



OFFICE *of* GOVERNMENT INFORMATION SERVICES

January 12, 2016 — Sent via U.S. Mail



Re: Case No.: 201500986
NG: HK: CM: AS

NATIONAL
ARCHIVES
and RECORDS
ADMINISTRATION

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Dear [REDACTED]:

This responds to your request for assistance from the Office of Government Information Services (OGIS), which we received on July 20, 2015. Your request for assistance pertains to your Freedom of Information Act (FOIA) requests to the U.S. Patent and Trademark Office (USPTO) and the Department of Energy (DOE).

Congress created OGIS to complement existing FOIA practice and procedure; we strive to work in conjunction with the existing request and appeal process. The goal is for OGIS to allow, whenever practical, the requester to exhaust his or her remedies within the agency, including the appeal process. OGIS has no investigatory or enforcement power, nor can we compel an agency to release documents. OGIS serves as the Federal FOIA Ombudsman and our jurisdiction is limited to assisting with the FOIA process.

You made a request to DOE for patents and a record of invention forms submitted by [REDACTED]. DOE responded to your request by informing you that the records you seek fall under USPTO's jurisdiction. DOE referred your request to USPTO, which responded by informing you that to the extent you seek patents currently under a secrecy order, the agency can neither confirm nor deny the existence of those records pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3). You appealed the response, and USPTO upheld its initial decision on your request. You dispute this response, and seek OGIS's assistance with this matter.

OGIS contacted USPTO FOIA staff to discuss your request and appeal. USPTO confirmed its position that it can neither confirm nor deny the existence of records responsive to your request. In cases such as this where agencies are firm in their position, there is little for OGIS to do beyond providing more information about the agency's actions.

When an agency responds to a FOIA request by neither confirming nor denying the existence of responsive records, this is known as a "Glomar" response. A "Glomar" response is proper when to admit that records even



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exist would reveal a fact that is exempt under FOIA. (See Department of Justice Guide to the Freedom of Information Act, p. 169 of the guide

http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption1_1.pdf).

Exemption 3 of the FOIA allows the withholding of information prohibited from disclosure by another statute if the statute either " requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or it establishes particular criteria for withholding or refers to particular types of matters to be withheld." In response to your request, the USPTO is neither confirming nor denying the existence of the records pursuant to FOIA Exemption 3 by referencing 35 U.S.C. § 122(a). This statute provides that applications for patents shall be kept in confidence by the USPTO and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of an Act of Congress or in such special circumstances as may be determined by the Director. Therefore, the USPTO can neither confirm nor deny whether there are unpublished patent applications by [REDACTED] under a secrecy order as an agency may refuse to confirm or deny the existence or non-existence of responsive records if the particular FOIA exemption at issue would itself preclude the acknowledgment of such documents.

While we understand that this is not the response and outcome you had hoped to receive, we hope that this information about your request is useful to you. Thank you for contacting OGIS; we will now consider this matter closed.

Sincerely,

JAMES V.M.L. HOLZER

Director

cc: [REDACTED], FOIA Officer, Department of Energy
[REDACTED], FOIA Specialist, Patent and Trademark Office

We appreciate your feedback. Please visit <https://www.surveymonkey.com/s/OGIS> to take a brief anonymous survey on the service you received from OGIS.