

National Aeronautics and Space Administration

Headquarters

Washington, DC 20546-0001



August 5, 2009

Reply to Attn of:

Office of the General Counsel

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

Re: Appeal of FOIA 08-270

Dear Mr. Margolin:

This is a response to your letter dated June 10, 2009, appealing an initial determination under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., issued on May 14, 2009, by Ms. Kellie N. Robinson, FOIA Public Liaison Officer, NASA Headquarters. Your original FOIA request of June 30, 2008, sought to obtain "all documents related to the Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222."

In the initial determination Ms. Robinson informed you that NASA Headquarters Office of General Counsel conducted a search and from that search certain enclosed documents were provided that were responsive to your request. In addition Ms. Robinson informed you that certain other documents found responsive to your request contain information that is exempt from disclosure under the deliberative process privilege of Exemption 5, 5 U.S.C. §552(b)(5).

In your appeal letter dated June 10, 2009, you assert that NASA did not give an estimate of the volume of the documents being withheld, in violation of 5 U.S.C. §552(a)(6)(F), which states that:

In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

In addition to the alleged failure to provide this information your appeal letter requests documentation including:

- 1) Letter dated March 19, 2009, written by Mr. Gary G. Borda and addressed to Optima Technology Group (OTG);
- 2) Evidence (patent report) that Mr. Borda refers to in his letter and how such materials and/or documents are directed to the '724 claims; and
- 3) Records between NASA and Rapid Imaging Software (Mike Abernathy), which provided the synthetic vision system for the X-38 project which was referred to in the Borda letter.

Your appeal has been reviewed and processed pursuant to applicable statutes and regulations, specifically 14 CFR Part 1206. This process involved an examination of your original request, FOIA case law, the initial determination, the assertions made in your appeal, and related documentation.

First, in response to your assertion that you were not provided an estimate of the volume of documents withheld under Exemption 5, we now inform you that the withheld documents constitute approximately one hundred (100) pages in total volume.

Second, the document requested under item 1) above is already in your possession. You quoted the document verbatim in your appeal letter to NASA and included an exact copy in your materials (Appendix NA) that you returned to NASA accompanying your letter of appeal.

Third, I have determined that the documents you request under item 2) above are exempt from release under FOIA Exemption 5. The documents concerning the patent reports were prepared by attorneys in anticipation of litigation under NASA Case No. I-222. The preparation of the patent report was done in close collaboration between agency attorneys and agency personnel. Exemption 5 excludes from disclosure any documents that are "inter-agency or intra agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5). This exemption protects from disclosure those documents and other memoranda prepared by an attorney in contemplation of litigation. See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). The exemption is not limited to civil proceedings, but extends to administrative proceedings. See Environmental Protection Services v. EPA, 364 F. Supp. 2d 575, 586 (N.D. W.Va. 2005). In addition the exemption protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977); Electronic Privacy Information Center v. Dep't of Homeland Security, 384 F. Supp. 2d 100, (D.D.C. 2005). Your request that NASA show how such materials and/or documents are directed to the '724 claims is also protected by the attorney client privilege.

Finally, with regard to the documents you request under item 3), these documents exceed the scope of the original FOIA request you submitted on June 30, 2008. Your original request identified documents related to the Administrative Claim of Jed Margolin for Infringement of U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222. That request was forwarded to the Office of General Counsel, NASA HQ, which maintains the administrative claim file that includes all the documents the Agency holds in connection with the patent infringement claim. However, your request did not identify documents relating to an independent program conducted through a contractual arrangement made over a decade ago at other NASA Centers. See Chester Kowalczyk v. Dep't of Justice, 73 F.3d 386 (D.C. Cir. 1996). You will need to make a separate request for these additional documents and provide more specificity as to the nature of the documents you are requesting.

In response to your appeal, I will affirm the initial determination.

This is a final determination and is subject to judicial review under the provisions of 5 U.S.C. § 552 (a)(4), a copy of which is enclosed.

Sincerely,



Thomas S. Luedtke
Associate Administrator
for Institutions and Management

Enclosure

cc:
HQ/Mr. Hargrove

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

defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

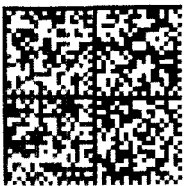
(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

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