

PTAAARMIGAN

PATENT AND TRADEMARK ATTORNEYS, AGENTS AND APPLICANTS FOR RESTORATION AND
MAINTENANCE OF INTEGRITY IN GOVERNMENT

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August 25, 2021

Via Email FOIARequests@uspto.gov; efoia@uspto.gov

General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Re: **Freedom of Information—Appeal in Request F-21-00169**

Dear General Counsel:

This is an appeal under 5 U.S.C. § 552(a)(6)(A) from a determination in FOIA request F-21-00169 that is adverse in two respects.

- The PTO misdated the date of receipt of the request. The request was properly filed July 12, 2021, not July 15.
- The USPTO's silence is an adverse action on PTAAARMIGAN's request for a public interest fee waiver.

Because the PTO's "interim agency response" letter of July 27 was too incomplete to meet the PTO's obligations under law, it was inadequate to toll the time for agency response. A response was due 20 working days from July 12, 2021, and that was August 9, 2021.

Fortunately, corrective action should not be difficult. The request is specifically framed to request several collections of records that, by law, were each required to be maintained in a consolidated, segregated, and integrated form. Statute requires that the major one of those collections was to be made available on the PTO's web site two years ago. Perhaps the entire request can be satisfied by a simple confirmation that the web pages are all there is. Production should require minimal staff time.

Background

PTAAARMIGAN is an association of patent and trademark attorneys, agents, and applicants for restoration and maintenance of integrity in government. PTAARMIGAN is organized as a nonprofit limited liability company, and operates as a nonprofit public benefit organization under IRC § 501(c)(4). See Exhibit D.

On July 12, 2021, PTAAARMIGAN filed its Freedom of Information Act request (see Exhibit A). As filed on July 12, the request satisfied all written regulations and requirements for a valid FOIA request, including name and contact information for PTAAARMIGAN.

To limit search time, the request specified that it requests only those records already collected in consolidated, segregated, and integrated form, in several specific locations:

To confine search, requests 1, 2, and 3 are limited to (a) the rulemaking record for rules RIN 0651-AD31, and for Information Collection reviews for OMB control numbers 0651-0012, -0016, -0020, -0021, -0031, -0032, -0033, -0059, -0063, -0064, -0069, and -0075, in each case, as the record stood on or at any time earlier than September 21, 2020, and (b) the rulemaking record for any subsequent guidance documents implementing or interpreting the 2020 Fee Setting Rule or DOCX rule.

In the alternative, if sorting the rulemaking record into responsive and non-responsive portions is more costly to the Office than simply producing the entire rulemaking record for this rule and its Information Collection reviews, PTAAARMIGAN has no objection. PTAAARMIGAN asks only that the separate files be segregated, designated, and produced with whatever organization and indexing the Office maintains in ordinary course.

To reduce reproduction, for requests 1, 2, and 3, materials available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> as of August 4, 2020 may be omitted.

Reflecting the PTO's low costs in replying to the request, and the high value to the public, the July 12, 2021 request included the following fee waiver requests:

Because records requested were required to be collected in the rulemaking record for rules RIN 0651-AD31, and for specific Information Collection reviews 0651-0012, -0016, -0020, -0021, -0031, -0032, -0033, -0059, -0063, -0064, -0069, and -0075, they should be readily located without search. PTAAARMIGAN anticipates that under 37 C.F.R. § 102.11(d)(4), no search fees should be assessed.

In the alternative, PTAAARMIGAN requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the public regarding the PTO's policies, including on matters directly affecting thousands of patent and trademark holders and applicants.

In a second alternative, requests a news media fee waiver: PTAAARMIGAN expects to provide the records to those who can use them for news reporting.

In a third alternative, PTAAARMIGAN requests a public interest fee waiver because PTAAARMIGAN is a § 501(c)(4) public benefit organization, with no commercial, trade or profit interest, and seeks the record in support of its public benefit activities.

Upon receipt, we will make these records or their analysis publicly available on a website for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in advocacy, reports, newsletters, and other public disseminations to advance our educational mission. Therefore, disclosure 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); 37 C.F.R. § 102.11(k)(1)].

On July 14, 2021, the PTO sent an email, "before processing can begin, please provide a contact name and phone number as this is a requirement for all FOIA request." The email identified no statute, regulation, or any document with force of law that would impose any such "requirement for all FOIA requests." PTAAARMIGAN was left to guess at what possibly could be intended, since a contact name and email address for PTAAARMIGAN had been provided in the initial request.

On July 15, 2021, PTAAARMIGAN replied by email. That email reminded the PTO of a basic principle: laws only exist when they have been validly promulgated with force of law and exist in writing:

Dear Ms Alexander:

Thank you for your request. If you could identify the statute or regulation that specifies that "contact name and phone number ... is a requirement for all FOIA request" for agency records (as opposed to Privacy Act records) that would be helpful -- no such requirement appears in the places one would look, 5 U.S.C. § 552, 37 CFR § 102.1 or § 102.4. Everyone benefits when rules exist in writing.

Later on July 15, the PTO sent an acknowledgement letter (Exhibit B) by email, stating "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 **Thursday, July 15, 2021.**" The acknowledgement letter identifies no basis for dating the request to July 15 rather than the actual date of receipt, July 12.

On July 27, 2021, the PTO sent an "Interim Agency Response" requesting search fees of \$ 4322.25 (Exhibit C). The July 27 letter contains not a single word responsive to the multiple grounds for a fee waiver presented in the original July 12, 2021 request. The July 27 letter does not explain how the PTO can have any search costs whatsoever, when the request was directed to rulemaking records that the PTO was required to collect and consolidate in ordinary course.

Argument

Throughout the entire life of this FOIA request, the PTO has been playing fast and loose with the facts, and making up the law. The July 27 "Interim Agency Response" letter shows more game playing and obstruction.

I. Adverse determination 1: the PTO's erred in its determination of "date received"

The date of receipt for a FOIA request—and thus the 20 days for response—"shall commence on the date on which the request is first received by the appropriate component of the agency." § 552(a)(6)(A)(ii). The FOIA request was sent to the email addresses designated by the PTO¹ for FOIA requests, FOIARequests@uspto.gov. The request met all requirements of statute or regulation.

The reason for setting a date of July 15 is not explained.

Accordingly, please confirm the correction of the receipt date (and the date from which all deadlines run) from the erroneous July 15 date to the correct July 12 date, and recalendar all dates based thereon.

¹ <https://www.uspto.gov/learning-and-resources/ip-policy/electronic-freedom-information-act-e-foia>

II. Adverse determination 2: the PTO erred by denying PTAAARMIGAN's request for a fee waiver

A. The fee estimate overlooks a key fact in the request

The July 27 letter ignores a limiting phrase in the July 12 request: “To confine search, requests 1, 2, and 3 are limited to [several rulemaking records].” Request 4 is likewise limited to records that were to be assembled to prepare a submission to OMB/OIRA.

The July 27 letter does not explain how there can be *any* search cost, when the request is directed to several discrete collections of records that the PTO was *required to assemble and maintain in ordinary course*. *E.g.*, 44 U.S.C. § 3506(c)(3) (agency must compile and provide a supporting record for rules covered by the Paperwork Reduction Act); E-Government Act of 2002, Pub.L. 107-347 (Dec. 17, 2002), § 206(d), codified in notes to 44 U.S.C. § 3501 (“To the extent practicable ... agencies shall ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under [5 U.S.C. § 553]. ... Agency electronic dockets shall make publicly available online ... other materials that by agency rule or practice are included in the rulemaking docket under [5 U.S.C. § 553(c)]”); § 5 U.S.C. § 801(a)(1)(B)(i) and (ii) (agency must assemble and consolidate a record under the Congressional Review Act); *American Radio Relay League, Inc. v. Federal Communications Comm’n*, 524 F.3d 227, 237, 238 (D.C. Cir. 2008); *Hanover Potato Prods. v. Shalala*, 989 F.2d 123 (3d Cir. 1993).

The collections of records are already assembled. If the pre-assembled rulemaking record files have no responsive records, or if the PTO timely complied with its statutory obligations and made all responsive records available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> and at OMB/OIRA's and SBA's web sites, then it is sufficient to so state (and give a precise URL at OMB/OIRA's web site for the specific ICR filing, and a precise URL at SBA's).

The request also covers any communications with (and preparations for communication with) OMB/OIRA and SBA, up to and including late May 2021. However, as a practical matter, pursuant to those same laws, those records of supplementary activities should have been maintained in segregated, discrete, and consolidated collections as well, likely in the same rulemaking record with the base rule. These, likewise, should be identifiable at minimal effort.

The request narrows the scope of requested records to categories that should already exist as consolidated, segregated, and integrated collections. The likely custodian is Nicholas Oettinger in the Office of General Counsel. If searching these collections for responsive records will take more than two hours, then simply produce the entire rulemaking record and the relevant OMB and SBA submissions their entirety, or provide the relevant URLs. These steps should reduce search time to essentially zero.

B. The July 27 fee determination disregards the “public interest” fee waiver request

Waivers of fees are provided for by statute, § 552(a)(4)(A)(iii)², in the following circumstances :

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the 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 § 552(a)(4)(A)(iii)

Requests for fee waivers are to be liberally construed. *Bartko v. Dept. of Justice*, 898 F.3d 51, 75 (D.C. Cir. 2018).

As demonstrated below PTAAARMIGAN is entitled to a public interest fee waiver.

1. PTAAARMIGAN has no commercial interest

PTAAARMIGAN LLC is a nonprofit LLC , and has applied for § 501(c)(4) nonprofit status. See Exhibit D. PTAAARMIGAN has no commercial interest.

2. The records sought will likely “significantly contribute to the public’s understanding of operations or activities of the government”

The requested records concern a **\$3 billion** rulemaking, an “activity of government.” § 102.11(k)(2)(i). The requested records are only those not already made available at the PTO’s, OMB/OIRA’s, and SBA’s web sites. § 102.11(k)(2)(ii). They will contribute to understanding by the entire patent bar, via dissemination at PTAAARMIGAN’s web site <http://ptaaarmigan.org/resources> , and likely articles in ABA and AIPLA publications and the three main patent blogs (see Exhibit E). § 102.11(k)(2)(iii). The contribution will be “significant” because there is no other source to understand whether undisclosed rationales and motivations exist for the 2020 Fee-Setting Rule, and if so, what those rationales and motivations may be. § 102.11(k)(2)(iv).

The public has a right to know significant details of an agency’s financial arrangements, especially when the requested records might illuminate potential improper influences. *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1180-81 (11th Cir. 2005). Here, the subject matter is the PTO’s fee-setting rule, a rule that covers **over \$3 billion in fees**. The requests relate to potential improper influences over the PTO’s fee setting.

A request that meets a three-part test set forth in *Center for Medicare Advocacy, Inc. v. U.S. Dept. of Health & Human Svcs.*, 577 F.Supp.2d 221 (D. D.C. 2008), is “likely to contribute significantly to public understanding of the operations or activities of the government” and, therefore, be eligible for a fee waiver:

- the request requests materials underlying an agency decision, supplementary to the materials made public by the agency;

² The PTO’s implementing regulations at 37 C.F.R. § 102.11(k) provide a framework for discussion, but cannot attenuate a statutory right.

- the request is made by an advocacy organization whose public interest activities include producing written materials to be distributed to inform and train members of its relevant public, and advocating on legislative and regulatory affairs;
- the requester proposes to make information accessible to members of the public who cannot otherwise readily locate a particular law or interpretive document.

Center for Medicare Advocacy, 577 F.Supp.2d at 241-42. PTAAARMIGAN is such an entity, requesting records for such purposes, and the request requests records underlying an agency decision, less the materials already made public.

A fee waiver is appropriate when the requested records may explain how an agency sidestepped important procedural protections, and the requested records may reveal how an agency “functions in reality compared to how the system was intended to function.” *Bartko*, 898 F.3d at 75. The requested records may explain sidestepping of requirements under the Administrative Procedure Act, Paperwork Reduction Act, Regulatory Flexibility Act, and Executive Orders 12866 and 13771.

Each subcategory of each request meets multiple ones of the statutory legal tests, and the criteria of § 102.11(k)(2):

- The request requests underlying rationale for many of the conclusions in the relevant Federal Register notices. These records may reveal potential improper influences in the PTO’s financial arrangements, and improper lack of candor with OMB/OIRA and SBA. The PTO makes such underlying legal analyses available when favorable to the PTO.³ By producing a 2012 memo, the PTO waived whatever privilege might otherwise exist, and the public is now entitled to benefit of a subject matter waiver.
- In several Federal Register notices, Patent and Trademark Office, *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN-AD31, *Notice of Proposed Rulemaking*, 84 Fed. Reg. 37398 (Jul. 31, 2019), *Final Rule*, 84 FR 37398 (Jul 31, 2019), correction, 85 Fed. Reg. 58282 (Sep. 18, 2020), the PTO claimed to have “previous approval by OMB” for every component of the 2020 Fee Setting Rule and DOCX rule. No such previous approval is visible on OMB/OIRA’s web site, at least not in the places one would normally look first (the relevant Control Number files, for dates around July 2019). If this approval actually existed, the public is entitled to know where it can be found (if available) and the correspondence between PTO and OMB by which the PTO obtained that “previous approval.”
- A number of laws require an agency to conduct cost-benefit analyses. *E.g.*, 44 U.S.C. § 3507, 5 C.F.R. § 1320.8; 5 U.S.C. §§ 603 and 604; Executive Order 12866. Public comment letters⁴ noted deficiencies in the PTO’s cost-benefit analyses. The Final Rule notice discusses costs and savings to the PTO for some components of the 2020 Fee Setting Rule, but contains no discussion of corresponding costs to the public, and

³ Bernard Knight, General Counsel, *USPTO Patent Fee Setting*, https://www.uspto.gov/sites/default/files/documents/Fee_Setting_Opinion.pdf (Feb. 10, 2012)

⁴ *E.g.*, Seventy-Three Patent Practitioners, [comment letter, Setting and Adjusting Patent Fees During Fiscal Year 2020](#), at pages 4-30 (Sep. 27, 2019).

declines to answer a number of the public comments that explained those costs. If the PTO considered costs to the public, the public has a right to the records in which the PTO analyzed and balanced those costs. If the PTO didn't, the public has a right to know that.

In sum, the July 12 request asks for records that will likely contribute to public understanding of the government's activities, and that are not in the requester's commercial interest. Accordingly, a fee waiver is warranted and appropriate.

C. PTAAARMIGAN is eligible for a “news media” fee waiver

PTAAARMIGAN is likewise eligible for the “news media” fee waiver of search fees. § 552(a)(4)(A)(ii)(II). PTAAARMIGAN makes such materials available to the public via its web site, <http://ptaaarmigan.org/resources>. Members of PTAAARMIGAN regularly publish articles for publication in the publications of the ABA, AIPLA, and the blogs Patently-O, IP Watchdog, and Patent Docs to explain recent developments in agency practice and administrative law to the patent and trademark bar (see Exhibit E).

The records produced will likely be incorporated into future articles. The “news” exception does not require identification of a specific publication venue, only a “solid basis for expecting publication” which, in turn, may be based on “past publication record.” § 552(a)(4)(A)(ii); § 102.11(b)(6).

D. The PTO erred in silently disregarding the fee waiver request

FOIA requests are subject to the Administrative Procedure Act, particularly the requirement of 5 U.S.C. § 555(e), “Prompt notice shall be given of the denial in whole or in part of a written ... request.... [T]he notice shall be accompanied by a brief statement of the grounds for denial.” See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 46, 48, 49 (1983) (“The first and most obvious reason for finding the [the agency's rule to be] arbitrary and capricious is that [the agency] apparently gave no consideration whatever... We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.”).

Because the PTO's “interim agency response” letter is entirely silent on an issue that was fairly raised in the initial July 12 request, the July 27 letter is insufficient to legally toll the 20-day deadline for agency response. That 20 days expired on August 9. The PTO is now in default.

III. Form of production

The statute (§ 552(a)(3)(B)) provides:

In making any record available to a person under this paragraph, an agency shall provide the record in any **form or format requested by the person if the record is readily reproducible by the agency** in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

The initial July 12 request asked “Please provide the requested material in its native electronic form such as Excel, Word or PDF, or other native electronic form that preserves all metadata, underlying electronic properties, and calculation formulae.” PTAAARMIGAN now reminds that the requested form or format is the form in which the PTO maintains records for its own use, in ordinary course, with no change or conversion. Folder structure should be preserved as well. Combining into an enclosing .zip or .rar archive form for emailing, or for physical mail or courier on a CD-ROM or USB drive is appropriate and appreciated. PTAAARMIGAN prefers to receive the documents by email, at ptaaarmigan@ptaaarmigan.org (three “a”s). If the documents will exceed 10Mb, the preferred delivery is via a CD ROM or USB memory to P.O. Box 590372, Newton MA 02459, with a confirmation email that a physical delivery is on its way.

IV. Conclusion

In light of the forgoing:

- (1) The PTO’s failure to even acknowledge a request for a fee waiver, let alone offer any response, was unlawful;
- (2) The FOIA requests entail near-zero search burden;
- (3) The requested records should be produced at no search fee or (as applicable) an express acknowledgement that no such records exist should be provided; and
- (4) PTAAARMIGAN’s requests are eligible for a fee waiver.

Because of the PTO’s game playing and failure to provide any meaningful *bona fide* response within 20 days, the PTO is now in default. Even if the 20-day period was tolled July 27, only nine days remain. The records should be readily collected and produced within nine business days, with no search fee.

Very truly yours,
PTAAARMIGAN

Attachments:

- Exhibit A Jul. 12, 2021, FOIA request email (with exhibit)
- Exhibit B Jul. 15 letter from FOIA office, acknowledging FOIA request of July 12, but misattributing date
- Exhibit C July 27, 2021, letter from FOIA office to PTAAARMIGAN, estimating fees at \$ 4322.25
- Exhibit D Tax exempt correspondence from IRS
- Exhibit E Articles published by PTAAARMIGAN members

Exhibit A

Jul. 12, 2021, FOIA request email

PTAAARMIGAN

PATENT AND TRADEMARK ATTORNEYS, AGENTS AND APPLICANTS FOR RESTORATION AND
MAINTENANCE OF INTEGRITY IN GOVERNMENT

MAILING: P.O. Box 590372, NEWTON MA 02459
E-MAIL: PTAAARMIGAN@PTAAARMIGAN.ORG

July 12, 2021

Via Email FOIARequests@uspto.gov; efoia@uspto.gov

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

Re: **Freedom of Information Act Request**

Dear FOIA Officer:

PTAAARMIGAN is a not-for-profit § 501(c)(4) social welfare organization, that educates and advocates on behalf of patent and trademark attorneys, agents, and applicants. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), PTAAARMIGAN hereby requests the following records from the U.S. Patent & Trademark Office (PTO).

Definitions.

OMB is the Office of Management and Budget.

OIRA is the Office of Information and Regulatory Affairs.

SBA is the Small Business Administration, including the Office of Advocacy.

“2020 Fee Setting Rule” means the rule (and all subcomponent rules) set forth in Patent and Trademark Office, *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN-AD31, *Notice of Proposed Rulemaking*, 84 Fed. Reg. 37398 (Jul. 31, 2019), *Final Rule*, 84 FR 37398 (Jul 31, 2019), correction, 85 Fed. Reg. 58282 (Sep. 18, 2020), and any associated filing, request, communication, inquiry, or approval to or from OMB, OIRA, or SBA relating thereto under Executive Orders 12866 or 13771, the Information Collection regulations (5 C.F.R. Part 1320), the Paperwork Reduction Act, or Regulatory Flexibility Act (the PTO’s notices designate OMB control numbers 0651–0012, 0651–0016, 0651–0020, 0651–0021, 0651–0031, 0651–0032, 0651–0033, 0651–0059, 0651–0063, 0651–0064, 0651–0069, and 0651–0075) relating to any of the foregoing, any decision *not* to file or seek any of the foregoing, and any guidance, instructions, policy or legal memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification in connection with any of the foregoing.

“DOCX rule” means any rule or guidance to require, set fees to encourage, or to otherwise encourage or require patent application filing in DOCX form. The term “DOCX rule” includes but is not limited to the amendment to 37 C.F.R. § 1.16(u) to impose “Non-DOCX Filing Surcharge Fee,” *Submitting Patent Applications in Structured Text Format and Reliance*

on the Text Version as the Source or Evidentiary Copy, 86 Fed. Reg. 29571 (Jun. 2, 2021), and *Directors' Forum, Modernizing patent filing with DOCX*, <https://www.uspto.gov/blog/director/entry/modernizing-patent-filing-with-docx> (May 25, 2021). The term "DOCX rule" includes any associated filing, request, communication, inquiry, or approval to or from OMB, OIRA, or SBA relating thereto under Executive Orders 12866 or 13771, the Information Collection regulations (5 C.F.R. Part 1320), the Paperwork Reduction Act, or Regulatory Flexibility Act (the PTO's notices designate OMB control numbers 0651-0012, 0651-0016, 0651-0020, 0651-0021, 0651-0031, 0651-0032, 0651-0033, 0651-0059, 0651-0063, 0651-0064, 0651-0069, and 0651-0075) relating to any of the foregoing, any decision *not* to file or seek any of the foregoing, and any guidance, instructions, policy or legal memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification in connection with any of the foregoing.

Where a request relates to an agency decision, it includes "reasons supporting it," which are not privileged. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S.Ct. 777, 786 (Mar. 4, 2021).

Request.

To confine search, requests 1, 2, and 3 are limited to (a) the rulemaking record for rules RIN 0651-AD31, and for Information Collection reviews for OMB control numbers 0651-0012, -0016, -0020, -0021, -0031, -0032, -0033, -0059, -0063, -0064, -0069, and -0075, in each case, as the record stood on or at any time earlier than September 21, 2020, and (b) the rulemaking record for any subsequent guidance documents implementing or interpreting the 2020 Fee Setting Rule or DOCX rule.

In the alternative, if sorting the rulemaking record into responsive and non-responsive portions is more costly to the Office than simply producing the entire rulemaking record for this rule and its Information Collection reviews, PTAAARMIGAN has no objection. PTAAARMIGAN asks only that the separate files be segregated, designated, and produced with whatever organization and indexing the Office maintains in ordinary course.

To reduce reproduction, for requests 1, 2, and 3, materials available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> as of August 4, 2020 may be omitted.

1. Kindly provide the following records insofar as they relate to the "2020 Fee Setting Rule" (including its component DOCX rule):
 - a. Records sufficient to identify the individuals (either by title or by name) that were either required to, or actually did, sign off on the Notice of Proposed Rulemaking of July 31, 2019, Notice of Final Rule of Aug. 3, 2020, and correction of Sep. 18, 2020.
 - b. Any submission to OMB, OIRA or SBA relating to the 2020 Fee Setting Rule. This request includes documents sufficient to identify all persons (by title or by name) that participated in the certification required by 44 U.S.C. § 3506(c)(3) and the date of such submission, and any reply by OIRA and/or SBA.

- c. Any decision to *not* submit to OIRA or to SBA any rule, rule subcomponent, or information collection covered by the 2020 Fee Setting Rule notices, including documents sufficient to identify all persons (by title or by name) involved in such decision.
- d. All records relating to the PTO's decision to characterize the 2020 Fee Setting Rule as "rules of agency practice and procedure and/or interpretive rules." See 85 Fed. Reg. 58282:

Rulemaking Considerations

A. Administrative Procedure Act: This rulemaking corrects typographical and format errors in a rulemaking setting and adjusting patent fees. The changes in this rulemaking involve rules of agency practice and procedure and/or interpretive rules. See *Perez v. Mortg.*

Accordingly, prior notice and opportunity for public comment for the changes in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Perez*, 135 S.

that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" (quoting 5 U.S.C. 553(b)(A)).

- e. Any communications with OMB, OIRA, or SBA, and any underlying facts, relating to designation of the 2020 Fee-Setting rulemaking or any subcomponent thereof as a "transfer payment," including any guidance or instructions relied on, and any policy or legal memoranda, or economic analyses developed or relied on for any such determination. *E.g.*, at 84 Fed. Reg. 37400 or 85 Fed. Reg. 46935:

alternative. Consistent with OMB Circular A-4, "Regulatory Analysis," the rule involves a transfer payment from one group to another. The Office

alternative. Consistent with the Office of Management and Budget (OMB) Circular A-4, "Regulatory Analysis," this rule involves a transfer payment from one group to another. The Office

- f. All records relating to the "determination" in the 2020 Fee Setting Rule that the rulemaking is "not significant," "significant," or "economically significant" for purposes of Executive Order 12866, and any communication with OMB or OIRA regarding the determination. See 84 Fed. Reg. 37430; 85 Fed. Reg. 46935:

C. Executive Order 12866 (Regulatory Planning and Review): This proposed rule has been determined to be economically significant for purposes of Executive Order 12866 (Sept. 30, 1993).

C. Executive Order 12866 (Regulatory Planning and Review)

This Final Rule has been determined to be economically significant for purposes of Executive Order 12866 (Sept. 30, 1993). The Office has

- g. On September 18, 2020, the PTO ran a "correction," that the rulemaking was "not significant." 85 Fed. Reg. 58282. Kindly provide all records relating to identification of any error in the earlier designation as "economically significant," and any correction of such error:

C. Executive Order 12866 (Regulatory Planning and Review): This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

- h. All records relating to *non-inclusion* of the DOCX rule in the PTO's Regulatory Impact Analysis prepared in connection with the 2020 Fee Setting Rule, https://www.uspto.gov/sites/default/files/documents/RIA_July2019.docx
2. Please provide all communications with OMB or OIRA or SBA relating to the DOCX rule. This includes any communications in advance of the Notice of Proposed Rulemaking of July 31, 2019, and all communications relating to rulemaking RIN 0651-AD31 and Information Collection Control Numbers 0651-0031 and -0032.
3. At *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN 0651-AD31, 83 Fed. Reg. 37487-88 (Aug. 1, 2018), 84 Fed. Reg. 37398-440 (Jul. 31, 2019), and 85 Fed. Reg. 46932, 43985 (Aug. 3, 2020) the PTO claims to have obtained OMB approval for the DOCX rule:

P. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This Final Rule involves information collection requirements that are subject to review by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3549). The collection of information involved in this Final Rule

have been reviewed and previously approved by the OMB under control numbers 0651-0012, 0651-0016, 0651-0020, 0651-0021, 0651-0031, 0651-0032, 0651-0033, 0651-0059, 0651-0063, 0651-0064, 0651-0069, and 0651-0075. In addition, updates to the aforementioned information collections as a result of this Final Rule have been submitted to the OMB as non-substantive change requests.

Please provide all communications with OMB, OIRA, or SBA, relating to the DOCX rule that was prepared, submitted, and/or approved, and any guidance, instructions, policy memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification for the claim developed in preparation for any submission to OMB, OIRA, or SBA, or any decision not to make such a submission. Please include sufficient context to identify the date on which any document was submitted to OMB, OIRA, or SBA.

4. Please provide all documents relating to assessment of burden on the public (as defined in 5 C.F.R. § 1320.3(b)(1)) of the DOCX rule. Please include:
 - a. Documents sufficient to identify any effort to “consult with members of the public” as provided by 44 U.S.C. § 3506(c)(2)(A) and 5 C.F.R. § 1320.8(d)(1) concerning the DOCX rule (other than the notice and comment letters reflected at <https://www.uspto.gov/about-us/performance-and-planning/public-comments-setting-and-adjusting-patent-fees> and [PTAAARMIGAN | PTAAARMIGAN@PTAAARMIGAN.ORG | P.O. Box 590372, NEWTON, MA 02459](https://www.uspto.gov/about-us/performance-and-</div><div data-bbox=)

- [planning/public-comments-setting-and-adjusting-patent-fees-0](#)), including any survey, any communications to or from the public (including the ABA, AIPLA, IPO, NAPP, IEEE-USA, and similar interested organizations);
- b. Any documents relating to assessment of burden of the DOCX rule under 44 U.S.C. § 3507(d)(1)(A), 5 C.F.R. § 1320.5(a)(3) or § 1320.11(b);
 - c. Any objective support provided to OIRA with any estimate of burden for the DOCX rule.

Delivery

Please provide the requested material in its native electronic form such as Excel, Word or PDF, or other native electronic form that preserves all metadata, underlying electronic properties, and calculation formulae. PTAAARMIGAN prefers to receive the documents by email, at **ptaaarmigan@ptaaarmigan.org**. If the documents will exceed 10Mb, the preferred delivery is via a CD ROM or USB memory to P.O. Box 590372, Newton MA 02459, with a confirmation email.

Public Interest Fee Waiver

Because the requests are confined to the rulemaking record for specific rules and Information Collection reviews, records should be readily located without search. PTAAARMIGAN anticipates that under 37 C.F.R. § 102.11(d)(4), no search fees should be assessed.

In the alternative, PTAAARMIGAN requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the public regarding the PTO's policies, including on matters directly affecting thousands of patent and trademark holders and applicants.

In a second alternative, PTAAARMIGAN requests a public interest fee waiver because PTAAARMIGAN is a § 501(c)(4) public benefit organization, with no commercial, trade or profit interest, and seeks the records in support of its public benefit activities..

Upon receipt, we will make these records or their analysis publicly available on a website for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in advocacy, reports, newsletters, and other public disseminations to advance our educational mission. Therefore, disclosure 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."¹.

We may be reached at the address below, if you have any questions.

Very truly yours,

PTAAARMIGAN

¹ 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1).

Exhibit B

**Jul. 15 letter from FOIA office,
acknowledging FOIA request of July 12, but
misattributing date**



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

Thursday, July 15, 2021

VIA EMAIL

Mr. Richard Neifeld
PTAAARMIGAN

Dear Mr. Neifeld:

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 **Thursday, July 15, 2021**.

Your request has been docketed as **"FOIA Request No. F-21-00169."** 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 Thursday, August 12, 2021. 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 C

**July 27, 2021, letter from FOIA office to
PTAAARMIGAN, estimating fees at
\$ 4322.25**



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

July 27, 2021

Mr. Richard Neifeld
PTAAARMIGAN
PTAAARMIGAN@PTAAARMIGAN.ORG

RE: *Freedom of Information Act (FOIA) Request No. F-21-00169*

Dear Mr. Neifeld:

This is in response to your letter dated July 12, 2021, in which you requested, pursuant to the FOIA, 5 U.S.C. § 552 a copy of:

The following records insofar as they relate to the 2020 Fee Setting Rule (including its component DOCX rule):

1. Records sufficient to identify the individuals (either by title or by name) that were either required to, or actually did, sign off on the Notice of Proposed Rulemaking of July 31, 2019.
2. Please provide all communications with OMB or OIRA or SBA relating to the DOCX rule. This includes any communications in advance of the Notice of Proposed Rulemaking of July 31, 2019, and all communications relating to rulemaking RIN 0651-AD31 and Information Collection Control Numbers 0651-0031 and -0032.
3. Please provide all communications with OMB, OIRA, or SBA, relating to the DOCX rule that was prepared, submitted, and/or approved, and any guidance, instructions, policy memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification for the claim developed in preparation for any submission to OMB, OIRA, or SBA, or any decision not to make such a submission. Please include sufficient context to identify the date on which any document was submitted to OMB, OIRA, or SBA, and please provide all documents relating to assessment of burden on the public (as defined in 5 C.F.R. § 1320.3(b)(1)) of the DOCX rule.

Preliminary estimates indicate that the approximate processing cost of this FOIA request is \$ 4322.25. Associated copying charges cannot be estimated until a final determination regarding releasability is made.

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 costs required to adequately respond to your request.

As a non-commercial use FOIA requester, you are responsible for a search (excluding the first two hours) and for duplication (excluding the first 100 pages). See 37 C.F.R. § 102.11(c)(1)(iv).

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

Since the estimate exceeds \$250.00, you are required to pay the entire amount estimated before a search can begin. See 37 C.F.R. § 102.1(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 \$ 4322.25. The payment may 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 full is not received by August 26, 2021, 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.

Sincerely,

A handwritten signature in black ink, appearing to read 'Traci Alexander', is positioned above the typed name.

Traci Alexander
FOIA Specialist
Office of General Law

Exhibit D

Tax exempt correspondence from IRS

Date of this notice: 06-22-2021

Number of this notice: CP 575 E

PTAARMIGAN LLC
PO BOX 590372
NEWTON, MA 02459

WE ASSIGNED YOU AN EMPLOYER IDENTIFICATION NUMBER

Thank you for applying for an Employer Identification Number (EIN). We assigned you EIN [REDACTED]. This EIN will identify you, your business accounts, tax returns, and documents, even if you have no employees. Please keep this notice in your permanent records.

When you submitted your application for an EIN, you checked the box indicating you are a non-profit organization. Assigning an EIN does not grant tax-exempt status to non-profit organizations. Publication 557, Tax-Exempt Status for Your Organization, has details on the application process, as well as information on returns you may need to file. To apply for recognition of tax-exempt status under Internal Revenue Code Section 501(c)(3), organizations must complete a Form 1023-series application for recognition. All other entities should file Form 1024 if they want to request recognition under Section 501(a).

Nearly all organizations claiming tax-exempt status must file a Form 990-series annual information return (Form 990, 990-EZ, or 990-PF) or notice (Form 990-N) beginning with the year they legally form, even if they have not yet applied for or received recognition of tax-exempt status.

Unless a filing exception applies to you (search www.irs.gov for Annual Exempt Organization Return: Who Must File), you will lose your tax-exempt status if you fail to file a required return or notice for three consecutive years. We start calculating this three-year period from the tax year we assigned the EIN to you. If that first tax year isn't a full twelve months, you're still responsible for submitting a return for that year. If you didn't legally form in the same tax year in which you obtained your EIN, contact us at the phone number or address listed at the top of this letter.

For the most current information on your filing requirements and other important information, visit www.irs.gov/charities.



Department of the Treasury
Internal Revenue Service
Tax Exempt and Government Entities
P.O. Box 2508, Room 4024
Cincinnati, OH 45021

Date: July 06, 2021
Person to Contact: Customer Services
Contact telephone number: 877-829-5500

PTAAARMIGAN LLC
Po Box 590372
Newton, Massachusetts 02459

We received your Form 8976, *Notice of Intent to Operate Under 501(c)(4)*, you filed on June 22, 2021. This acknowledgement is not a determination by the IRS that you qualify as tax-exempt under Internal Revenue Code (Code) Section 501(a) as an organization described in Code Section 501(c)(4).

For important information about your responsibilities, including recordkeeping, reporting, and disclosure requirements, go to www.irs.gov/charities.

If you have questions, you can call Customer Services at 1-877-829-5500.

Exhibit E

Articles published by PTAAARMIGAN members

- Oct. 24, 2019: Emil Ali and David Boundy, *Executive Orders 13891 and 13892: changes we can expect at the USPTO*, <https://patentlyo.com/patent/2019/10/editorial-executive-changes.html>
- Oct. 9, 2019, David Boundy, *Re-examining the USPTO's Bid for Adjudicatory Chevron Deference—a Response to One Analysis of Facebook v. Windy City*, <https://www.ipwatchdog.com/2019/10/09/re-examining-usptos-bid-adjudicatory-chevron-deference-response-one-analysis-facebook-v-windy-city/id=114364>
- Oct. 2, 2019, Pamela Chestek, *Petition Asks USPTO to Undo Rulemaking on Physical Addresses in Trademark Applications*, <https://www.ipwatchdog.com/2019/10/02/petition-asks-uspto-undo-rulemaking-physical-addresses-trademark-applications/id=114127>
- Oct. 1, 2019, David Boundy, *Back Out of the Deference Labyrinth—a Response to Prof. Golden*, <https://patentlyo.com/patent/2019/10/deference-labyrinth-response.html>
- Dec. 3, 2018, David Boundy, *Agency Bad Guidance Practices at the Patent and Trademark Office: a Billion Dollar Problem*, 2018 Patently-O Law Journal, <https://patentlyo.com/media/2018/12/Boundy.2018.BadGuidance.pdf>
- Jul. 16, 2018, Jeremy Doerre & David Boundy, *Berkheimer, the Administrative Procedure Act, and PTO Motions to Vacate PTAB § 101 Decisions*, <https://www.ipwatchdog.com/2018/07/16/berkheimer-administrative-procedure-act-pt-motions-vacate-ptab-%C2%A7-101-decisions/id=99194>
- Sep. 5, 2017, David Boundy, *37 C.F.R. § 1.75(e), Jepson claims, and the Administrative Procedure Act*, <https://patentlyo.com/patent/2017/09/%c2%a7-administrative-procedure.html>
- Apr. 25, 2012, David Boundy, *Opportunity to Reform Existing PTO Regulations and to Ease Patent Application Paperwork Burden*, <https://www.ipwatchdog.com/2012/04/25/opportunity-to-reform-existing-pt-regulations-and-to-ease-patent-application-paperwork-burden/id=24378/>