

PTAARMIGAN LLC

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March 28, 2022

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 for DOCX “Yearlong Study”**

Dear FOIA Officer:

PTAARMIGAN LLC is a not-for-profit § 501(c)(4) limited liability company. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), PTAARMIGAN hereby requests the following records from the U.S. Patent & Trademark Office (USPTO).

DEFINITIONS

“DOCX rule” means any rule or guidance to require, encourage, or incentivize patent application filing in DOCX form, or set fees for such purpose. The term “DOCX rule” includes but is not limited to the amendment to 37 C.F.R. § 1.16(u) to impose a “Non-DOCX Filing Surcharge Fee.” Relevant notices include *PPAC Public Hearing on the Proposed Patent Fee Schedule*, 83 Fed. Reg. 37487 (Aug. 1, 2018); *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN-AD31, *Notice of Proposed Rulemaking*, 84 Fed. Reg. 37398 (Jul. 31, 2019); *Final Rule*, 85 Fed. Reg. 46932 (Aug. 3, 2020); correction, 85 Fed. Reg. 58282 (Sep. 18, 2020); *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); delay of effective date, 86 Fed. Reg. 66192 (Nov. 22, 2021); and Directors’ Forum, *Modernizing patent filing with DOCX*, <https://www.uspto.gov/blog/director/entry/modernizing-patent-filing-with-docx> (May 25, 2021).

ICR is an “information collection request” under the Paperwork Reduction Act or OMB’s Information Collection regulation.

OMB is the Office of Management and Budget.

OIRA is the Office of Information and Regulatory Affairs.

“Records” are defined at 44 U.S.C. § 3301 and 5 U.S.C. § 552(f)(2) to 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” and any such information “that is maintained for an agency by an entity under Government contract, for the purposes of records management.”

The terms “and” and “or” as used herein shall be construed both conjunctively and disjunctively in order to bring within the scope of this request any record that would otherwise not be so included.

REQUEST

1. In the DOCX Final Rule notice, 85 Fed. Reg. 46932, 46957 col. 1 and 46958 col. 1 (Aug. 3, 2020) the USPTO refers to a “yearlong study of the feasibility of processing text in PDF documents:”

through study.

Comment 55: One commenter wrote that instead of DOCX, applicants could upload most of their submissions as text-based PDFs. The commenter further stated that, currently, the USPTO’s computer systems degrade files to flatten them to unstructured bitmaps. The commenter contends the problem is caused by the USPTO.

Response: The USPTO conducted a yearlong study of the feasibility of processing text in PDF documents. The results showed that searchable text data is available in some PDFs, but the order and accuracy of the content could not be preserved. With DOCX, the Office is able to use the text directly and pass it on to USPTO downstream systems, which results in increased data accuracy and a more streamlined patent process.

Please provide all records relating to this “yearlong study.” To the degree they were available on the USPTO’s web site, or on another Federal Government website, as of Aug. 2, 2020, identification by URL is sufficient. This request includes the following, insofar as they relate to the “yearlong study”:

- a. all considerations of “implementation defined” parameters of Standards ECMA-376 and ISO/IEC 29500;
- b. all consideration of optional plug-ins used by patent attorneys, agents, and applicants;
- c. all documents defining any subset of ECMA-376 the USPTO proposes to support;
- d. all documents defining methodology, study design, and assumptions;
- e. any contracts with third parties to conduct the “yearlong study,” and instructions to such third party;
- f. any survey instrument directed to any member of the public;
- g. any survey instrument directed to agency staff;
- h. any statistical compilation of survey responses;
- i. all underlying data collected in support of the “yearlong study;”
- j. any mathematical or computer models (these should be produced in native form—such as spreadsheets, not as PDF captures of the spreadsheets);
- k. all documents stating assumptions, intermediate findings, conclusions, reservations on the conclusions for the “yearlong study,” and the like;
- l. any comparisons to, or analyses of, WIPO’s ePCT or inquiries to WIPO relating to PDF or DOCX as a filing medium;
- m. any disclosure to the public of this “yearlong study” and its underlying support;

- n. any request for comment on the “yearlong study” published by the USPTO, before or concurrent with either the July 2019 Notice of Proposed Rulemaking or the August 3, 2020 Final Rule notice;

and documents sufficient to identify:

- o. alternatives considered, and conclusions as to all alternatives rejected;
 - p. what variables and attributes of PDF and DOCX were studied, and weight or importance assigned to each;
 - q. any null hypothesis and all statistical methods used to reject or confirm that hypothesis;
 - r. any comparative study of the reliability of, or feasibility of, processing text from DOCX documents.
2. Please provide all communications with OMB or OIRA relating to the DOCX rule. This includes any communications relating to any regulatory review under any executive order, or any ICR or other filing, between July 1, 2016 and March 30, 2022, purporting to cover information collections contained in the DOCX rule. If the USPTO has never sought clearance under the Paperwork Reduction Act or Information Collection regulation for the DOCX rule, it is sufficient to so state.
 3. Please provide any objective support for any estimate of burden provided to OIRA for the DOCX rule.
 4. Please provide any communications, including any supporting documents, with the Small Business Administration relating to regulatory flexibility analysis or approval for the DOCX rule.

For requests 1, 2, 3, and 4, materials available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> as of August 2, 2020 may be omitted. Other records available elsewhere on the USPTO’s website, or on another Federal Government website, in each case no later than August 2, 2020, may be identified by URL.

PRIVILEGES AND REQUIRED DISCLOSURE

Under the deliberative process privilege, factual information generally must be disclosed. *EPA v. Mink*, 410 U.S. 73, 87–88 (1973) (deliberative process privilege does not shield “memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context”). Agencies must disclose “those portions of predecisional and deliberative documents that contain factual information that does not ‘inevitably reveal the government’s deliberations.’” *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350, 366 (D.C. Cir. 2021), quoting *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Facts presented “without interpretation, characterization, or analysis by the author” are releasable. *Bayala v. United States Department of Homeland Security*, 264 F.Supp.3d 165, 176 (D.D.C. 2017).

PTAARMIGAN calls attention to a memorandum of March 15, 2022 from Attorney General Garland.¹

DELIVERY

PTAARMIGAN requests that records be produced in the *native* original electronic form or format in which USPTO maintains records for its own use in ordinary course, with no change or conversion. If the USPTO maintains its records as XLS or XLSX spreadsheets, DOCX, or high-resolution text-searchable PDFs, PTAARMIGAN requests that the records be produced in that native electronic form. For example, a PDF printout of a scanned spreadsheet is *not* a native original form of an electronic spreadsheet—the electronic XLS or XLSX file is. If the USPTO maintains records for its own use as high-resolution or text-searchable PDFs, low-resolution or bitmap PDFs are not “native original electronic form.” Folder structure within directories 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.

PTAARMIGAN prefers to receive the records (a) by email at ptaaarmigan@ptaaarmigan.org (three “a”s), (b) by a file delivery service such as DropBox or KiteWorks, or (c) if the records will exceed 10Mb, 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.

FEE WAIVER

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

Public interest. 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).

PTAARMIGAN has no commercial, trade or profit interest. PTAARMIGAN LLC is a nonprofit LLC organized under the laws of Missouri, and has applied to the IRS for recognition as a § 501(c)(4) social welfare nonprofit, see Attachment A.

PTAARMIGAN seeks the records in support of its public benefit activities. PTAARMIGAN seeks to advance the public interest, by two general classes of activities.

- PTAARMIGAN’s primary activity is disseminating information to inform the public about actual or alleged Federal government activity. PTAARMIGAN disseminates information via PTAARMIGAN’s web site, www.ptaaarmigan.org, and via publications in periodicals and intellectual property web blogs.

¹ Merrick Garland, *Memorandum for Heads of Executive Departments and Agencies, Freedom of Information Act Guidelines*, <https://www.justice.gov/ag/page/file/1483516/download> (Mar. 15, 2022)

- PTAAARMIGAN advocates on behalf of intellectual property attorneys, agents and owners, and on behalf of IP-owning parties in the private sector.

The records will “contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 37 C.F.R. § 102.11(k)(2)(iii). Upon receipt, PTAAARMIGAN will make these records or their analysis publicly available on its 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. PTAAARMIGAN members have published multiple articles in magazines published by the American Bar Association and American Intellectual Property Law Association, and articles on www.patentlyo.com and www.ipwatchdog.com and <https://www.patentdocs.org> (the three most-read blogs among intellectual property lawyers). Publications by PTAAARMIGAN members and articles based on records previously obtained by PTAAARMIGAN’s FOIA requests are listed on PTAAARMIGAN’s web site, <http://ptaaarmigan.org/resources> in the “projects” and “Articles of Interest” section.

Understanding how Government functions. The records are “likely to contribute significantly to public understanding of Government operations or activities.” § 102.11(k)(2)(iv). These records illuminate the USPTO’s processes for rulemaking and analysis of a specific regulation, an important government function. To PTAAARMIGAN’s knowledge, the records sought are not otherwise available to the public.

Public understanding of operations of the government. The records requested are “likely to contribute significantly to public understanding of the operations or activities of the government,” § 552(a)(4)(A)(iii), 37 C.F.R. § 102.11(k)(1), and, therefore, be eligible for a fee waiver:

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

PTAAARMIGAN is such an entity, requesting records for such purposes, and the request seeks records underlying the USPTO’s regulatory decisions.

Financial arrangements and motivations. In addition, 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 USPTO’s policies, including on matters directly affecting thousands of patent and trademark holders and applicants. The public has a right to know significant details of an agency’s financial arrangements, especially when the requested records might illuminate potential

motivations and influences. Because the USPTO has fee-setting authority, and exercised that fee-setting authority with respect to the DOCX rule for the USPTO’s own financial interest, the requested records may disclose potential motivations and influences over the USPTO’s fee setting.

Intended effect of law contrasted with function in reality. A fee waiver is appropriate when the requested records may explain an agency’s compliance with procedural law, and the requested records may reveal how an agency functions in reality compared to how the system was intended to function. The requested records may illuminate agency compliance with the Administrative Procedure Act and Paperwork Reduction Act, and the consideration the USPTO gave to comment letters during notice-and-comment.

News media. PTAAARMIGAN is likewise eligible for the “news media” fee waiver of search fees. § 552(a)(4)(A)(ii)(II); 37 C.F.R. § 102.11(b)(6) and (d)(1). PTAAARMIGAN makes FOIA records available to the public via its web site, <http://ptaaarmigan.org/resources>. 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). Members of PTAAARMIGAN regularly use FOIA documents articles published by the ABA, AIPLA, and in the major patent law blogs to explain recent developments in agency practice and administrative law to the patent and trademark bar. Examples of those publications are listed at <http://ptaaarmigan.org/resources> in the “Articles of Interest” section. The records produced will likely be incorporated into future comment letters and articles.

CORRESPONDENCE

PTAAARMIGAN may be reached at email address ptaaarmigan@ptaaarmigan.org (three “a”s) for any clarification. § 552(a)(6)(A)(ii)(I).

Very truly yours,

PTAAARMIGAN

Attachments:

Attachment A Certificate of Organization of PTAAARMIGAN LLC, and § 501(c)(4)
 registration

Attachment A

Certificate of Organization of PTAAARMIGAN LLC, and § 501(c)(4) registration

STATE OF MISSOURI



John R. Ashcroft
Secretary of State

CERTIFICATE OF ORGANIZATION

WHEREAS,

PTAAARMIGAN LLC
LC1796489

filed its Articles of Organization with this office on the 22nd day of June, 2021, and that filing was found to conform to the Missouri Limited Liability Company Act.

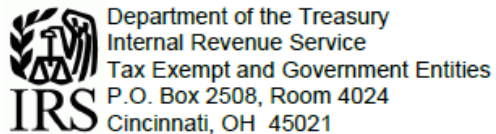
NOW, THEREFORE, I, John R. Ashcroft, Secretary of State of the State of Missouri, do by virtue of the authority vested in me by law, do certify and declare that on 22nd day of June, 2021, the above entity is a Limited Liability Company, organized in this state and entitled to any rights granted to Limited Liability Companies.

Effective Date: June 22, 2021

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the GREAT SEAL of the State of Missouri. Done at the City of Jefferson, the 22nd day of June, 2021.


Secretary of State





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.