



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

March 9, 2022

VIA EMAIL

PTAAARMIGAN LLC
P.O. Box 590372
Newton, MA 02459
PTAAARMIGAN@PTAAARMIGAN.ORG

Re: **Request for Clarification**
Freedom of Information Act (FOIA) Request No. F-22-00072

Dear PTAAARMIGAN:

This is in response to your letter dated January 28, 2022, in which you requested, under the Freedom of Information Act, 5 U.S.C. § 552:

1. USPTO's rulemaking, or making or issuance of any rule (as those two terms are defined in 5 U.S.C. § 551), regulation, guidance, regulatory action (as that term is defined in Executive Order 12866 § 3(e)), or sponsorship of any collection of information (as that term is defined in 5 C.F.R. § 1320.3(c)).
2. USPTO's economic analysis, regulatory analysis, cost-benefit analysis, regulatory impact analysis, or regulatory flexibility analysis of any rule, regulation, guidance, regulatory action, or collection of information, or burden or economic impact on small entities thereof.
3. USPTO's deciding whether or not to seek review of any matter from the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), or the Small Business Administration (SBA).
4. USPTO decisions to implement or not to implement, and policies and procedures implementing, governing, or guiding USPTO compliance with, any of:
 - a. The rulemaking procedures of the Administrative Procedure Act (5 U.S.C. §§ 552(a)(1) and (a)(2), and 553), the Paperwork Reduction Act (44 U.S.C. §§ 3506 and 3507), the Regulatory Flexibility Act (5 U.S.C. § 603 and 604), the Independent Offices Appropriations Act (31 U.S.C. § 9701), the Congressional Review Act (5 U.S.C. § 801), and OMB's information collection regulations (5 C.F.R. Part 1320).
 - b. Executive Orders 12866, 13258, 13422, 13563, 13771, 13777, 13891, and 13992, OMB Memoranda M-09-13, and M-11-28, and OMB Bulletin 07-02, and 15 C.F.R. Part 29.
 - c. OFFICE OF MGMT. & BUDGET, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, OMB BULLETIN 07-02 (Jan. 18, 2007), reprinted in 72 Fed. Reg. 343240, 3436 (Jan. 25, 2007).
 - d. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2020-1, reprinted in *Adoption of Recommendations*, 86 Fed. Reg. 6612 (Jan 22, 2021).

Commented [CD1]: Are you seeking information on USPTO's rulemaking process for any type of information collection?

Commented [CD2]: Please narrow the type of analysis you are seeking as well as specifying whether you are looking for analysis of a rule, regulation, regulatory action, etc.

Commented [CD3]: The Agency cannot conduct a search to prove a negative "whether or not to seek review of any matter." Furthermore the term "any matter" must be narrowed in order to conduct a reasonable search for documents.

Commented [CD4]: Please see comment above regarding conducting a search to prove a negative, as well as the extensive scope of Agencies and guidance described in sections [a-e] of this request.

5. USPTO policies, procedures, practices, or standards, issued, adopted, or in effect at any time between August 1, 2004 to present, for preparing any submission to OMB, OIRA or SBA.
6. Policies and procedures for making available to the public any written communication between OIRA and USPTO or any person not employed by the federal government concerning a proposed collection of information under the Paperwork Reduction Act.

Commented [CD5]: Please narrow the timespan of this request, as well as specify the type of submission you are seeking records for. The OMB/OIRA and SBA have discrete and different functions in relation to USPTO. Therefore it will be necessary to specify which types of policies, procedures, practices or standards you are looking for in relation to each agency.

Each of topics 1-6 above include records (a) authored by USPTO, or (b) authored by the Department of Commerce, OMB, OIRA, SBA, or any other government or private-sector entity, and adopted or observed by the USPTO.

The request includes records relating to any of the following (this list is by way of example, and does not limit the request):

Commented [CD6]: "Relating" is too broad and can be construed in many different ways. Please provide more specificity as to what types of related records you are seeking.

- Implementation of, interpretation of, or USPTO policy with respect to any of the laws and directives listed in topic 4, above.
- Any record produced by USPTO or Department of Commerce, that was adopted as policy or procedure by the USPTO, in response to the USPTO's request for comment on its regulations and regulatory processes, Patent and Trademark Office, *Improving Regulation and Regulatory Review* (Docket No.: PTO-C-2011-0017), 76 Fed. Reg. 15891 (March 22, 2011).
- In 2011, the USPTO published a web page announcing a comprehensive regulatory review.¹ The "preliminary plan for the review of its existing significant regulations" announced on that web page is nominally within the request, but because it is already public, it need not be produced. However, the "results of previous regulatory reviews," "current regulatory review" and finalized "plan" mentioned on this web page are not indexed on this page, and apparently are not public anywhere else either. They are within the scope of this request, and should be produced.
- In 2017, the USPTO announced a "Working Group on Regulatory Reform" to implement Executive Order 13771 to review and improve USPTO regulations.² Any product of that working group and adopted by the USPTO is within the scope of this request, and should be produced.
- Any comment letters that were received in relation to that 2011 request for comment, 2011 regulatory review, or 2017 regulatory working group, and not posted on the web page <https://www.uspto.gov/patents/laws/coments-public/comments-improvingregulation-and-regulatory-review>.³

Commented [CD7]: Please provide what type of work product you are seeking – final guidance, etc. Please note that any work product resulting from this working group that has been published won't be provided through FOIA, while any drafts or deliberative communications created pursuant to the Working Group will be subject to FOIA Exemptions.

As it currently reads, your request fails to adequately describe records or a system of records because the parameters for search are too broad, vague, or lack time specificity which would allow the Agency to conduct a reasonably thorough search. As such, we kindly request a clarification of the records you seek. I have noted some of the challenges posed by the breadth of your requests in the margins above.

Clarification Requested. Your request requires clarification before the Agency is able to formulate a reasonable search for responsive documents. See 37 C.F.R. § 102.4(b). FOIA requesters have two responsibilities when submitting FOIA requests: (1) that they reasonably describe the records being sought; and (2) that they submit them in accordance with agency regulations. See 5 U.S.C. § 552(a)(3)(A). A "reasonably described" record is one that enables an agency employee familiar with the subject matter of the request to identify responsive records with a

¹ <https://www.uspto.gov/learning-and-resources/ip-policy/rulemaking/look-back-plan-planretrospective-analysis-existing>

² Working Group on Regulatory Reform, <https://www.uspto.gov/about-us/uspto-working-groupregulatory-reform>

³ The letters themselves that are already made public on this page need not be produced. Any letter that was received and not made public on this page should be produced.

“reasonable amount of effort.” See Brumley v. United States Department of Labor, 767 F.2d 444, 445 (8th Cir. 1985).

Your request seeks a voluminous amount of information that does not clearly or plainly describe specific records that you are seeking. The FOIA is a means through which members of the public may obtain copies of documents in existence at the time of the submission of a request. It is not an appropriate vehicle to advance questions, interrogatories or otherwise seek opinions or confirmation about agency activities. The FOIA governs the disclosure or nondisclosure of records only: it is not a means to engage the Agency in an interrogatory fashion. See Hudgins v. Internal Revenue Serv., 620 F. Supp. 19, 21 (D.D.C. 1985).

As written, your request does not provide sufficient specificity of information to permit the agency to formulate a reasonable search for responsive documents.

Fee Waiver Request

In order to waive or reduce fees your request must demonstrate that: (i) 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 (ii) Disclosure of the information is not primarily in the commercial interest of the requester.

Regarding the first requirement, due to the breadth and scope of your request, your letter does not clearly establish that the information requested will significantly add to the public’s understanding of the operations of the USPTO. Please note that certain portions of a request may meet the requirement for a fee waiver, while other portions may not. Due to the breadth and scope of your request, I cannot determine at this time which portions, if any, meets the criteria described above.

Secondly, though you state that “PTAAARMIGAN disseminates information via PTAAARMIGAN’s web site, www.ptaaarmigan.org, and via publications in periodicals and intellectual property web blogs. PTAAARMIGAN advocates on behalf of intellectual property attorneys, agents and owners, and on behalf of IP-owning parties in the private sector,” you have not made clear how these records would actually be disseminated in a manner which would “contribute to the understanding of a ‘reasonably broad audience’ of persons interested in the subject these records, as opposed to the individual understanding of the requester, or a narrow universe of the public such as intellectual property attorneys, agents and owners. See 37 CFR § 102.11 k(2)(iii). Furthermore, due to the scope of your request, it would be helpful to know the range of your website’s viewership or subscription, and how your organization intends to disseminate the information you are seeking. Based on the foregoing, a decision regarding your eligibility for a fee waiver cannot be made at this time, pending clarification of your request.

Proposed Remedy. Please specify the records you are seeking based on the comments provided by the Agency above. Defining a specific universe of records desired should provide serviceable search parameters for Agency subject-matter experts and help us respond most effectively and efficiently to your request. Without clarification, the Agency can do no more than attempt to guess as to the specific type of records being sought.

Please provide, within 14 calendar days of the date of this letter, a response with the requested clarifications by e-mail to efoia@uspto.gov or by mail to the USPTO FOIA Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450. Please include your request number with the correspondence. Since the Agency cannot presently determine a reasonable scope for your request, processing cannot continue until these clarification issues are resolved. Accordingly, pending your response to this letter, your request is placed on hold. If you would like to set up a teleconference to discuss your request, please contact me directly at (571) 272-0512, or the USPTO Office of General Counsel main number at (571) 272-3000.

Sincerely,

Dorothy G. Campbell

USPTO FOIA Officer
Office of General Law

