



November 22, 2016

**VIA CERTIFIED MAIL**

Ricou Heaton  
USPTO FOIA Officer  
United States Patent and Trademark Office  
Madison Building East  
600 Dulany Street  
Alexandria, VA 22314  
Email: FOIARequests@uspto.gov

**Re: Freedom of Information Act Request**

Dear Mr. Heaton:

I write on behalf of the Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are examining time and attendance abuses at the United States Patent and Trademark Office (“USPTO”).

A recent report from the United States Department of Commerce’s (“DOC”) Office of Inspector General (“OIG”) found significant time and attendance abuses at the USPTO.<sup>2</sup> According to the OIG Report, USPTO employees were paid for a total of 288,479 unsupported hours, mostly while teleworking.<sup>3</sup> These hours equate to over \$18.3 million in potential waste paid to abusers as both wages and benefits.<sup>4</sup> Unsurprisingly, the OIG’s report coincides with patent examiners facing an all-time high patent backlog.<sup>5</sup> The total unsupported hours highlighted by the OIG’s report would have reduced the patent backlog by 15,990 cases.<sup>6</sup> This is concerning because USPTO has doubled the amount of patent examiners since 2005 by increasing the number of “teleworkers.”<sup>7</sup> Additionally, the OIG report detailed several policy deficiencies which prevent the USPTO from

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about).

<sup>2</sup> See OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF COMMERCE, INVESTIGATIVE REPORT NO. 14-0990, U.S. PATENT AND TRADEMARK OFFICE ANALYSIS OF PATENT EXAMINERS’ TIME AND ATTENDANCE (Aug. 2016), *available at* <https://www.oig.doc.gov/OIGPublications/14-0990.pdf> [hereinafter OIG REPORT] (last visited Nov 7, 2016).

<sup>3</sup> *Id.* at 3. Unsupported hours are hours that patent examiners claimed to have worked, but that the OIG determined were unsupported by the evidence they reviewed.

<sup>4</sup> *Id.*

<sup>5</sup> *Oversight of the U.S. Patent and Trademark Office Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter *Judiciary Hearing*] (testimony of Hon. Michelle K. Lee, Director, U.S. Patent and Trademark Office)

<sup>6</sup> OIG Report, *supra* note 2.

<sup>7</sup> *Judiciary Hearing*, *supra* note 5.

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adequately overseeing examiner work hours, especially concerning hours when the examiner is teleworking.<sup>8</sup> Teleworking is common in many industries and allows employees to work from home by logging into their workstation but requires oversight tools to prevent abuse by the employee. The USPTO is particularly susceptible to telework abuse because approximately 6,000 of its 12,623 employees work from home full-time without ever reporting to a physical office.<sup>9</sup>

According to USPTO Director Michelle Lee, the agency has “ordered counseling, sent letters of reprimand, terminated wrongdoers and collected money from them for hours they did not work.”<sup>10</sup> The OIG’s report indicates that 415 patent examiners accounted for 43% of the unsupported hours and racked up about \$7.8 million in bonuses in less than two years.<sup>11</sup>

Unfortunately, the OIG’s report failed to include the total number of examiners found to have abused the telework policy. While testifying before the U.S. House Committee on the Judiciary, Director Lee declined to comment on the exact number of examiners that violated the policy, despite claiming that the practice is not widespread.<sup>12</sup> In the interest of government accountability and transparency, CoA seeks to identify policy changes, the full extent of telework abuses, and whether disciplinary action has been taken against employees that claimed hours they did not work.

Accordingly, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, CoA Institute hereby requests access to the following records for the time period of January 1, 2015 to the present:<sup>13</sup>

1. All records compiled and sent by the USPTO to the Department of Commerce Office of Inspector General related to time and attendance abuse by USPTO employees or contractors.
2. All records, including communications among and between USPTO employees in the Office of the Under Secretary and Director, Office of the General Counsel, Office of the Commissioner for Patents, and the Office of the Commissioner for Trademarks relating to time and attendance abuses by USPTO employees or contractors.
3. All records, including communications among and between employees in the USPTO Office of the Under Secretary and Director, Office of the General Counsel, Office of

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<sup>8</sup> *Id.*

<sup>9</sup> *Judiciary Hearing*, *supra* note 5; *see also* U.S. PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2015, at 104 (2015), *available at* <https://www.uspto.gov/sites/default/files/documents/USPTOFY15PAR.pdf>.

<sup>10</sup> Lisa Rein, *Patent chief tells lawmakers ‘time and attendance fraud is not tolerated’*, WASH. POST, Sept. 13, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/patent-chief-tells-lawmakers-time-and-attendance-fraud-is-not-tolerated/> (last updated Sept. 13, 2016).

<sup>11</sup> David Thornton, *Implications of Telework Abuse Continue to Plague USPTO*, FED. NEWS. RADIO, Sept. 1, 2016, *available at* <http://federalnewsradio.com/agency-oversight/2016/09/new-report-finds-resurgence-old-telework-problems-uspto/>.

<sup>12</sup> *Judiciary Hearing*, *supra* note 8 (statement of Hon. Michelle K. Lee, Director, U.S. Patent and Trademark Office).

<sup>13</sup> For the purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. *See Pub. Citizen v. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. *See Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at \*7-9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

the Commissioner for Patents, and the Office of the Commissioner for Trademarks relating to disciplinary action at the USPTO as a result of time and attendance abuses by USPTO employees or contractors.

4. All records relating to the February 2015 document entitled “Full-Time Teleworker Policy,” including any new or updated versions of that policy.<sup>14</sup>

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of all applicable fees. The FOIA and applicable regulations provide that the USPTO shall furnish requested records without or at reduced charge if “disclosure of the 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.”<sup>15</sup>

In this case, the requested records unquestionably shed light on “operations or activities of the government,” namely, what disciplinary actions have been taken regarding time and attendance abuses at the USPTO, the extent of those abuses, and what policies have been enacted to prevent future abuses. The OIG Report shows that patent examiners would have been able to process approximately 16,000 more patents had they been working during their claimed unsupported hours.<sup>16</sup> Efficient processing of patent applications creates predictable business expectations for individual inventors and businesses. As a fee-based agency, the USPTO owes its users clarity, efficiency, and transparency.

CoA Institute has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through the Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>17</sup> In addition, as CoA Institute is a non-profit organization, as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under FOIA.<sup>18</sup> As the D.C. Circuit recently held, the “representative of the news media” test focuses on the requestor, not the specific FOIA request at issue.<sup>19</sup> CoA Institute satisfies this test because it gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw

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<sup>14</sup> Referenced in the OIG Report on page 2.

<sup>15</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1); *see also Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>16</sup> OIG REPORT, *supra* note 2, at 10.

<sup>17</sup> *See Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>18</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 37 C.F.R. § 102.11(b)(6).

<sup>19</sup> *See Cause of Action*, 799 F.3d at 1121.

materials into a distinct work, and distributes that work to an audience.<sup>20</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>21</sup> These distinct works are distributed to the public through various media, including the Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.”<sup>22</sup> In light of the foregoing, numerous federal agencies—including the Department of Commerce—have appropriately recognized the Institute's news media status in connection with its FOIA requests.<sup>23</sup>

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<sup>20</sup> The USPTO definition of “representative of the news media,” 37 C.F.R. § 102.11(b)(6), is in conflict with the statutory definition and controlling case law. The agency has improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *See Cause of Action*, 799 F.3d at 1125 (“Congress . . . omitted the ‘organized and operated’ language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an ‘organized and operated’ requirement to the statutory definition.”). Under either definition, however, CoA Institute qualifies as a representative of the news media.  
<sup>21</sup> *See, e.g., Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: Executive Branch Earmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>23</sup> *See, e.g.,* FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); *see also* FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep't of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep't of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Comm'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

**Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>24</sup>

**Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 407-9964 or by e-mail at [lamar.echols@causeofaction.org](mailto:lamar.echols@causeofaction.org). Thank you for your attention to this matter.



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LAMAR ECHOLS  
COUNSEL

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<sup>24</sup> See, e.g., 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).