



United States Patent and Trademark Office

Office of the General Counsel

December 19, 2016

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Mr. Reed Rubinstein
Dinsmore & Shohl LLP
801 Pennsylvania Ave., NW
Suite 610
Washington, D.C. 20004

RE: *Freedom of Information Act Appeal A-17-00005 (Appeal of Request No. F-16-00215)*

Dear Mr. Rubinstein,

This determination responds to the letter dated November 16, 2016, which was received by the United States Patent and Trademark Office ("USPTO" or "Agency") on November 18, 2016, appealing the USPTO's October 5, 2016 initial determination in connection with Freedom of Information Act ("FOIA") Request No. F-16-00215, filed on behalf of your client, the America Center for Equitable Treatment, Inc. Your appeal has been docketed as FOIA Appeal No. A-17-00005.

FOIA Request and Response

You initially contacted the USPTO via email on June 10, 2016, requesting records containing the following information:

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 sheets 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.

Initial FOIA Request No. F-16-00215. On June 13, 2016, the Agency acknowledged your request, advised that the Agency expected to send its response no later than July 12, 2016, and that you would be notified if additional time was required. Initial Acknowledgement (FOIA Request No. F-16-00215). The Agency advised you on July 15, 2016, July 26, 2016 and July 28, 2016, that additional time was required to respond to your request due to unusual circumstances. Supplemental Correspondences (FOIA Request No. F-16-00215). On August 9, 2016, the Agency proposed a rolling release of responsive documents. August 9, 2016 Supplemental Correspondence (FOIA Request No. F-16-00215). On August 31, 2016, you advised that you were “ready for the rolling release” and asked when you will “begin to see records.” FOIA Appeal No. A-17-00005. On October 5, 2016, the USPTO informed you that it had identified 901 pages of documents responsive to your request and are releasable, but redacted portions of the material pursuant to Exemption (b)(5) and (b)(6) of the FOIA. *See* Initial Determination (FOIA Request No. F-16-00215).

Appeal

The pending appeal is from the USPTO’s October 5, 2016 initial determination in response to your FOIA request. *See* FOIA Appeal No. A-17-00005. In your appeal, received by the USPTO on November 18, 2016, you question the adequacy of the search and/or allege that the Agency has made “an unlawful determination to withhold responsive records in violation of FOIA.” *Id.* You also allege that the Agency failed to segregate and release nonexempt information and abused exemption (b)(5). *Id.* You do not dispute the exemption (b)(6) redactions. *Id.*

For the reasons set forth below, your appeal is denied.

Untimely Appeal

An appeal of an adverse determination in response to a FOIA request “must be received by the Office of General Counsel within thirty calendar days of the date of the written denial.” 37 C.F.R. §102.10(a). *See also* *Center for Biological Diversity v. Gutierrez*, 451 F. Supp. 2d. 57 (D.C. Cir. 2006) (electronic submission of FOIA appeal that was filed 12 minutes late under Department of Commerce FOIA regulations deemed untimely.) “An adverse determination is a denial of a request in any respect,” including a determination to withhold any requested record in whole or in part. 37 C.F.R. § 102.7(b).

Here, the Agency’s Initial Determination in response to your FOIA request was dated October 5, 2016. Initial Determination (FOIA Request No. F-16-00215). In order to be timely, an appeal needed to be filed with the Office of General Counsel by November 4, 2016. *See* 37 C.F.R. § 102.10(a). However, the appeal letter was dated November 16, 2016 (12 days later) and received by the Office of General Counsel on November 18, 2016 (14 days later). *See*

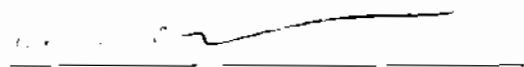
FOIA Appeal No. A-15-00007. Consequently, the appeal is denied as untimely. *See Center for Biological Diversity*, 451 F. Supp. 2d. at 57.

Final Decision and Appeal Rights

This is the final decision of the United States Patent and Trademark Office with respect to your appeal. You have the right to seek judicial review of this decision as provided in 5 U.S.C. § 552(a)(4)(B). Judicial review is available in the United States District Court for the district in which you reside or have a principal place of business, the United States District Court for the Eastern District of Virginia, or the United States District Court for the District of Columbia. Additionally, as part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448

Sincerely,



Nicholas Oettinger,
Acting Deputy General Counsel for General Law