March 12, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED


Dear [Name]

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;
f. Facebook USPTO counsels:
   1. Heidi L. Keefe, Reg. No. 40,673;
   2. Christopher-Charles King aka Christopher P. King, Reg. No. 60,985;
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:
Sincerely,

James O. Payne
Deputy General Counsel for General Law