an agency must determine whether to comply with a request — that is, whether a requester will receive all the documents the requester seeks. “It is not enough that, within the relevant time period, the agency simply decides to later decide....” Instead, “within the relevant

time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions." *CREW*, 711 F.3d at 186. Otherwise, an agency could respond to a request "in terms not susceptible to immediate administrative appeal — by simply stating, in essence, that it will produce documents and claim exemptions over withheld documents in the future." *Id.* In other words, *CREW* expressly prohibits the response USPTO has given to the American Center in this case. *Id.* at fn.5 ("In order to facilitate an administrative appeal, an agency must indicate the scope of the documents it intends to produce and the exemptions it will claim").

Relief Requested

USPTO has failed to seasonably produce responsive records and provide a list of claimed exemptions (if any) with an appropriately detailed justification therefore. The agency's conduct therefore amounts to a constructive denial of FOIA Request No. F-16-00215. Consequently, the American Center hereby requests the following relief:

1. Immediate commencement of the promised "rolling release" and a reasonable time certain for full disclosure.
2. A determination within two weeks of today's date identifying all claimed exemptions and providing a justification for each specifically explaining how disclosure of each withheld information segment would damage the interests protected by the claimed exemption. See *Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998); *Pacific Architects & Engineers, Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974). Conclusory and generalized allegations of exemptions are unlawful. *Id.* (citations omitted).

Please contact me if you have any questions.

Best regards,



Reed D. Rubinstein

RDR:um

EXHIBIT 1

Frye, Althea (Miracorp Inc.)

To: FOIA Requests
Subject: RE: American Center for Equitable Treatment, Inc. Freedom of Information Request

From: Rubinstein, Reed [<mailto:Reed.Rubinstein@DINSMORE.COM>]
Sent: Friday, June 10, 2016 3:54 PM
To: FOIA Requests <FOIARequests@USPTO.GOV>
Subject: American Center for Equitable Treatment, Inc. Freedom of Information Request

Attn: FOIA Officer

Attached is a FOIA request by our client, the American Center for Equitable Treatment, Inc. (ACET). Please be sure to identify and treat ACET as the requestor on all subsequent correspondence and communications.

Feel free to contact me if you have any questions.

Cordially,

Dinsmore

Reed D. Rubinstein
Partner

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June 10, 2016

VIA ELECTRONIC MAIL

USPTO FOIA Officer
United States Patent and Trademark Office
PO Box 1450
Alexandria, VA 22313-1450
FOIARequests@uspto.gov

Re: AMERICAN CENTER FOR EQUITABLE TREATMENT, INC'S FREEDOM OF INFORMATION ACT REQUEST

Dear FOIA Officer:

On behalf of our client, the American Center for Equitable Treatment, Inc., a 501(c)(3) corporation, and as required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and 37 C.F.R. § 102.4, please provide me with the following records.

1. All records referencing or concerning the SUPPORTING STATEMENT filed by the United States Patent and Trademark Office (PTO) with the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) in Patent Processing (Updating), OMB Control No. 0651-0031, ICR Reference No. 201301-0651-002. Relevant records include but are not limited to:

(a) All drafts, revisions and versions of the Supporting Statement.

(b) All estimates of paperwork burden and their derivation pursuant to 5 CFR 1320.8(a)(4), including underlying assumptions and data used for the derivation and estimates; tabulations, mathematical models, calculations, analysis, computer spreadsheets in their native form and in their entirety (with all cells accessible) including embedded cell relationships, cell-reference links and embedded equations.

(c) All records, guidance or manuals describing any of the items listed in paragraphs (a) and (b) above, including any communications and material provided to or by consultants to the PTO.

2. All records referencing or concerning OMB review of ICR Reference No. 201301-0651-002 not otherwise included in Request #1 above.

“Records” are defined at 44 U.S.C. § 3301, and per 5 U.S.C. § 552(f)(2) include “any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any format, including an electronic format.” To be clear, our request also includes metadata as well as records that may have been created, handled, transmitted, or found on private, nongovernmental email accounts.

The terms “and” and “or” shall be construed both conjunctively and disjunctively.

Relevant search terms include: “0651-0031”, “30-Day Notice”, “60-Day Notice”, “applicant or patent owner”, “Notice of Action”, “burden”, “control number”, “exemption”, “ICR or information collection request”, “information collection” or “collection of information”, “PRA or Paperwork Reduction Act”, “paperwork burden”, “patent application”, “patent prosecution”, “supporting statement”, “Terms of Clearance”, “Bahr”, “Fawcett”, “Tamayo”, “Fraser”, “Neyland”, “Hunt,” “Mancini”, and “Shelanski.”

On behalf of our client, we request a public interest fee waiver because the requested records directly concern and bear upon the regularity of the government’s operations and activities, will be highly informative to the general public regarding the PTO’s policies and execution of its statutory obligations to minimize regulatory burden on the public, and contribute significantly to public understanding of interagency process. Upon receipt, our client will make these records publically available on a freely available website for use by journalists, scholars, students, and interested members of the public at no charge. Also, our client will use the information obtained from these records in reports, newsletters, and other public disseminations to advance its educational mission.

Nevertheless, without waiving our client’s right to appeal a fee waiver denial, we hereby authorize you to supply records responsive to this request without informing me of cost if the fees do not exceed \$500.00, which we agree to pay. Please be sure to contact me if the fees will exceed that amount and to arrange for record delivery.

I may be reached at either 202-372-9120 or reed.rubinstein@dinsmore.com if you have any questions.

Best regards,



Reed D. Rubinstein

RDR:um

EXHIBIT 2



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

June 13, 2016

VIA EMAIL

Mr. Reed Rubinstein
Dinsmore & Shohl LLP
801 Pennsylvania Ave., N.W.
Suite 610
Washington, DC 20004

Dear Mr. Rubinstein:

Your Freedom of Information Act (FOIA) and/or Privacy Act request was received by the United States Patent and Trademark Office (USPTO) FOIA Office on **June 13, 2016**.

Your request has been docketed as "**FOIA Request No. F-16-00215.**" Any further inquiries regarding your request should include that number. A copy of your request is attached for reference.

In the event your original request was incorrectly addressed, please address all inquiries regarding your request to:

FREEDOM OF INFORMATION ACT (FOIA) OFFICER
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Or via email to foiarequests@uspto.gov

The Agency expects to send its response to this request no later than Tuesday, July 12, 2016. You will be notified if it appears that additional time is required. You may check on the status of your request at the Agency's website: www.uspto.gov, click on "Freedom of Information Act" at the bottom of the page, and then "Check FOIA Request Status." You will need your request number, shown above, to check on the status of your request.

Sincerely,

USPTO FOIA Office

Enclosure

EXHIBIT 3

Request Status

Please complete all the required fields marked with an asterisk (*).

* Case Number:

Case #	Status
F-16-00215	In Process

Note: Case Number must be entered exactly as provided. Example F-13-00080.

Definitions of FOIA Request Status:

Received - Your request has been properly received by the USPTO FOIA Office. A notice was sent informing you of a case assignment number and anticipated completion date.

Assigned for Processing - Your request has been assigned to a FOIA Specialist for processing.

On Hold - Need Info/Clarification - Your request is on hold (meaning that the processing time is suspended) pending clarification of scope, request for additional information, etc. You will be notified via correspondence explaining any reason(s) your request is on hold.

In Process - Your request is actively being processed by the USPTO FOIA Office.

Cost Estimate Sent - Your request is on hold (meaning that the processing time is suspended) pending resolution of a fee matter, e.g., estimated costs exceed what was promised to pay, estimated costs exceed \$250.00, etc. You will be notified via correspondence explaining the specific fee matter that must be resolved before processing continues.

Completed - The processing of your request is completed, and an Agency response is being created.

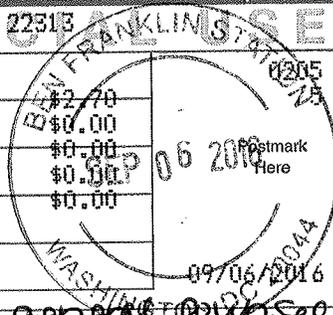
Closed - The Agency's response in your request was sent and your case is closed.

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ALEXANDRIA, VA 22313

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Total Postage & Fees	\$1.36
	\$7.36



Sent To **Deputy General Counsel**
FOIA Appeal, USPTO

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or PO Box No. **PO BOX 1450**

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