National Aeronautics and Space Administration

Headquarters
Washington, DC 20546-0001

April 13, 2010

Reply to Attn of: Office of the General Counsel

Mr. Jed Margolin
1981 Empire Road
Reno, NV 89521-7430

Dear Mr. Margolin:

By letter dated March 9, 2010, you appealed an initial determination under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., issued February 11, 2010, by Ms. Denise Young, NASA Headquarters, Freedom of Information Act Office. Your request sought the following:

1. How many claims for patent infringement have been filed with NASA since January 1, 1999? This includes requests which NASA chose to handle as claims even if the person who submitted it had not intended it to be an official claim.

2. How many of the claims for patent infringement in paragraph 1 were affirmed by NASA?

3. How many of the claims for patent infringement in paragraph 1 were made by what NASA considers Independent Inventors?

4. What does NASA consider an Independent Inventor?

5. How many of the claims for patent infringement that NASA affirmed in paragraph 2 were filed by Independent Inventors?

6. How many of the claims for patent infringement in paragraph 1 were denied by NASA?

7. How many of the claims for patent infringement that were denied by NASA in paragraph 6 resulted in a Court action against NASA?

8. How many of the claims for patent infringement that were denied by NASA that resulted in a Court action against NASA in paragraph 7 were filed by Independent Inventors?

9. Please send me document(s) referred to by GAO as "NASA's procedures for administratively reviewing a claim of patent infringement..."

10. What is the name of the Director of the Infringement Division?

11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

Although items numbered 1 through 8 were phrased as questions, and not as requests for records as required under the FOIA, NASA conducted a search to determine whether it had responsive records which contained the information requested in the questions. As a result, the initial determination provided a copy of the log of claims for patent infringement against the Agency maintained by the NASA Headquarters Office of General Counsel in response to item number 1. No records were found in response to item number 9, but you were referred to the GAO since you indicated that the record you sought was referenced in a GAO report. Finally, you were provided a link to NASA Procurement Information Circular 08-12 which implements the applicable standards of ethics for Federal contractors in response to item 11. You were advised that a search of NASA Headquarters records conducted pursuant to your request had located no records responsive to items 2 through 8 or item 10.

You have appealed the February 11, 2010 initial determination. In your appeal letter, you state your belief that the "no records" response you received to items 2 through 8 and item 10 "lacks credibility." In addition, you assert your belief that NASA has records responsive to items 3-5 referencing the category of "Independent Inventor" based on a telephone conversation you conducted with a NASA employee in June, 2003. Finally, in response to the "no records" response asking for the identity of NASA's Director of the Infringement Division, you ask NASA to provide you with the name of the person who currently performs that function if that position no longer exists.

With regard to item 9, you state that NASA's response to your request is "uninformed and insulting" by referring you to the U.S. Government Accountability Office (GAO) for a document cited in a 2000 GAO report. With regard to item 11, you state your belief that "it is not credible that NASA has no standard of ethical conduct for its Contractors." Although you do not specifically state a basis for appeal of the initial determination on item 1, we note that you conclude with the statement that NASA's response to your request for items 1 through 11 is "wholly inadequate," so we will consider the Agency's response to all 11 items in this decision on appeal.

Your appeal has been reviewed and processed consistent with NASA FOIA regulations. This process has involved a review of your original December 14, 2009 request, the assertions in your appeal letter, the February 11, 2010 initial determination, and the controlling FOIA case law. Based on this review, and for the reasons below, I have decided to affirm the initial determination.

Federal agencies are not required to create records in order to respond to a FOIA request, *see* National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975), nor are they required to answer questions posed as FOIA requests, *see* Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985). Agencies have an obligation to search for records which may be responsive to requests under the FOIA that are "inartfully posed in the form of questions." Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981). However, the request, however inartful, must reasonably describe the records sought as required by the FOIA. 5 U.S.C. 552(a)(3)(A). That is, agency staff must be able to reasonably ascertain exactly which records are being requested and to locate them. Marks v. DOJ, 578 F.2d 261, 263 (9th Cir. 1978).

Item 1 requested the number of claims for patent infringement NASA has received since January 1, 1999. NASA responded to item 1 by providing you with a copy of the log of administrative claims for patent infringement maintained by the NASA Headquarters Office of General Counsel. This record is responsive to your request as it allows you to discern the number of claims for patent infringement the Agency has received in the relevant time period.

Items 2 and 6 request the number of patent claims affirmed and denied by NASA respectively during the relevant period. As you note in your appeal, the log provided as item 1 is incomplete as to the disposition of the claims identified therein. The log was provided as it is maintained by the Agency. Because the Agency is not required to create new records in response a FOIA request, there are no Agency records which enumerate the information requested in items 2 and 6.

There are no responsive records to items 3, 4, 5 and 8 because the search revealed no Agency records which refer to Agency use of the category "Independent Inventors."

There are no responsive records to item 7 because the search revealed no records which enumerate Court actions resulting from claims for patent infringement denied by NASA.

Although in item 9 you failed to identify a particular GAO report, NASA Headquarters Office of General Counsel identified GAO Administrative Review B-285211, NASA's Administrative Review of a Patent Infringement Claim, dated August 8, 2000, which states that the GAO reviewed NASA's procedures for administratively reviewing a claim of patent infringement as attached to a September 29, 1987 letter. As confirmed by the document quoted at page 13 of your appeal, the NASA Headquarters Office of General Counsel did not have a copy of the attachment as of January, 2009. The search revealed that no copy of the attachment has been located since that time.

There are no responsive records to item 10. In your appeal, you make a new request and state that if no one has the title of Director of the Infringement Division, you request the identity of the person who performs that function. The current functional structure of the Commercial and Intellectual Property Law Practice Group in the NASA Headquarters Office of General Counsel is available at http://www.nasa.gov/offices/ogc/commercial/index.html.

In response to item 11, you were provided a reference to the Agency's implementation of the Federal Acquisition Regulations (FAR) implementing rules applicable to contractor ethics. NASA follows the Federal Government standards for contractor ethics as set out in the FAR and therefore, there are no additional records responsive to your request.

Therefore, for the reasons set forth above, the initial determination is affirmed. This is a final determination and is subject to judicial review under the provisions of the FOIA, 5 U.S.C. § 552(a)(4), a copy of which is enclosed.

Sincerely,

Thomas S. Luedtke
Assistant Administrator
for Agency Operations

Enclosure

Freedom of Information Act, Section 552(a)(4), as amended

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request. [Effective one year from date of enactment of Public Law 110-175]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the

National Aeronautics and
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