[redacted]

April 4, 2013

The Honorable Jim Jordan (4th Dist. OH)
3121 West Elm Plaza
Lima, OH 45805
T (419) 999-6455
F (419) 999-4238

Dear [redacted]

Re: USPTO FOIA Request re. Leader Technologies, Inc.
and U.S. Patent No. 7,139,761

[redacted]

Enclosed is a courtesy copy of my *third* communication with the Patent Office related to my FOIA request. Perhaps you got a hint of my frustration in our call. The Patent Office is putting up a pretense while evidently intending to ignore me. This is not the way I do business, and since we pay these people their salaries, we should not put up with this sort of conduct. USPTO FOIA service should not equate to stonewalling the public. This conduct makes a mockery of the Freedom of Information Act. Sorry to be so direct, but this conduct demands it.

Attached is my ***Renewed* FOIA Appeal**. As you will read, the Patent Office has blanked out essentially everything of substance in their responses. Considering just the publicly known conflicts of interest in this matter, I feel compelled to challenge this evident stonewalling. Here is a quick synopsis of the conflicts:

1. **Presidential privilege.** The FOIA officer cited "presidential communications privilege." Why would they cite that privilege if the president has not become involved somehow? I am told that presidents have not been involved with patent prosecutions since Andrew Jackson. That being the case, how can President Obama's involvement be privileged since he can have no subject matter involvement?
2. **Judicial conflicts/misconduct.** Two of the three Federal Circuit panel judges (Judge Alan D. Lourie, Judge Kimberly A. Moore), including the presiding judge, held stock in Facebook when they made the *Leader v. Facebook* decision.
3. **Ignoring well-established precedent.** Judge Lourie even ignored a well-settled test of on-sale bar evidence that ***he authored*** in 2002. *Group One v. Hallmark*.
4. **Abuse of due process.** After invalidating Facebook's last remaining "evidence" of on-sale bar in their opinion, the Federal Circuit panel created *new* evidence and argument for Facebook, in the secrecy of chambers, and ruled against Leader anyway, in clear violation of due process since Leader was given no opportunity to challenge it.
5. **Abuse of Exemption 5 privileges.** The FOIA officer cited Exemption 5, but then ignored the law on providing me sufficient detail.

6. The appeal response was transparent in its plan to placate me by removing the redactions on a few previously redacted documents so that they could be seen to go through the motions. Do they think this conduct is not obvious?
7. **Collusion with Facebook.** The Federal Circuit timed their denial of Leader's petition to coincide with the day Facebook went public.
8. **Ignored new evidence of potential criminal violations**. The Federal Circuit ignored new evidence that Facebook concealed 28 Zuckerberg computer hard drives and Harvard emails from Leader Technologies during discovery. They were actually in the possession of Facebook's attorneys, yet they told Leader they were lost.
9. **Broken legal discipline.** The DC Bar has "declined" to investigate judicial misconduct in *Leader v. Facebook*; the Supreme Court Clerk referred the investigation to the Federal Circuit Clerk of Court Jan Horbaly, one of the chief actors in this misconduct.
10. **Attempt to absolve judicial conflicts.** The Federal Circuit Bar Association (FCBA) attempted through Weil Gotschal LLP to introduce a precedent-setting motion to absolve the *Leader v. Facebook* judges from conflicts of interest.
11. **Undisclosed FCBA conflicts.**
    a. Three Facebook attorney firms (Fenwick & West, Gibson Dunn, and Orrick Herrington) are members of the "Leaders Circle" at the FCBA.
    b. Microsoft, one of Facebook's largest investors, is a Director of the FCBA.
    c. Federal Circuit Clerk of Court Jan Horbaly is an *ex officio* officer of the FCBA.
    d. C-SPAN-2 video shows the close connection between the Patent Office, the Federal Circuit, and Facebook's and Microsoft's attorney Thomas G. Hungar.

Can the collusion and conflicts be any more apparent? What Leader and others are encountering in Washington D.C. is a circling of the wagons. The more these actors are challenged, the more they stonewall.

I have read through the un-redacted tidbits I was given and notice that perhaps a half dozen USPTO individuals had to organize meetings to orchestrate their response to my request. Why all this coordination if everyone is following the patent rules?

More questions. No answers.

[redacted]

Sincerely,

[redacted]

Enclosed: USPTO FOIA (Renewed) Appeal of Privacy Act Inquiry Response, Apr. 4, 2013

FREEDOM OF INFORMATION (RENEWED) APPEAL OF PRIVACY ACT INQUIRY RESPONSE

April 5, 2013

Per USPTO Letter Mar. 12, 2013—Req. No. F-13-00064

James C. Payne
Deputy General Counsel for General Law
Kathryn Siehndel
USPTO FOIA Officer
Office of General Law
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
efoia@uspto.gov

Re: Freedom of Information Act Appeal A-13-00009 (Appeal of Request No. F-13-00064) / Facebook, Inc. and Leader Technologies, Inc.)

Dear Mr. Payne:

RENEWED REQUEST PER HODEL V. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., 452 US 264 (1981); CITIZENS TO PRESERVE OVERTON PARK, INC. V. VOLPE, 401 US 402 (1971)

I received your March 12, 2013 response to my appeal. Your recitation of the chronology of our past communications is accurate. Therefore, I will not repeat it for the sake of brevity.

The only information that you supplied in response to my request were two already-published opinions which I asked you not to supply because I already have them. Therefore, nothing in the "fifty-three pages of documents" that you reference in your March 12 letter is new information. You sent me information that I already have, and that I told you I have, and the remaining documents that you sent were blacked out (redacted). **In sum, I received no new information from you.**

Your reply to my appeal does not comply with FOIA. The Freedom of Information Act ("FOIA") disclosure rules are intended to avoid time consuming *in camera* judicial reviews as the result of heavy-handed USPTO redactions. The law is clear. Without sufficient levels of detail, USPTO personnel can too easily conceal inappropriate conduct. FOIA requires disclosure of ***all*** information that you would be required to disclose in litigation consistent with the Federal Rules of Civil Procedure Rule 26(b)(5). If you wish to withhold information, you must produce a privilege log that describes the item, the nature of the information being withheld (author, recipients, topics, dates, etc.) and you must identify the specific privilege being claimed in sufficient detail. See CompTel III(C)(2)(c)¶3, sub. You did not produce a privilege log.

The Freedom of Information Act of 1966, 5 U. S. C. § 552, and specifically Exemption 5, require the USPTO to do better than make generic claims of privilege. The U.S. Supreme Court states that you

must "attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means **short** of submitting them for *in camera* inspection." EPA v. Mink, 410 US 73 at 94 (emphasis added). "As the D.C. Circuit has reiterated numerous times, **agencies cannot rely on 'conclusory and generalized allegations of exemptions**,' as it has done here." Id. Indeed, it is my duty to pursue this inquiry because I have reason to believe "the agency response is vague, its claims too sweeping, or there is a **reason to suspect bad faith**." Mead Data Cent., Inc. v. US Dept. of Air Force, 566 F. 2d 242 (D.C. Cir. 1977) at 262 (emphasis added).

Reason to Suspect Bad Faith

Remarkably, you cited presidential communications privilege. Why have President Obama and the White House become involved? President Obama has approximately 35 million "Likes" on Facebook.[1] Indeed, if Facebook eventually loses in Leader v. Facebook due to judicial misconduct or otherwise, the President's connection to those 35 million Facebook users might be shifted away from his current political alliances. It is public knowledge that a large number of major shareholders of Facebook made substantial donations to the Committee to Reelect the President in 2012. It is also public knowledge that President Obama's political organization relied heavily on demographic data from Facebook to understand and influence political preferences. It is public knowledge that the President's successful voter micro-targeting emerged from his Facebook data and assistance from Facebook employees and executives.

President Obama has 35 million "Likes" on Facebook. This is an evident conflict of interest. If he has intervened in *Leader v. Facebook* matters, the President's communications with the Patent Office are likely not exempt, since no president since Andrew Jackson has been involved with the patenting process.

If President Obama and the Executive Branch are involved in this unprecedented third Leader reexamination order, the public has a right to know and to explore the justifiability of that claim, and whether bad faith is at play. Mead Data, *supra*.

This is essentially Facebook's fourth attempt to invalidate Leader Technologies' patent with now stale arguments and the same prior art already discredited at trial, Leader Technologies, Inc. v. Facebook, Inc., 08-cv-862-LPS (D.Del. 2008). Facebook lost these arguments at trial, then in two other re-examination challenges. As you know, even Patent Examiner Deandra M. Hughes stated that she disagreed with this fourth reexam order. Your FOIA duty is to identify the specific redacted items on **which you are claiming presidential communications privilege**, as well as other privileges.

Given the vagaries of your response, any reasonable person has little confidence that the USPTO "conducted an adequate search in response to that request." CompTel v. Federal Communications Commission (D.D.C.2012). Even if the USPTO did conduct an adequate search, "the agency has not provided sufficient detail regarding its justifications for withholding certain information under various FOIA exemptions. Id.

Conflicts of Interest

I believe that I have adequately explained my concerns about bad faith in my initial FOIA request. Therefore, I will not repeat that information. However, I will supplement that concern, and draw your attention to new information in this matter.[2] Particularly disturbing are the Federal Circuit's own records revealing that two of the three judges on the Leader v. Facebook Court panel held stock in

[1] Barack Obama. Facebook. <https://www.facebook.com/barackobama>.
[2] Americans For Innovation. *The Real Facebook – A Portrait of Corruption* <http://americans4innovation.blogspot.com>.

Facebook while deliberating the case, and without disclosing those holding or disqualifying themselves.[3] **Tellingly, Facebook went public the very day these judges handed down their Facebook-favorable decision.**

Considering that this third reexamination is attempting to alter Leader's patent claims in Facebook's favor, using the evidently tainted Leader v. Facebook decision, the conduct of the Patent Office *vis a vis* the Federal Circuit, and now the White House apparently, all become relevant. The Court ignored dramatic new evidence that Facebook and Mark Zuckerberg concealed 28 computer hard drives and volumes of Harvard emails from Leader Technologies before trial. Adding to the conflicts questions, I have recently learned that the DC Bar Association and the Clerk of the Supreme Court have "declined" to investigate the Federal Circuit's conflicts of interest. Strangely, even The Federal Circuit Bar Association *filed a motion to absolve the judges of their conflicts of interest*; a motion that was quickly pulled off the table once it was challenged.[4] The Bar's involvement becomes especially suspicious when considering that Facebook attorneys are part of the "Leaders Circle" at The Federal Circuit Bar Association where Federal Circuit Clerk of Court is an *ex officio* officer, Microsoft is a Director (one of Facebook's largest shareholders), and three Facebook's law firms Gibson Dunn LLP, Fenwick & West LLP and Orrick Herrington LLP are active.[5]

Facebook's Lawyers & the U.S. Patent Office

Now, turning attention to the relationships between Facebook's lawyers and the USPTO, those associations are exemplified by the C-SPAN-2 video *Federal Circuit Court of Appeals – Future of the Court*, May 19, 2006. In this video, Gibson Dunn's Thomas G. Hungar (Facebook's attorney) is making policy recommendations to the Court and its Clerk of Court, Jan Horbaly, whose decision in *Leader v. Facebook* is the subject matter in the current USPTO deliberations. The video thumbnail easily shows Facebook's attorney, the Court and the USPTO on the same lectern. Could the conflicts of interest be any more clear?[6] While Mr. Whealan may no longer be chief counsel, where are his former staffers? In any event, Clerk of Court Jan Horbaly still rules over the Federal Circuit. Have these people carried on these undisclosed associations with Facebook's lawyers? The public has an interest and right to know if the USPTO is treating patent applications equitably, and without bias. Under normal circumstances, perhaps appearing at the same lectern is not suspicious. But Mr. Payne, I think you will have to agree that in this circumstance, a prudent and reasonable person can do little else but suspect impropriety. See Fig. 1.

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[3] Renewed Motion for Leave to File Brief of *Amicus Curiae* by Dr. Lakshmi Arunachalam, Jul. 27, 2010 , Leader Tech v. Facebook, 2011-1136 (Fed. Cir.) <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS#page=22>; see also "Judge Alan D. Lourie Chose Retirement Fund Value Over Justice?" *Donna Kline Now!* Aug. 7, 2012 <http://donnaklinenow.com/investigation/hijinks-at-the-high-court>.

[4] Response to Request of Federal Circuit Bar Association's Request for Reissue Re. Leader v. Facebook, Case No. 2011-1366 (Fed. Cir.) by Lakshmi Arunachalam, Ph.D., Sep. 17, 2012 <http://www.scribd.com/doc/106156081/Response-to-Request-of-Federal-Circuit-Bar-Association-s-Request-for-Reissue-Re-Leader-v-Facebook-Case-No-2011-1366-Fed-Cir-by-Lakshmi-Arunach>.

[5] The Federal Circuit Bar Association, *Leaders Circle* <http://www.fedcirbar.org/olc/pub/LVFC/cpages/misc/leaderscircle.jsp>.

[6] Jan Horbaly, Clerk of Court for the Federal Circuit, and John M. Whealan, Deputy General Counsel for Intellectual Property Law and Solicitor for the United States Patent and Trademark Office.. "The Federal Circuit, Looking Ahead." C-SPAN-2 video. May 19, 2006. <http://www.c-spanvideo.org/program/192618-1>. Indeed the thumbnail photo on this C-Span shows Mr. Whealan speaking at the lectern with Jan Horbaly to his immediate left, and Facebook Counsel Thomas G. Hungar to Mr. Whealen's left.

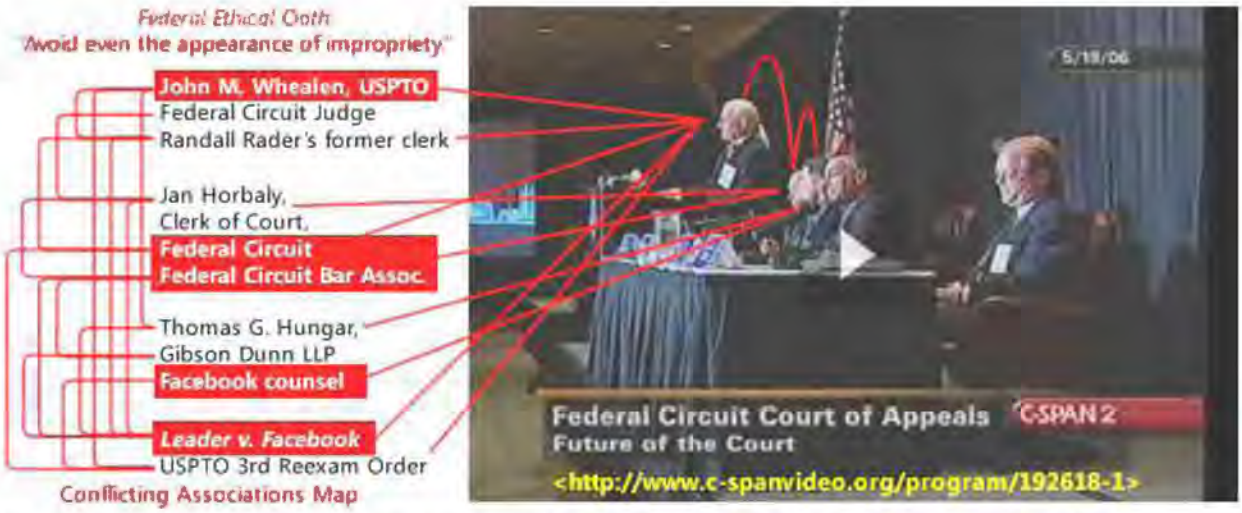

Fig. 1 – Associations Map illustrates just some of the remarkable conflicts of interest in this *Leader v. Facebook* matter.

Former USPTO Deputy General Counsel John M. Whealan's biography says that he served as "law clerk to Judge Randall R. Rader"[7] This close association among Facebook's counsel (Hungar), the Courts Chief Judge (Rader), the Clerk of Court (Horbaly) and the USPTO legal staff (Whealan), past and present, raises inevitable suspicions, especially in these circumstances.

Federal Circuit's Professional and Legal Conduct

Besides the evident professional misconduct, there is the equally grave matter of the legal misconduct in this case. This negligence is argued well in Leader's *Writ of Certiorari*. Therefore, I will not repeat it hear. Petition for Writ of Ceriorari Leader Technologies Inc., v. Facebook, Inc., No. 12-617 (US Supreme Court, Nov. 16, 2012).[8]

Conclusory Assertions are Insufficient

"[C]onclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases." Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854 (D.C. Cir. 1980) at 861.

Having established that your conclusory statements do not satisfy Exemption 5, I now turn to the reasons you have provided:

1. Possibly inter- or intra-agency in nature
2. Possibly predecisional
3. Possibly part of the deliberative process
4. Possibly attorney-client privilege
5. Possibly work product privilege
6. Possibly presidential communications privilege

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[7] John M. Whealen. George Washington University Law. <http://www.law.gwu.edu/Faculty/profile.aspx?id=14159>.
[8] *Writ of Certiorari*, Leader Technologies, Inc., Nov. 16, 2012 <http://www.leader.com/docs/(CLICKABLE-CITES)-Petition-for-Writ-of-Ceriorari-Leader-Technologies-Inc-v-Facebook-Inc-No-12-617-U-S-Supreme-Court-Nov-16-212.pdf>.

As a matter of simple logic, these six privileges cannot all be true for each redaction. For example, if it is a "presidential communications privilege," it is general knowledge that the President of the United States is not normally involved with patent reexaminations, if ever. Therefore, it is inconceivable that President Obama would have any factual or legal standing in a patent reexamination. If this is true, then his communication *would not be exempt* from disclosure. You need to tell me which item of blocked information is relying on the presidential privilege, and why.

The level of detail required by law for my FOIA request is described below.

1. Inter- or intra-agency privilege—"Exemption 5 must be either inter- or intra-agency in nature." CompTel III(C)(2)(a). Therefore, your FOIA duty is to release information exchanged with third parties who are not inter- or intra-agency. It is inconceivable that communications with Facebook's attorneys, for example, would be protected by privilege. Such *ex parte* communications without the knowledge of the other party are an abuse of due process. Abuse of due process by a court waives privilege claims. United States v. United States Gypsum Co., 438 US 422 (1978) at 460-462 ("Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error . . . *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction")(emphasis in original).

The USPTO response does not differentiate whether or not communications and information were exchanged with third parties, nor were yout specific about why the exemption is relevant to the information withheld.

2. / 3. Predecisional / Deliberative—The DC Circuit requires the USPTO to provide enough detail to evaluate the merits of a predecisional or deliberative privilege claim. The court said that the explanation must be "sufficiently detailed for the Court to ensure that the documents meet both the predecisional and deliberativeness requirements." CompTel III(C)(2)(c)¶4.

4. Attorney-client privilege — With regard to attorney-client privilege, FOIA accepts no blanket objections. The USPTO must be specific. Fisher v. United States, 425 US 391 (1976) at 403 ("Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege."); also cited in CompTel; See also Coastal States, *supra*.

No Confidentiality Markings

As proof of the USPTO's questionable **attorney-client privilege** assertion, the response has "failed to affirmatively establish confidentiality" and 'the evidence shows **no** attempt whatsoever to protect these memoranda within the agency." Coastal States at 863 (emphasis in original). Not a single item of the information provided by the USPTO was marked "confidential" or "attorney-client privileged" or "work product." A reasonable person can only conclude that the information was *not* considered attorney-client privileged and was, in fact, accessible to others within the agency who did not enjoy the privilege. Or, the agency was cavalier about privilege, and thus *waived* privilege.

The DC Circuit in Coastal States goes on to emphasize: "Assuming, however, that the purposes of the attorney-client privilege might be served by extending its protection to the situation here, we agree with the district court that DOE has **failed to demonstrate a fundamental prerequisite to assertion of the privilege: confidentiality both at the time of the communication and maintained since**." Id. (emphasis added).

If the USPTO intends to argue that "circulation [was] limited to the confines of the agency," then the USPTO must demonstrate that the documents "were circulated no further than among those members." Id. (emphasis added).

5. Work Product Privilege — If the privilege is work product, the USPTO cannot rely on its heretofore conclusory claims, as discussed previously. The DC Circuit in 2012 established a reasonable standard of detail for FOIA assertions of privilege in response to FOIA requests, as stated in CompTel III(C)(2)(c)¶3. Some examples of acceptably detailed explanations of redactions:

> (describing redactions from Document 34 as "[h]andwritten notes of Dave Janas, FCC staff attorney, containing deliberative process attorney work product analysis of SBC invoices");
>
> id. (describing redactions from Document 13 as "(describing redactions from Document 34 as '[h]and written attorney work product note of Dave Janas, FCC staff attorney, containing SBC staff contact information and statement memorializing a request from the person');
>
> id. (describing redactions from Document 14 as 'an attorney work product analysis by Dave Janas, FCC staff attorney, of SBC submissions...').

The USPTO has not provided a single explanation, much less explanations consistent with CompTel.

6. Presidential Privilege—The USPTO has cited "presidential communications privilege" but did not establish a basis for such an assertion in this case. You have not made reference to any particular redacted material where presidential privilege is being asserted, or explained why the claim is justified. Therefore, my request is left in the dark, yet again.

What particular paragraphs in the redacted material are asserting president communications privilege? On presidential communication privilege, the USPTO cannot simply rely on a blanket privilege in asserting presidential privilege. While the DC Circuit held in Nixon v. Sirica, 487 F. 2d 700 (D.D.C. 1973) at 7117 that presidential communications are "presumptively privileged," the U.S. Supreme Court refined that principle stating "The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." United States v. Nixon, 418 US 683 (1974) at 713.

The remainder of this page is left blank intentionally.

FREEDOM OF INFORMATION (RENEWED) APPEAL OF PRIVACY ACT INQUIRY RESPONSE

RENEWED REQUEST

Considering that the USPTO response does not comply with FOIA, the declaration in your letter as a "Final Decision" is not ripe, and therefore moot. Therefore, I renew my request for the information pursuant to the statutes, as discussed herein. Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264 (1981) at 297 ("The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is **not ripe for judicial resolution**.")(emphasis added). See also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 US 402 (1971) at 413-414 ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an **abuse of discretion**, or otherwise **not in accordance with law**' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U. S. C. §§ 706 (2) (A), (B), (C), (D) (1964 ed., Supp. V).")(emphasis added)

I look forward to your response.

Sincerely,

[redacted]

cc:

The Honorable Jim Jordan (4th Dist. OH)
3121 West Elm Plaza
Lima, OH 45805
T (419) 999-6455
F (419) 999-4238

Rebecca M. Blank, Acting Secretary of Commerce and Deputy Secretary of Commerce,
Department of Commerce
1401 Constitution Ave. N.W.
Herbert C. Hoover Bldg, Room 5838
Washington, D.C. 20230
(202) 482-8376 | (202) 482-2308 FAX | rblank@doc.gov

Enclosures:

- **Exhibit A:** USPTO's March 12, 2013 response

SWORN TO AND SUBSCRIBED Before me this
____ date of _____, 2013

_____
Notary Public

FREEDOM OF INFORMATION (RENEWED) APPEAL OF PRIVACY ACT INQUIRY RESPONSE

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

March 12, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[redacted]

RE: ***Freedom of Information Act Appeal A-13-00009 (Appeal of Request No. F-13-00064)***

Dear [redacted]

This determination responds to your letter, dated February 7, 2013, and received by the United States Patent and Trademark Office (USPTO or Agency) on February 11, 2013, appealing the USPTO's January 29, 2013, response to your Freedom of Information Act (FOIA) Request No. F-13-00064. You appeal the Agency's assertion of FOIA Exemptions 5, 5 U.S.C. § 552(b)(5), to withhold certain information contained in the documents that were produced to you. *See* Appeal at 2-4. You also make additional requests for information that were not in your original FOIA request. *See id.* For the reasons outlined below, your appeal is granted in part and denied in part.

On December 18, 2012, you made the following FOIA request:

> Any and all communications regarding 95/001,261 (*In re.* McKibben *et al Inter partes* Reexamination Proceeding) and 90/010,591 (*In re.* McKibben *et al. Ex Parte* Reexamination Proceeding) among:

a. BPAI;
b. Office of the USPTO Director, David J. Kappos;
c. Designates of the Office of the USPTO Director;
d. Representatives and/or designates of The White House;
e. Microsoft, IBM, The Federal Circuit Bar Association, the Federal Circuit, Clerk of the Court Jan Horbaly, Judge Alan D. Lourie, Judge Randall R. Rader, Judge Evan J. Wallach, Judge Kimberaly A. Moore, Thomas C. Hungar, Gibson Dunn LLP, Orrick Herrington LLP, Weil Gotshal LLP, Mark Zuckerberg, Marc Andreessen, James W. Breyer, Lawrence Summers, Gordon K. Davidson, Facebook PAC, Facebook, Inc., Attorney General, US Justice Department; and
f. Facebook USPTO counsels:
    1. Heidi L. Keefe, Reg. No. 40,673;
    2. Christopher-Charles King aka Christopher P. King, Reg. No. 60,985;

3. Robert A. Hulse, Reg. No. 48,473;
4. Cooley Godward Kronish LLP;
5. White & Case LLP;
6. Fenwick & West LLP; and
7. Other Facebook USPTO law firm(s) and counsel(s).

Request at 2-3.

On January 29, 2013, the Agency produced fifty-three pages of documents that were responsive to your request. In those documents, the Agency redacted portions of twenty-two pages pursuant to FOIA Exemption (b)(5), which allows the Agency to redact deliberative, predecisional communications.

On February 7, 2013, you appealed the Agency's assertion of FOIA Exemption 5. You request the unredacted versions of the twenty-two redacted pages that were produced with the Agency's response. *See* Appeal at 2. Your justification is that the Agency's assertion of FOIA Exemption 5 is improper because "[a]ll substantive contents of the communications were blacked out . . . [, which] violates both the spirit and intent of FOIA . . . [and] made any meaningful evaluation impossible." *See id.* at 1-2.

In your appeal, you also make the following additional requests for information under FOIA:

> Please forward to me all communications, including staff notes, and records of internal communications, with Senator John Kyl ("USS Kyl") and any other Congressional Inquiry documents. Please also provide the contents of the "EDMS Folder 17230" and the contents of the "4 Mini Appeal Review" folder. Also, reference is made to acronyms "CRU," "SPE," "BPAI," and the "PTAB Trial Team;" . . . [and all communications between the FOIA Officer, any of the individuals cites above, and any individuals and/or entities identified in my original request.

FOIA Appeal at 2-3.

FOIA Exemption 5

The Agency redacted, pursuant to FOIA Exemption 5, portions of twenty-two pages of the documents that were produced. Exemption 5 excludes from disclosure any intra-agency materials that are "both predecisional and a part of the deliberative process." *McKinley v. Board of Governors of the Federal Reserve System*, 2011 WL 2162896 (D.C. Cir. June 3, 2011) (internal quotations omitted). Exemption 5 "was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity." *Id*; *See Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) ("As we have explained, Exemption 5 'incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant' – including the presidential communications privilege, the attorney-client privilege, the work product privilege, and the deliberative process privilege and excludes these privileged

documents from FOIA's reach."). The Agency reads your appeal as a request for the Agency to re-review the redactions made by the FOIA Officer.

In response to your appeal, the Agency has re-reviewed the twenty-two pages that were redacted. Further review of these pages indicates that six pages included inappropriate redactions. These pages are enclosed with this decision.

New Information Requests

The purpose of an appeal under 37 C.F.R. § 102.10 is to allow the top managers of . . . [the] agency to correct mistakes [if any] made at lower levels . . . ." *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). The purpose of an appeal is not to respond to an initial request for information made pursuant to the Agency's FOIA regulations, 37 C.F.R. Part 102. Thus, your new information requests will not be addressed as part of this determination letter. If you continue to desire this information, you can submit a new request under 37 C.F.R. Part 102.

Final Decision and Appeal Rights

This is the final decision of the USPTO with respect to your appeal. You have the right to seek judicial review of this denial 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,

James C. Payne

James C. Payne
Deputy General Counsel for General Law

Seldon, Karon

From: Yucel, Irem
Sent: Friday, April 27, 2012 4:47 PM
To: Moore, James T
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

(b)(5) [redacted]

From: Moore, James T
Sent: Friday, April 27, 2012 4:10 PM
To: Yucel, Irem
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

Seems pretty straightforward to me.

(b)(5) [redacted]

From: Yucel, Irem
Sent: Thursday, April 26, 2012 3:31 PM
To: Moore, James T
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

Ok. I suspect that we will need to meet on this soon, so if everyone can piece together their part of the story in advance of the meeting, we should be able to put something together.

I will have Sanny set something up early next week...possibly Tuesday...

Many thanks.

Remy

From: Moore, James T
Sent: Thursday, April 26, 2012 2:05 PM
To: Yucel, Irem
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

Me.

From: Yucel, Irem
Sent: Thursday, April 26, 2012 1:45 PM

Seldon, Karon

From: Yucel, Irem
Sent: Thursday, April 26, 2012 3:31 PM
To: Moore, James T
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

Ok. I suspect that we will need to meet on this soon, so if everyone can piece together their part of the story in advance of the meeting, we should be able to put something together.

I will have Sanny set something up early next week...possibly Tuesday...

Many thanks.

Remy

From: Moore, James T
Sent: Thursday, April 26, 2012 2:05 PM
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Me.

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Sent: Thursday, April 26, 2012 1:45 PM
To: Moore, James T
Cc: Yucel, Irem; Hanlon, Brian
Subject: FW: CONGRESSIONAL - EDMS Folder 17230
Importance: High

Jay,

I think that this is going to take a group effort to address. Please let me know who will be the POC from the Board for this. The deadline is May 7, so there is not a lot time here.

Thanks,

Remy

From: Cooksey, Janie
Sent: Thursday, April 26, 2012 11:46 AM
To: Yucel, Irem
Cc: Colarulli, Dana
Subject: CONGRESSIONAL - EDMS Folder 17230
Importance: High

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From: Cooksey, Janie
Sent: Thursday, April 26, 2012 11:46 AM
To: Yucel, Irem
Cc: Colarulli, Dana
Subject: CONGRESSIONAL - EDMS Folder 17230
Importance: High

Remy -

(b)(5)

[redacted]

In advance, that you for your assistance in this matter!!

Regards,

Janie Cooksey
Congressional Affairs Specialist
Office of Governmental Affairs
United States Patent and Trademark Office
U.S. Department of Commerce
Office number: (571) 272-7300
Direct number: (571) 272-8466

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Office number: (571) 272-7300
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Seidon, Karon

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Remy -

(b)(5) [redacted]

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Janie Cooksey

Seldon, Karon

From: Moore, James T
Sent: Friday, April 27, 2012 4:10 PM
To: Yucel, Irem
Cc: Hanlon, Brian
Subject: RE: CONGRESSIONAL - EDMS Folder 17230

Seems pretty straightforward to me.

(b)(5) [redacted]

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