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August 5, 2016

### VIA FACSIMILE, ELECTRONIC MAIL AND U.S. MAIL

Dionne Hardy, FOIA Officer  
Office of Management and Budget  
725 17th Street, NW, Room 9026  
Washington, DC 20503  
Fax: 202.395.3504  
OMBFOIA@omb.eop.gov

**Re: Appeal of OMB Response to FOIA OMB Tracking No. 16-096**

Dear Ms. Hardy:

This is to appeal the Office of Management and Budget's (OMB) response dated August 2, 2016, to the American Center for Equitable Treatment, Inc.'s (American Center) Freedom of Information Act (FOIA) request dated June 10, 2016, identified by OMB Tracking No. 16-096. A copy of the American Center's request, and of OMB's response thereto, are attached for your convenience.

### Background

The United States Supreme Court has explained that "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The FOIA is often described as a means for citizens to know "what their Government is up to." This is not a convenient formalism. Rather, it is "a structural necessity in a real democracy." *NARA v. Favish*, 541 U.S. 157, 171-72 (2004). Therefore, the general principal of law is that virtually every OMB "record"<sup>1</sup> must be made

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<sup>1</sup>A "record" is "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2)(A). An "agency record", in turn, is defined at 44 U.S.C. § 3301 to include "any information that would be an agency record subject to the requirements of [FOIA] when maintained by an agency in any

available to the public in one form or another, unless it is specifically exempted from disclosure or specially excluded from the FOIA's coverage in the first place. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b), (c).

Agencies must undertake a search that is "reasonably calculated to uncover all relevant documents" to comply with the FOIA. *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The FOIA defines the term "search" as "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D). Courts disfavor searches that exclude agency files where records might be located. *Truitt v. Dep't of State*, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (when request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as it did not include file likely to contain responsive records); *Nat'l Sec. Counselors v. CIA*, 549 F. Supp. 2d 6, 12-13 (D.D.C. 2012) (agreeing that agency might have unreasonably limited scope of request because search results indicated that agency was aware that plaintiff sought records related to particular subject). The reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations, or whether the agency improperly limited its search to certain record systems. *Jefferson v. DOJ*, 168 F. App'x 448, 450 (D.C. Cir. 2005) (reversing district court's finding of reasonable search when agency "offered no plausible justification" for searching only its investigative database and agency "essentially acknowledged" that responsive files might exist in separate database); *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that agency may not limit search to one record system if others are likely to contain responsive records).

### Appeal

Requests 1-3: OMB's reply, directing the American Center solely to a public online data base, is non-responsive and inadequate.

First, the public data base, located at [reginfo.gov](http://reginfo.gov), does not include the entire administrative record, much less all responsive records. This is obvious when simply considering the Supporting Statements for ICR Reference No. 201301-0651-002. We are aware of at least at least two versions, one dated January 28, 2013, and another dated July 22, 2013. However, only the July version is available online.

Second, it appears OMB did not search obviously relevant files where records might be located, including but not limited to OMB employee emails (OMB and private accounts), text messages, and/or other records bearing on OMB's processing or internal review of the relevant matters. The American Center's request specifically identified several of OMB's employees in the search terms "Fraser", "Neyland", "Hunt," "Mancini", and "Shelanski." At the very least, their email files should have been searched. In fact, there is no indication that OMB made a good-faith effort to find responsive records, whether using the specified search terms or anything

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format, including an electronic format." This means metadata as well as records that may have been created, handled, transmitted, or found on private, nongovernmental email accounts.

else. As OMB was aware, one purpose of the American Center's request was to obtain records that "concern and bear upon the regularity of the government's operations and activities," for these "will be highly informative to the general public regarding OMB's policies and execution of its statutory obligations to minimize regulatory burden on the public, and contribute significantly to public understanding of interagency process." Therefore, OMB's response does not meet the FOIA's requirements.

Furthermore, OMB did not claim (and has now waived) any exemptions.

Therefore, the American Center requests OMB conduct a lawful search of all files where responsive records may be found, and then produce all responsive records that it discovers.

Request 4: OMB's claim, in response to this Request, that there are no responsive records demonstrates the inadequacy of the original search. For example, the American Center is aware of at least one email exchange between Mr. Hyatt and OMB's Alex Hunt. Mr. Hunts name was specifically identified in the search terms listed in the American Center's request, requiring a search in his email files.

Furthermore, OMB did not claim (and has now waived) any exemptions.

Therefore, the American Center requests OMB conduct a lawful search of all files where responsive records may be found and produce accordingly.

#### Conclusion

The American Center therefore requests that OMB perform an adequate, reasonable search for the records described in the FOIA request identified as OMB Tracking No. 16-096.

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





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

August 2, 2016

Mr. Reed Rubinstein  
Dinsmore  
Sent Via Email: [Reed.Rubinstein@Dinsmore.com](mailto:Reed.Rubinstein@Dinsmore.com)

Dear Mr. Rubinstein:

This responds to your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated June 10, 2016, which was received in this office on June 14, 2016, and assigned tracking number 16-096. Your request seeks certain records regarding the following: (1) OMB guidance and Paperwork Reduction Act (PRA) implementing regulations and United States Patent and Trademark Office (PTO) rules found at 37 CFR §§ 1.111, 1.115, 1.116, 1.130, 1.131, and 1.132; (2) Information Collection Requests (ICRs) numbers 201301-0651-002 and 201209-0651-014; (3) OMB's application of 5 C.F.R. § 1320(h) with respect to the PTO rules mentioned above; and (3) Gilbert P. Hyatt.

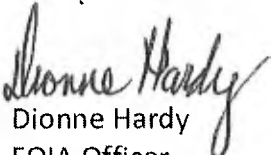
With respect to items 1 through 3 of your request, please note that OMB's guidance to agencies and implementing regulations for the PRA are publicly available at: [https://www.whitehouse.gov/omb/infoereg\\_infocoll](https://www.whitehouse.gov/omb/infoereg_infocoll). In addition, with respect to specific information collections associated with rules or specific ICR numbers, please note that OMB now uses an automated database to process agency requests for PRA reviews and approvals and the PRA dockets are available online. You can find information on specific information collection reviews here: <http://www.reginfo.gov/public/do/PRAMain>.

With regard to item 4 of your request, a search was conducted and no responsive records were identified.

You may contact the FOIA Requester Service Center at 202-395-FOIA, as well as our FOIA Public Liaison at 202-395-7250 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](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with the response to this request, you may administratively appeal by writing to OMB. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request.

Sincerely,

  
Dionne Hardy  
FOIA Officer





*Legal Counsel.*

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June 10, 2016

**VIA FACSIMILE AND ELECTRONIC MAIL**

Dionne Hardy, FOIA Officer  
Office of Management and Budget  
725 17th Street NW, Room 9026  
Washington, DC 20503  
Fax: 202.395.3504  
OMBFOIA@omb.eop.gov

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

Dear Ms. Hardy:

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 5 CFR Part 1303, please provide me with the following records.

1. All records referencing or concerning the Paperwork Reduction Act, 44 USC § 3501 *et seq.*, its implementing regulations in 5 CFR Part 1320, and Office of Management and Budget (OMB) guidance issued to agencies AND United States Patent and Trademark Office (PTO) rules 37 CFR 1.111, 1.115, 1.116, 1.130, 1.131, and/or 1.132, including but not limited to (a) all Information Collection Requests (ICRs), (b) OMB Forms 83-I, 83-C, 83-D, 83-E and certifications and supporting evidence thereto, (c) estimates of paperwork burden and their derivation pursuant to 5 CFR 1320.8(a)(4), and (d) Supporting Statements referencing or concerning the PTO rules specified in this Request.

2. All records referencing or concerning OMB review of ICR References Nos. 201301-0651-002 and 201209-0651-014 not otherwise included in Request #1 above.

3. All records referencing or concerning OMB's interpretation and/or application of 5 CFR 1320.3(h), and any of its subparts, with respect to PTO rules 37 CFR 1.111, 1.115, 1.116, 1.130, 1.131 and/or 1.132.



4. All records referencing or concerning Gilbert P. Hyatt.

“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”, “0651-0032”, “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”, “Manual of Patent Examination Practices or MPEP”, “PRA or Paperwork Reduction Act”, “paperwork burden”, “patent application”, “patent prosecution”, “PTO or USPTO”, “preliminary amendment”, “reexamination”, “supporting statement”, “Terms of Clearance”, “37 CFR 1.111 or Rule 111 or Rule 1.111”, “37 CFR 1.115 or Rule 115 or Rule 1.115”, “37 CFR 1.116 or Rule 116 or Rule 1.116”, “37 CFR 1.130 or Rule 130 or Rule 1.130”, “37 CFR 1.131 or Rule 131 or Rule 1.131”, “37 CFR 1.132 or Rule 132 or Rule 1.132”, “Bahr”, “Fawcett”, “Tamayo”, “Fraser”, “Neyland”, “Hunt,” “Mancini”, “Shelanski”, and “Hyatt”.

The relevant time for Requests 1-3 is June 1, 2012, to the present. Request 4 is not time-limited.

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 OMB’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.

Ms. Dionne Hardy  
June 10, 2016  
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I may be reached at either 202-372-9120 or [reed.rubinstein@dinsmore.com](mailto:reed.rubinstein@dinsmore.com) if you have any questions.

Best regards,

A handwritten signature in black ink, appearing to read "Reed D. Rubinstein". The signature is fluid and cursive, with the first name "Reed" and last name "Rubinstein" clearly distinguishable.

Reed D. Rubinstein

RDR:um