

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE FURMAN

INTELLECTUAL PROPERTY WATCH and
WILLIAM NEW,

Plaintiffs,

v.

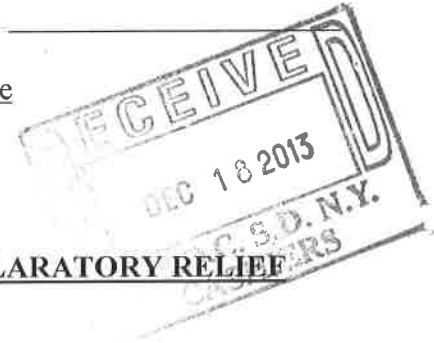
UNITED STATES TRADE REPRESENTATIVE,

Defendant.

13 CV 8955

Case No. _____

ECF Case



COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, brought by Intellectual Property Watch and its Editor-In-Chief, William New (together, "IP-Watch") to compel access to important information about the United States' negotiations over the proposed Trans-Pacific Partnership Agreement ("TPP"). In particular, plaintiffs seek public disclosure of the intellectual property provisions of that agreement and information related to development of the U.S. negotiating positions related to those provisions. Obtaining this information is a matter of urgent concern to IP-Watch, a leading news agency that reports on international intellectual property policies. IP-Watch needs this information to inform the public in a timely manner about the TPP, which could have very significant effects on global and domestic intellectual property law and policy.

2. The TPP is a proposed plurilateral trade agreement, currently being negotiated between twelve countries. Its ratification would significantly affect U.S. policy on numerous trade- and labor-related issues. The intellectual property provisions of the proposed treaty could

have a major impact on import and export of intellectual property, including patents, copyrighted works, and other material, to and from the United States. They could also significantly affect the ability of both the general public and owners of intellectual property to benefit from a balanced system of intellectual property regulation. The content of these provisions, as well as the manner in which they were developed, are therefore of substantial public interest.

3. The TPP has been negotiated by the Defendant United States Trade Representative (“USTR”) in nearly unprecedented secrecy. Other than unauthorized leaks, information about this agreement has been kept almost entirely from the public. The only non-governmental actors that have had meaningful access to the TPP drafting and negotiation process are representatives of industry groups that are members of one of the USTR’s “Industry Trade Advisory Committees” (“ITACs”).

4. The membership of ITACs does not reflect all stakeholders in the intellectual property issues. The ITAC membership excludes significant industries, representatives of civil society organizations, and independent experts. Transparency about the advice that the USTR has received from the industry insiders who comprise the ITACs is crucial so that the public may understand how the government may have been influenced in the development of the treaty.

5. On information and belief, TPP negotiations are nearing completion. Disclosure is particularly urgent now, while negotiations are still open, lest the final terms of the agreement be presented to the Congress and the public as a fait accompli. News media such as IP-Watch must be able to inform the public about the content of the agreement and the manner in which it was developed so that the public may meaningfully assess and debate the proposal before it is enacted into law.

6. Plaintiffs have been seeking information from USTR since March 2012, including the intellectual policy proposals being advanced by the USTR, the communication between the USTR and ITACs, and any secrecy agreements that resulted in the unprecedented secrecy surrounding these negotiations. USTR did not even respond to these FOIA requests for more than a year, and then disclosed virtually nothing of substance. USTR has withheld the bulk of responsive information it found, and refused even to search for entire categories of records, claiming they were categorically exempt from disclosure.

7. Plaintiffs' administrative appeal has gone unanswered, and they thus bring this action to enforce their statutory right to records requested more than 18 months ago. Without information regarding the positions that the USTR is taking in its negotiations with other countries, information about what kind of advice the USTR is getting from ITACs, and information about the extent of ITACs' influence over the USTR, IP-Watch is unable to provide adequate coverage to its readership, and the public is unable to assess whether the U.S. government is acting properly in the public's interest and on its behalf.

8. Given the significant public interest in understanding the TPP negotiations, including the role of ITACs, and because this request relates to an ongoing news story of significant public concern, plaintiffs seek expeditious treatment of this Complaint pursuant to 28 U.S.C. § 1657.

PARTIES

9. Plaintiff Intellectual Property Watch is a non-profit independent news service that reports on the interests and behind-the-scenes dynamics that influence the design and implementation of international intellectual property policies. Intellectual Property Watch submitted the FOIA request at issue here together with William New.

10. Plaintiff William New is the editor-in-chief of Intellectual Property Watch. He resides in Bronxville, New York. Mr. New has worked for Intellectual Property Watch since 2005. He is an accredited journalist at the World Trade Organization and the United Nations. Mr. New submitted the FOIA request at issue here together with Intellectual Property Watch.

11. Defendant United States Trade Representative is an agency within the executive branch of the United States government tasked with principal responsibility for negotiating the TPP. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this action and personal jurisdiction over the defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06.

13. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) because Plaintiff New resides within the district.

FACTS

Background

14. In 2008, the U.S. government agreed to enter talks to establish the TPP, an economic treaty between the United States and eight other countries, including some of the largest economies in the world. Negotiations began in 2010. By 2013, the list of countries participating in negotiations had grown to twelve, encompassing over 40% of the world economy.

15. Among the topics included in the treaty negotiations are provisions that would govern intellectual property rights and the enforcement of those rights between member states.

These provisions would have wide-ranging effects on intellectual property rights in the United States and elsewhere.

16. The TPP negotiations have been shrouded in virtually complete secrecy. In March 2010, the USTR and its foreign counterparts reportedly entered an agreement to keep negotiating positions and other negotiation documents classified, even for several years after the treaty is ratified. Information about the United States' negotiating position and progress of the negotiations has therefore been withheld from the public, even though it has been shared, in secret, with foreign counterparts as well as representatives of certain privileged U.S. industries who have been selected to participate as members of the USTR's ITACs.

17. In February 2010, the USTR established the Industry Trade Advisory Committee on Intellectual Property Rights, known as ITAC-15. ITAC-15 is a select group of representatives of industry, business, and other private sector interests. Together with other previously established ITACs, particularly ITAC-3 (Chemicals, Pharmaceuticals Health Science Products and Services), and ITAC-10 (Services and Financial Industries), the purpose of ITAC-15 is to assist the USTR in developing the United States' negotiating position concerning intellectual property.

18. Aside from the dates and locations of ITAC meetings, and redacted emails concerning such scheduling matters, the USTR has maintained complete secrecy in its communications with the ITACs, as well as the individual source and nature of all recommendations made by the ITACs and their members for the intellectual property provisions of the TPP.

19. Members of civil society groups and independent experts have long raised the concern that the industry groups represented on the ITACs are generally interested only in

expanding protection for intellectual property, and may wield significant influence over USTR positions without regard to the interests of consumers, the impact of positions on technology development and economic growth, and other vitally important interests. They have objected that the membership of the ITACs represent only a small set of the relevant interest groups, and that the USTR has not received adequate input from other interested parties.

20. IP-Watch, as a major, non-profit news organization dedicated to providing information to the public on international intellectual property policies, seeks to report on these matters of significant public concern and controversy. Given the secrecy imposed by USTR, IP-Watch cannot meaningfully report on the negotiations, and the public cannot know if the U.S. government is acting in the public's interest and on its behalf.

21. On November 13, 2013, a purported copy of a draft of the negotiated text of the TPP chapter on intellectual property was published online by WikiLeaks, which claimed to have received the draft from an anonymous source. That draft only raises more concerns about the positions that USTR has been advocating in the negotiations.

22. The information sought by plaintiffs goes beyond the unauthorized disclosure in a number of ways. In particular, plaintiffs seek information about USTR's final decisions and prior negotiating positions, earlier versions of the text, the terms of the secrecy agreement that apparently governs the negotiations, and the relationship and communication between ITACs and the USTR.

IP-Watch's FOIA Request

23. On March 23, 2012, IP-Watch submitted a FOIA request by letter to the USTR seeking five specific categories of records from January 1, 2009 to the present. (A true and correct copy of this request is annexed hereto as Exhibit A.)

24. In broad terms, the request sought records concerning U.S. negotiating positions and draft proposals, joint drafts of the TPP, communications between USTR and ITACs, the terms of secrecy agreement governing the negotiations, and the schedule of negotiation session and other meetings. The request emphasized the “urgent need to inform the public about USTR’s activities” in light of the “rapidly advancing negotiations over TPP.” It also underscored that the “prompt release of additional information is necessary for the public to weigh in on the substance of the agreement before it is completed.” Plaintiffs requested that the USTR expedite its treatment of the FOIA request. Plaintiffs also requested a public interest fee waiver for duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because “disclosure of the requested information is in the public interest.”

25. On April 5, 2012, Plaintiff New spoke on the telephone to officials of the USTR, including Stan McCoy and Jonathan R. Weinberger. Among other things, the USTR officials requested that the plaintiffs narrow the scope of their FOIA request.

26. On April 11, 2012, plaintiffs submitted by letter a narrowing amendment to their request. (A true and correct copy of this letter is annexed hereto as Exhibit B.) The amendment focused the scope of two of the five requested categories of documents. In particular, the amendment narrowed the request for documents concerning “the U.S. negotiating position, and any U.S. proposals for TPP” to only those documents concerning intellectual property rights and several other related topics that were specifically listed.

27. As amended, IP-Watch’s FOIA request seeks the following five categories of information:

- a. Records and correspondence consisting of, describing or concerning the U.S. negotiating position on, U.S. proposals for, and any U.S.-created draft text of any TPP chapters or sections concerning certain specified topics relevant to IP-Watch’s coverage, including but not limited to

proposals offered by USTR to other countries at any of the negotiation rounds or informal side meetings.

- b. Records, correspondence, and minutes consisting of, describing, or concerning all communications between USTR or USTR employees and any member of the ITAC on Intellectual Property Rights (ITAC 15), the ITAC on Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3), and the ITAC on Services and Finance Industries (ITAC 10). The requested records, correspondence, and minutes include, but are not limited to, any proposals, policy suggestions, requests, or comments on the U.S. negotiating position, or on proposed or joint drafts of the TPP or any portion thereof, with any of these three ITACs, or any past or present member thereof, including a list of 65 specified individuals.
- c. Any joint texts of the TPP or any of its provisions that had been circulated to negotiating parties during and/or after each negotiation round or informal side meeting.
- d. Records and correspondence indicating the 2012 schedule of official negotiation rounds (including locations) and the schedule for any informal side meetings (including locations);
- e. The full text of, and any records or correspondence referencing, the Memorandum of Understanding dated March 4, 2010, that commits countries not to declassify documents related to negotiations for four years from entry into force of the TPP agreement, and any subsequent documents concerning amendments to this agreement or subsequent related Memoranda of Understanding (MOUs) concerning or establishing classification requirements for negotiating countries.

USTR's Responses

28. On March 19, 2013 – nearly a year after plaintiffs' original FOIA request – Defendant provided an "initial response" by e-mail. (A true and correct copy of this response is annexed hereto as Exhibit C.) In the response, Defendant asserted that documents responding to request items (a) and (c) above, related to the U.S. negotiating positions and joint texts of the TPP, were categorically exempt from disclosure under FOIA. Defendant refused to conduct a search for those documents.

29. In the same letter, Defendant indicated that it had completed an initial search for documents from the ITAC members listed in the request in item (b), but had not yet completed the process of reviewing those records for responsiveness and releasability. Finally, in response to items (d) and (e), related to the schedule of negotiations and the TPP parties' non-disclosure agreement, Defendant released 277 pages of TPP-related documents in full. The majority of the released documents consisted merely of copies of materials publicly available on the USTR website. USTR did not disclose the text of the requested non-disclosure agreement.

30. On June 21, 2013, fifteen months after plaintiffs' original FOIA request, Defendant provided a "final response" by e-mail. (A true and correct copy of this response is annexed hereto as Exhibit D.)

31. In the final response, Defendant confirmed its refusal to search for documents in categories (a) and (c). Defendant offered two reasons for the categorical withholding and failure to conduct a search: First, that the "draft text of the TPP, circulated among TPP negotiating parties is classified per Executive Order 13,526 and thus exempt from disclosure under Exemption 1 of the FOIA," and, second, that "USTR internal proposals and deliberations related to the United States TPP negotiating positions would be withheld in full pursuant to the deliberative process privilege under FOIA Exemption 5." *Id.* With respect to records responsive to item (b) of the request, Defendant stated that it had conducted a review and located 298 responsive e-mails/attachments reflecting communications between the USTR and ITAC members listed in our request. Of these, the USTR released seventy-seven e-mails/attachments. Third-party e-mail addresses and phone numbers were redacted from these seventy-seven documents pursuant to FOIA Exemption 6. Two of these seventy-seven documents also included redactions of business confidential information pursuant to Exemption 4. The USTR

denied release of the other 221 e-mails/attachments in full, asserting that they all constituted deliberative process privileged material exempt from disclosure pursuant to Exemption 5, and that thirteen of these records were also business confidential under Exemption 4. The letter stated that it constituted a “complete response” to plaintiffs’ request, subject only to administrative appeal.

32. At no time has the Defendant addressed plaintiffs’ request for expedited processing and a public interest fee waiver.

IP-Watch’s Administrative Appeal

33. By an e-mail and letter dated August 19, 2013, plaintiffs filed an administrative appeal with Jacqueline Caldwell, a FOIA officer at the USTR. (A true and correct copy of this request is annexed hereto as Exhibit E.) In that letter, plaintiffs appealed: (1) Defendant’s withholdings and redactions; (2) Defendant’s refusal to search for documents responsive to request items (a) and (c); and (3) Defendant’s failure to address plaintiffs’ request for expedited processing and public interest fee waiver.

34. On September 30, 2013, well after the twenty-day statutory deadline for determinations on appeal had passed, a USTR representative notified Plaintiff New by telephone that processing of the appeal would cease in the event of a government shutdown, and gave no concrete indication of when plaintiffs might expect a determination from USTR after government operations resumed.

35. Plaintiffs have yet to receive a determination with respect to their administrative appeal. Plaintiffs have therefore constructively exhausted their administrative remedies.

FIRST CAUSE OF ACTION
(Failure to expedite plaintiffs' request)

36. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

37. Defendant's failure to expedite the processing of plaintiffs' request and appeal violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendant's corresponding regulations.

SECOND CAUSE OF ACTION
(Failure to make reasonable search for records)

38. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

39. Defendant's failure to make a reasonable search for records requested by plaintiffs violates FOIA, 5 U.S.C. § 552(a)(3), and Defendant's corresponding regulations.

THIRD CAUSE OF ACTION
(Failure to make records promptly available)

40. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

41. Defendant's failure to make promptly available and to release all of the documents requested by plaintiffs violates FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendant's corresponding regulations.

FOURTH CAUSE OF ACTION
(Wrongful withholding or redaction of records)

42. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

43. Defendant's wrongful withholding of records, or portions thereof, requested by plaintiffs violates FOIA, 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(A), and Defendant's corresponding regulations.

FIFTH CAUSE OF ACTION
(Failure to grant waiver of fees)

44. Plaintiffs repeat, reallege, and incorporate the allegations in the foregoing paragraphs as though fully set forth herein.

45. Defendant's failure to grant a waiver or fees violates FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendant's corresponding regulations.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully pray that this Court:

- a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- b. Order Defendant to conduct a thorough search for all responsive records;
- c. Declare that records related to the TPP that are responsive to plaintiffs FOIA request must be disclosed by the Defendant in their entirety;
- d. Enjoin Defendant immediately and expeditiously to provide to plaintiffs copies of the requested documents;
- e. Award plaintiffs the costs of this proceeding, including reasonable attorneys' fees and costs; and
- f. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

MEDIA FREEDOM AND INFORMATION
ACCESS CLINIC, YALE LAW SCHOOL

By: 

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Dated: December 18, 2013
New Haven, CT

Exhibit A



Intellectual Property Watch

23 March 2012

BY CERTIFIED MAIL AND FACSIMILE—

FOIA Officer Jacqueline B. Caldwell
Office of the United States Trade Representative
1724 F Street, N.W., Room 514
Washington, D.C. 20508
Fax: (202) 395-9458

RE: Freedom of Information Act Request

Dear Ms. Caldwell,

This letter constitutes an expedited request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records, correspondence, and agreements consisting of or concerning U.S. negotiating positions, U.S. draft proposals, and any joint drafts of the Trans-Pacific Partnership agreement (TPP), or any portions thereof, and the March 4, 2010 Memorandum of Understanding on the TPP. I, William New of Intellectual Property Watch, submit this request to the Office of the United States Trade Representative (USTR).

I request the following agency records,¹ from January 1, 2009 to the present:

1. Records and correspondence consisting of, describing or concerning the U.S. negotiating position, and any U.S. proposals for TPP or any of its provisions, and any U.S.-created draft text of TPP or any of its provisions, including but not limited to proposals offered by USTR to other countries at any of the negotiation rounds or informal side meetings;
2. Records, correspondence, and minutes consisting of, describing, or concerning all communications between USTR or USTR employees and any member of the Industry Trade Advisory Committee (ITAC) on Intellectual Property Rights (ITAC 15), the Industry Trade Advisory Committee On Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3), and the Industry Trade Advisory Committee On Services and Finance Industries (ITAC 10). The requested records, correspondence, and minutes include, but are not limited to, any proposals, policy suggestions, requests, or comments on the U.S. negotiating position, or on proposed or joint drafts of the TPP or any portion thereof, with any of the following individuals (but this request is not limited to communications with the following individuals):

¹ “Records” include but are not limited to: electronic records, letters, correspondence, tape recordings, notes, data, memoranda, reports, email, computer source and object code, technical manuals, technical specifications, or any other materials.

- Mr. Richard H. Kjeldgaard
- Mr. Timothy P. Trainer
- Stevan D. Mitchell, Esq.
- J. Anthony Imler, Ph.D.
- Perla M. Kuhn, Esq.
- Jeffrey P. Kushan, Esq.
- Brian S. Roman, Esq.
- Mr. Thomas J. Thomson
- Neil I. Turkewitz, Esq.
- Mark Chandler, Esq.
- Sarah B. Deutsch, Esq.
- Mr. Scott M. Frank
- Mr. John Frisbie
- Tanuja Garde, Esq.
- A. Bob Ghosh, Esq.
- Mr. Luis H. Arguello, Jr.
- Robert E. Branand, Esq.
- Shawn M. Brown, Esq.
- Mr. P. Claude Burcky
- Mr. V. M. (Jim) DeLisi
- Mr. Donald E. Ellison
- Mr. Zoran I. Franicevich
- Geoffrey Gamble, Esq.
- Mr. Edward L. Gibbs
- Mr. Vijay Goradia
- Trevor J. Gunn, Ph.D.
- Jonathan Herzog, Esq.
- Mr. Maurice J. Kerins
- Mr. Ralph F. Ives
- Mr. Craig S. Kramer
- Mr. Adrian Krygsman
- Mr. A. E. (Ted) May, III
- Matthew T. McGrath, Esq.
- Douglas T. Nelson, Esq.
- Tracey J. Norberg, Esq.
- Ms. Lisa A. Phillip
- George L. Rolofson, Ph.D.
- Mr. Richard I. Sedlak
- Mr. Albert C. (Cal) Sutphin
- Jay T. Taylor, Esq.
- Mr. Thomas G. Zieser
- Harry L. Vroomen, Ph.D.
- Jacquelynn Ruff, Esq.
- Mr. Greg S. Slater
- Mr. John F. Neuffer
- Mr. Arun K. Bhumitra
- Mr. Edward A. Bond

- Daniel W. Caprio, Jr.
 - Mr. C. Gregory Farmer
 - Mr. Jeffrey M. Ferry
 - Mark E. Foster, Esq.
 - Mr. Jake E. Jennings
 - Mr. Joseph P. Lui
 - Mr. Todd R. Loewenstein
 - Ms. Wendy E. Owens
 - Mr. Kenneth Rogers
 - Ms. Jennifer H. Sanford
 - Mr. Michael J. Smith
 - Ms. Elizabeth R. Benson
 - Mr. Brian C. Toohey
 - Mr. Gregory M. Frazier
 - Mr. William A. Jordan
 - Mr. Leonard N. Karp
 - Jean M. Prewitt, Esq.
 - Joseph L. Ternullo, Esq.
3. Any joint texts of the TPP or any of its provisions that have been circulated to negotiating parties during and/or after each negotiation round or informal side meeting, including, but not limited to, texts circulated during and/or after the following meetings:
- Round 1 – Melbourne, Australia, March 15-19, 2010
 - Round 2 – San Francisco, California, June 14-18, 2010
 - Round 3 – Brunei, October 4-9, 2010
 - Round 4 – Auckland, New Zealand, December 6-10, 2010
 - Round 5 – Santiago, Chile, February 14-18, 2011,
 - Round 6 – Singapore, March 24-April 1, 2011
 - Round 7 – Ho Chi Minh City, Vietnam, June 15-24, 2011
 - Round 8 – Chicago, Illinois, September 6-15, 2011
 - Round 9 – Lima, Peru, October 22-29, 2011
 - Round 10– Kuala Lumpur, Malaysia, December 5-9, 2011
 - Round 11 - Melbourne, Australia, March 2-9, 2012
 - Intersessional meeting on IPR in Santiago, Chile, April 9-13, 2012²
4. Records and correspondence indicating the 2012 schedule of official negotiation rounds (including locations) and the schedule for any informal side meetings (including locations);
5. The full text of, and any records or correspondence referencing, the Memorandum of Understanding dated March 4, 2010 that commits countries not to declassify documents related to negotiations for four years from entry into force of the TPP agreement, and any subsequent documents concerning amendments to this

² See <http://www.ustr.gov/tpp>.

agreement or subsequent related Memoranda of Understanding (MOUs) concerning or establishing classification requirements for negotiating countries.³

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is made by “a person primarily engaged in disseminating information.” 6 CFR § 5.5(d)(1)(ii); 5 U.S.C. § 552(a)(6)(E)(v). In determining whether there is “urgency to inform,” and thus a “compelling need” for expedited processing, the D.C. Circuit Court of Appeals has held that three factors must be considered: “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001).

This request clearly concerns a matter of current exigency to the American public. The rapidly advancing negotiations over TPP have created an urgent need to inform the public about USTR’s activities. TPP is quickly approaching its final form with little to no input from the public. There have already been eleven rounds of negotiations.⁴ Six rounds of negotiation took place in 2011 alone. In February 2012, U.S. Trade Representative Ron Kirk told the House Ways and Means Committee that the administration will ask lawmakers to renew fast-track authority for trade agreements, and explained that he aims to complete TPP by the end of 2012.⁵ The USTR website on TPP similarly explains that “President Obama along with the other eight TPP leaders agreed to seek to finalize an agreement in the coming year.”⁶

TPP’s quick progress proves that the consequences of delaying a response would compromise the significant recognized interest in enhancing public debate on potential legislative action. The prompt release of additional information is necessary for the public to weigh in on the substance of the agreement before it is completed. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F.Supp.2d 246, 260 (D.D.C. 2005) (granting expedited processing because “[p]laintiff’s FOIA requests could have a vital impact on development of the substantive record in favor of re-authorizing or making permanent the special provisions of the Voting Rights Act”); *ACLU v. Dep’t of Justice*, 321 F.Supp.2d 24, 30 (D.D.C. 2004) (granting expedited processing because plaintiffs’ FOIA request aimed to provide information for “the ongoing national debate about whether Congress should renew Section 215 and other Patriot Act surveillance provisions before they expire in December 2005.”). Without timely access to the information requested here, the public will be unable to give full consideration to the significant issues surrounding TPP and will be deprived of their right to civic engagement. Finally, this request concerns federal government activity as it seeks vital information about the TPP process and the U.S. government’s negotiating positions on, and proposals for, the agreement itself.

³ See <http://www.citizen.org/documents/us-transparency-letter-2011.pdf>.

⁴ See <http://www.ustr.gov/tpp> (noting that round ten of negotiations took place December 5-9, 2011 in Kuala Lumpur, Malaysia).

⁵ See Vicki Needham, *Kirk: White House will ask Congress for fast-track authority this year*, The Hill, Feb. 29 2012, <http://thehill.com/blogs/on-the-money/1005-trade/213349-kirk-white-house-will-send-fast-track-authority-bill-to-congress-this-year>.

⁶ <http://www.ustr.gov/tpp>.

I qualify as a party “primarily engaged in disseminating information.” I am a professional journalist with a history of more than 15 years of writing about and editing on these issues. I also work as the Director/Editor-in-Chief for Intellectual Property Watch, a publication well known for its coverage of international intellectual property law and policy. I was previously a writer and editor in good standing for Inside U.S. Trade and National Journal, and am an accredited journalist at the World Trade Organization and the United Nations in Geneva, and a member of the Association of Correspondents Accredited to the United Nations (ACANU) in Geneva. Intellectual Property Watch is a reputable, independent news publication, with tens of thousands of readers worldwide, including key policymakers and stakeholders in Washington and elsewhere in the United States. Our website is <http://www.ip-watch.org/>. Intellectual Property Watch is well situated to analyze, interpret, and communicate this information to readers who have demonstrated particularized interest in this subject matter. For more information, see <http://www.ip-watch.org/about/>.

Request for a Public Interest Fee Waiver

Intellectual Property Watch is entitled to a waiver of duplication fees because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(a)(iii) and 6 C.F.R. § 5.11(k). To determine whether a request meets this standard, DHS components determine whether “[d]isclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government,” and whether such disclosure “is not primarily in the commercial interest of the requester.” 6 C.F.R. §§ 5.11(k)(i), (ii). This request clearly satisfies these criteria.

First, USTR’s workings concern “the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2)(i) (internal quotation marks omitted). Second, disclosure of the requested information “is likely to contribute to an understanding of government operations or activities.” 6 C.F.R. § 5.11(k)(2)(ii) (internal quotation marks omitted). Third, the requested material will “contribute to public understanding” of the Trans-Pacific Partnership Agreement. 6 C.F.R. § 5.11(k)(2)(iii) (internal quotation marks omitted). As IP Watch will publish articles based on the information and circulate the records to interested parties, this information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

Fourth, the disclosure will “contribute significantly” to the public’s knowledge and understanding of the Trans-Pacific Partnership Agreement. 6 C.F.R. § 5.11(k)(2)(iv) (internal quotation marks omitted). Disclosure of the requested information will help inform the public about the contours of the substance of the Trans-Pacific Partnership Agreement, as well as contribute to the public debate.

Finally, a fee waiver is appropriate here because IP Watch has no commercial interest in the disclosure of the requested records. 6 C.F.R. § 5.11(k)(3). IP Watch is a non-profit organization, publishes all of its content under a Creative Commons license, and plans to make these documents openly and publicly available, with no expectation to gain financial benefit.

IP Watch is entitled to, at the least, a complete waiver of search fees. 6 C.F.R. § 5.11(d)(1).

If this request is denied in whole or in part, please justify all deletions by reference to the specific exemptions of the Act, pursuant to 32 C.F.R. § 701.8(o)(3). In addition, please release all segregable portions of otherwise exempt material in accordance with 32 C.F.R. 701.8(l) and 32 C.F.R. § 701.57.

In particular, the national security exemption should not be applied to any documents created by USTR itself or by other U.S. parties, or to any joint draft texts of the TPP, as these do not constitute properly classified material under Executive Order 13526.⁷ Documents, proposals, and drafts created by USTR, and joint drafts of the TPP text that form the basis of the agreement USTR will eventually ask the President to sign, do not constitute “foreign government information” or “foreign relations or foreign activities of the United States, including confidential sources” by any stretch of the imagination.⁸ Rather, these records concern the U.S. position on trade policy, a matter of strong public interest where domestic democratic participation should be encouraged and national security is not at risk. As a court recently found, “since the United States would be revealing its own position only, not that of any other country,” the USTR negotiating position should not be subject to the national security exemption.⁹

The lack of national security risk or risk to sensitive diplomatic relations or confidential sources is further evidenced by the fact that other countries or regions, such as New Zealand and the European Union, vocally desired to release draft negotiating texts to their own domestic constituents during negotiations of the Anti-Counterfeiting Trade Agreement (ACTA).¹⁰ Likewise, during negotiations of past regional and multilateral agreements, negotiating positions and draft joint texts were made available to the public before agreement texts were finalized.¹¹ Similarly, there was a large public record leading up to the 2000 World Intellectual Property Organization Patent Law Treaty.¹² Thus, countries do not traditionally perceive a national security risk in releasing to the public information about trade agreement negotiations.

It is doubtful that USTR will be able to meet the condition of showing that disclosure of its negotiating position to the American public, or of any joint draft texts of the TPP agreement, “reasonably could be expected to result in damage to the national security, which includes

⁷ Executive Order 13526, <http://edocket.access.gpo.gov/2010/pdf/E9-31418.pdf>.

⁸ See Executive Order 13526 at 1.4(b) and 1.4(d).

⁹ *Center for International Environmental Law v. Office of USTR*, 2012 WL 640882 (D.D.C. Feb 29, 2012).

¹⁰ See <http://www.beehive.govt.nz/release/groser-welcomes-release-acta-negotiating-text> (New Zealand Trade Minister Tim Groser welcomed a decision to publicly release the negotiating text of the Anti-Counterfeiting Trade Agreement, stating: “New Zealand has supported public release of the negotiating text, in response to strong public interest, and I am pleased that we have now reached agreement with the other participants in this negotiation. This will make the ACTA negotiations more accessible to the public and I hope that it will help the process of reaching a final agreement.”)(April 18, 2010). See also *Anti-Counterfeiting Trade Agreement: European Commission welcomes release of negotiating documents*, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=552> (“I am very glad that the EU convinced its partners to release the negotiation text”, said EU Trade Commissioner Karel De Gucht.).

¹¹ See, e.g., <http://www.ip-watch.org/2010/04/21/official-acta-text-released/>; the Free Trade Area of the Americas http://www.ftaa-alca.org/ftaadraft03/index_e.asp, the Hague Convention on Choice of Court Agreements http://www.hcch.net/index_en.php?act=conventions.text&cid=98, the so-called Paragraph 6 solution of the WTO Doha Declaration on TRIPS and Public Health <http://www.cptech.org/ip/health/cl/art30-exp.html>, and the United Nations Convention on the Use of Electronic Communications in International Contracts <http://www.gpo.gov/fdsys/pkg/FR-2004-08-31/pdf/04-19864.pdf>.

¹² See http://www.wipo.int/meetings/en/details.jsp?meeting_id=4057.

defense against transnational terrorism.”¹³ Agencies must submit affidavits supporting such classification describing “with reasonable specificity” justification for nondisclosure, and showing that the information “logically falls within the claimed exemption.” See *Lesar v. United States Dep’t of Justice*, 636 F.3d 472, 481 (D.C. Cir. 1980).

Courts will defer to agency affidavits implicating national security, but will find that records do not fall within the national security exemption when agencies fail to make the required showing that information “logically falls” within Exemption 1.¹⁴ With respect to the national security exemption, it is important for USTR to remember that “deference is not equivalent to acquiescence.” See *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). An agency declaration of the national security exemption may be found insufficient for bad faith. *Id.* And the D.C. Circuit recently found that USTR’s claim of the national security exemption for negotiating documents was inadequately supported by USTR’s affidavit.¹⁵

I ask to receive all documents responsive to my request in electronic format, whenever possible. If some or all of the responsive documents are available in digital form by e-mail, please send them to me at wnew@ip-watch.ch.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me at the above email address. Pursuant to the applicable FOIA provision and Department regulations, I expect a response regarding my request for expedited processing within the ten (10) day statutory time limit, 6 CFR § 5.5(d)(4).

Sincerely,



William E. New
Editor in Chief of Intellectual Property Watch
6 Beverly Road
Bronxville, New York 10708
wnew@ip-watch.ch

¹³ Executive Order 13526 at 1.1(4).

¹⁴ See *American Civil Liberties Union v. Office of the Director of Nat. Intelligence*, 2011 WL 5563520 at 5 (S.D.N.Y. 2011). See also *El Badrawi v. Dep’t of Homeland Security*, 583 F.Supp.2d 285, 313 (D.Conn. 2008) (finding that the agency’s affidavit “does not provide sufficiently detailed and specific information as to why the information would hinder the ability to obtain such information in the future or why such secrecy is allowed by the terms of the executive order.”); *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999) (finding inadequate “vague and conclusory affidavits that we must say read much like bureaucratic double-talk.”).

¹⁵ *Center for International Environmental Law v. Office of USTR*, 2012 WL 640882 (D.D.C. Feb 29, 2012).

Exhibit B



Intellectual Property Watch

11 April 2012

BY CERTIFIED MAIL AND FACSIMILE—

FOIA Officer Jacqueline B. Caldwell
Office of the United States Trade Representative
1724 F Street, N.W., Room 514
Washington, D.C. 20508
Fax: (202) 395-9458

RE: Freedom of Information Act Request, dated March 23, 2012.

Dear Ms. Caldwell,

I am writing with respect to my request under the Freedom of Information Act, 5 U.S.C. §552, dated March 23, 2012 for certain records relating to the Trans-Pacific Partnership Agreement (TPP) (attached hereto), and the telephone conversation with Mr. Stan McCoy and Mr. Jonathan R. Weinberger, among others, of the Office of the United States Trade Representative (USTR) on April 5, 2012 in which you asked me to consider narrowing the scope of my request—in particular, paragraphs 1, 2, and 3.

I am prepared to clarify the scope of my request with respect to paragraphs 1 and 2 of the March 23, 2012 request. I am not prepared to amend my request in paragraph 3, which stands as outlined in the original March 23, 2012 request.

Except for the below amendments to paragraphs 1 and 2, my request of March 23, 2012 stands as filed and attached. As discussed in the telephone conversation with USTR officials on April 5, 2012, the filing date of my FOIA request, including the below amendments, will remain March 23, 2012.

Amendments to my March 23, 2012 FOIA request.

With respect to paragraph 1 of my March 23, 2012 FOIA request, I seek the following records from January 1, 2009 to the present, in the place of the records requested in paragraph 1 of my request dated March 23, 2012:

1. Records and correspondence consisting of, describing or concerning the U.S. negotiating position on, U.S. proposals for, and any U.S.-created draft text of any TPP chapters or sections concerning the following topics, including but not limited to proposals offered by USTR to other countries at any of the negotiation rounds or informal side meetings:
 - o IP rights (including but not limited to copyright, patent, trademark, geographical indications (GIs), domain names, design)
 - o E-commerce
 - o Transparency (including but not limited to “Transparency and Procedural Fairness for Healthcare Technologies,” ie the pharmaceutical pricing annex)
 - o Enforcement, including international cooperation

- o Pharmaceuticals
- o Medical devices
- o Telecommunications
- o Border measures
- o The establishment of any international “committees” for policing TPP standards.

In addition to the above topics and/or sections, I request any records consisting of, describing or concerning the U.S. negotiating position on, U.S. proposals for, and U.S.-created drafts of provisions of any part of TPP that might implicate IP Watch’s coverage of: access to knowledge, biodiversity, genetic resources, biotechnology, public health, education, research & development, innovation, IP enforcement, environmental impact, finance, human rights, information and communications technology/broadcasting, technological cooperation/technological transfer, and traditional and indigenous knowledge.

With respect to paragraph 2 of my request dated March 23, 2012, I seek the following records from January 1, 2009 to the present, in the place of the records requested in paragraph 2 of my request dated March 23, 2012:

2. Records, correspondence, and minutes consisting of, describing, or concerning all communications between USTR or USTR employees and any member of the Industry Trade Advisory Committee (ITAC) on Intellectual Property Rights (ITAC 15), the Industry Trade Advisory Committee On Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3), and the Industry Trade Advisory Committee On Services and Finance Industries (ITAC 10). The requested records, correspondence, and minutes include, but are not limited to, any proposals, policy suggestions, requests, or comments on the U.S. negotiating position, or on proposed or joint drafts of the TPP or any portion thereof, with any of the following individuals (this request is not limited to communications with the following individuals, but is limited to communications with ITAC 15, ITAC 3, and ITAC 10, and any past or present member thereof):

- Mr. Richard H. Kjeldgaard
- Mr. Timothy P. Trainer
- Stevan D. Mitchell, Esq.
- J. Anthony Imler, Ph.D.
- Perla M. Kuhn, Esq.
- Jeffrey P. Kushan, Esq.
- Brian S. Roman, Esq.
- Mr. Thomas J. Thomson
- Neil I. Turkewitz, Esq.
- Mark Chandler, Esq.
- Sarah B. Deutsch, Esq.
- Mr. Scott M. Frank
- Mr. John Frisbie
- Tanuja Garde, Esq.
- A. Bob Ghosh, Esq.
- Mr. Luis H. Arguello, Jr.
- Robert E. Branand, Esq.
- Shawn M. Brown, Esq.
- Mr. P. Claude Burcky
- Mr. V. M. (Jim) DeLisi

- Mr. Donald E. Ellison
- Mr. Zoran I. Franicevich
- Geoffrey Gamble, Esq.
- Mr. Edward L. Gibbs
- Mr. Vijay Goradia
- Trevor J. Gunn, Ph.D.
- Jonathan Herzog, Esq.
- Mr. Maurice J. Kerins
- Mr. Ralph F. Ives
- Mr. Craig S. Kramer
- Mr. Adrian Krygsman
- Mr. A. E. (Ted) May, III
- Matthew T. McGrath, Esq.
- Douglas T. Nelson, Esq.
- Tracey J. Norberg, Esq.
- Ms. Lisa A. Phillip
- George L. Rolofson, Ph.D.
- Mr. Richard I. Sedlak
- Mr. Albert C. (Cal) Sutphin
- Jay T. Taylor, Esq.
- Mr. Thomas G. Zieser
- Harry L. Vroomen, Ph.D.
- Jacquelynn Ruff, Esq.
- Mr. Greg S. Slater
- Mr. John F. Neuffer
- Mr. Arun K. Bhumitra
- Mr. Edward A. Bond
- Daniel W. Caprio, Jr.
- Mr. C. Gregory Farmer
- Mr. Jeffrey M. Ferry
- Mark E. Foster, Esq.
- Mr. Jake E. Jennings
- Mr. Joseph P. Lui
- Mr. Todd R. Loewenstein
- Ms. Wendy E. Owens
- Mr. Kenneth Rogers
- Ms. Jennifer H. Sanford
- Mr. Michael J. Smith
- Ms. Elizabeth R. Benson
- Mr. Brian C. Toohey
- Mr. Gregory M. Frazier
- Mr. William A. Jordan
- Mr. Leonard N. Karp
- Jean M. Prewitt, Esq.
- Joseph L. Ternullo, Esq.

All other requests made in the March 23, 2012 request stand as is, including but not limited to my request for expedited processing and request for a public interest fee waiver.

Sincerely,

A handwritten signature in cursive script, appearing to read "willece".

William E. New
Editor in Chief of Intellectual Property Watch
6 Beverly Road
Bronxville, New York 10708
wnew@ip-watch.ch

Exhibit C

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

March 19, 2013

VIA EMAIL

Mr. William E. New
Editor in Chief of Intellectual Property Watch
6 Beverly Road
Bronxville, New York 10708
wnew@ip-watch.ch

Dear Mr. New:

This letter is USTR's initial response to your Freedom of Information Act (FOIA) request of March 23, 2012, and a slightly modified version of the request you submitted on April 11, 2012 after speaking with the USTR FOIA Office on April 5, 2012. USTR received your FOIA appeal via fax on January 11, 2013, seeking a response to your initial FOIA request. You sought copies of the following records:

- (1) Records and correspondence consisting of, describing or concerning the U.S. negotiating position with respect to the Trans-Pacific Partnership ("TPP"), and any U.S. proposals or draft texts of the TPP;
- (2) Records, correspondence, and minutes consisting of, describing or concerning all communications between USTR and any member of the Industry Trade Advisory Committee (ITAC) on Intellectual Property Rights, the ITAC on Chemicals, Pharmaceuticals, Health Science Products and Services, and the ITAC on Services and Finance Industries related to the TPP;
- (3) Joint texts of the TPP or any of its provisions that have been circulated to negotiating parties;
- (4) Records and correspondence indicating the 2012 schedule of official negotiation rounds of the TPP (including locations) and the schedule for and locations of side meetings; and
- (5) The full text of, and records or correspondence referencing, the Memorandum of Understanding dated March 4, 2010, as well as any subsequent amendments or Memoranda of Understanding.

We had a telephone conference on January 23, 2013, and we reviewed the portions of your FOIA request that sought categories of documents that, by their very nature, would be exempt from disclosure under the FOIA. Specifically, we noted that records in categories (1) and (3) above would not be releasable because draft text of the TPP, circulated among TPP negotiating parties is classified confidential per Executive Order 13526 and thus exempt from disclosure under Exemption 1 of the FOIA. Further, USTR internal discussions of the United States negotiating positions with respect to the TPP would also be withheld pursuant to the deliberative process privilege under FOIA Exemption 5. We also described the burdensome search USTR would need to undertake to locate and account for the records likely to be responsive to categories (1) and (3) though ultimately the agency would withhold these records in full.

Mr. William New

Page 2

We also discussed the portions of your request, specifically categories (4) and (5), that sought records likely to be releasable and USTR agreed to focus its initial efforts on collecting these records. In doing so, we also offered to assemble a comprehensive set of TPP-related documents and material from the www.ustr.gov website, complete with embedded web links on the documents for your convenience.

Finally, we explained that category (2) appeared to encompass a set of discrete communications between USTR and the members of select Industry Trade Advisory Committees (ITACs) that USTR could search for and review for responsiveness and releasability, though we cautioned that this review process would take a few months to complete. We also noted that most, if not all, of these communications would qualify for protection under the (b)(5) deliberative process privilege as deliberations between the agency and a third party advisor and many of these records could also contain third party commercial and/or financial information which is also protected from disclosure under exemption (b)(4) of the FOIA. We agreed, however, to perform a close review of these communications to evaluate whether USTR would be in a position to waive the applicability of exemption (b)(5) to any of these documents to make discretionary releases of certain records. Note that USTR cannot discretionarily release information protected under exemption (b)(4) as the application of that exemption belongs to the third party whose information is at issue.

Accordingly, today we are releasing two hundred and seventy-seven (277) pages of TPP-related documents, a majority of which are from the USTR website, that include information responsive to categories (4) and (5) of your request. In particular, documents responsive to category (5) are located at pgs. 255-257 and documents responsive to category (4) are located throughout the production with groups of records beginning on pgs. 87 and 226. With regard to the category (2) ITAC communications, USTR has completed an initial search for documents from the ITAC members you listed in your request and we are in the process of reviewing those records for both responsiveness and releasability. We will continue this review process and contact you again as soon as we have additional progress to report.

Sincerely,



Melissa Keppel

Associate General Counsel

Case File # 1232317

Exhibit D

EXECUTIVE OFFICE OF THE PRESIDENT
THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

June 21, 2013

VIA EMAIL

Mr. William E. New
Editor in Chief of Intellectual Property Watch
6 Beverly Road
Bronxville, New York 10708
wnew@ip-watch.ch

Dear Mr. New:

This letter is USTR's final response to your Freedom of Information Act (FOIA) request of March 23, 2012, and a slightly modified version of the request you submitted on April 11, 2012 after speaking with the USTR FOIA Office on April 5, 2012. USTR received your FOIA appeal via fax on January 11, 2013, seeking a response to your initial FOIA request. You sought copies of the following records:

- (1) Records and correspondence consisting of, describing or concerning the U.S. negotiating position with respect to the Trans-Pacific Partnership ("TPP"), and any U.S. proposals or draft texts of the TPP;
- (2) Records, correspondence, and minutes consisting of, describing or concerning all communications between USTR and any member of the Industry Trade Advisory Committee (ITAC) on Intellectual Property Rights, the ITAC on Chemicals, Pharmaceuticals, Health Science Products and Services, and the ITAC on Services and Finance Industries related to the TPP;
- (3) Joint texts of the TPP or any of its provisions that have been circulated to negotiating parties;
- (4) Records and correspondence indicating the 2012 schedule of official negotiation rounds of the TPP (including locations) and the schedule for and locations of side meetings; and
- (5) The full text of, and records or correspondence referencing, the Memorandum of Understanding dated March 4, 2010, as well as any subsequent amendments or Memoranda of Understanding.

As I noted in my March 19, 2013, letter to you, we did not conduct searches for records in categories (1) and (3) above because draft text of the TPP, circulated among TPP negotiating parties is classified confidential per Executive Order 13526 and thus exempt from disclosure under Exemption 1 of the FOIA. Similarly, USTR internal proposals and deliberations related to the United States TPP negotiating positions would be withheld in full pursuant to the deliberative process privilege under FOIA Exemption 5. Instead, we focused our initial search efforts on categories (4) and (5) and released 277 pages of records in full to you with my March letter.

Additionally, we agreed to search for communications between USTR and the members the ITACs you identified above and to segregate any releasable communications from those that qualify for protection under FOIA exemption (b)(5) as deliberative communications and/or exemption (b)(4) which shields third party commercial and/or financial information from

Mr. William New

Page 2

disclosure. Accordingly, we conducted a detailed review of email messages and attachments and located two hundred ninety-eight (298) responsive emails/ attachments. Of these, we are releasing in part seventy-seven (77) emails/attachments amounting to one hundred and twenty-seven (127) pages of electronic correspondence. We have redacted small portions of these emails to protect third party email addresses and phone numbers pursuant to FOIA exemption 5 U.S.C. 552(b)(6) which exempts from disclosure information where release would constitute an unwarranted invasion of personal privacy. In addition, two pages contain redactions pursuant to 5 U.S.C. 552(b)(4) to exclude business confidential information. We are withholding the remaining two hundred twenty-one (221) emails/attachments in full as deliberative process under 5 U.S.C. 552(b)(5) with thirteen (13) of these emails also withheld under 5 U.S.C. 552(b)(4) as business confidential.

This constitutes a complete response to your request. Under 15 C.F.R §2004.6(d), if you are not satisfied with this response, then within sixty (60) days you may appeal it in writing to:

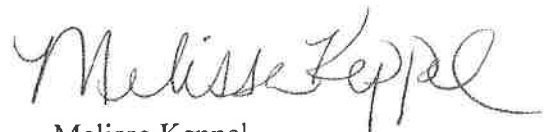
USTR FOIA Appeals Committee
GSD/RDF; Jacqueline Caldwell
Anacostia Naval Annex
Bldg. 410/Door 123
250 Murray Lane, S.W.
Washington, DC 20509

Phone number: 202-395-3419

Both the letter and the envelope should be clearly marked: "Freedom of Information Act Appeal" and should include a reference to the FOIA case number listed below. Heightened security in force may delay mail delivery; therefore we suggest that you also email any such appeal to FOIA@USTR.EOP.GOV. In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, where we searched for the records you requested.

Should you have any questions, please feel free to contact the FOIA office at (202) 395-3419.

Sincerely,



Melissa Keppel
Associate General Counsel

Case File # 1232317

Exhibit E



Intellectual Property Watch

August 19, 2013

VIA E-MAIL AND FEDERAL EXPRESS

USTR FOIA Appeals Committee
GSD/RDF; Jacqueline Caldwell
Anacostia Naval Annex
Bldg. 410 / Door 123
250 Murray Lane, S.W.
Washington, D.C. 20509
Email: FOIA@USTR.EOP.GOV

RE: Freedom of Information Act Appeal
Case File # 1232317

Dear Ms. Caldwell:

I write to appeal the final decision of the Office of the United States Trade Representative (“USTR”) dated June 21, 2013, denying the Freedom of Information Act (“FOIA”) request that I submitted on March 23, 2012, seeking information regarding certain aspects of U.S. negotiations over the proposed Trans-Pacific Partnership Agreement (“TPP”).

I. Background/Procedural History

A. The FOIA request and narrowing amendment

By letter dated March 23, 2012, (attached hereto as Exhibit A) I requested five categories of records from USTR regarding the TPP. I sought expedited treatment of these requests pursuant to 5 U.S.C. § 552(a)(6)(E)(v), because the documents sought relate to ongoing treaty negotiations about which there was and remains an urgency to inform the public. For similar reasons, I also requested a public interest fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

By email dated March 27, 2012, your office responded by asking to set up a phone call to discuss the FOIA request. During this telephone conversation, which occurred on April 5, 2012, representatives from your office, including Mr. Stan McCoy and Mr. Jonathan R. Weinberger, among others, asked me to consider narrowing the scope of my request — in particular, the scope of items 1, 2, and 3 of the request. In a letter dated April 11, 2012 (attached hereto as Exhibit B), I clarified the scope of my request with respect to items 1 and 2, but left the rest of the request unchanged.

As narrowed, then, I have requested the following categories of records, from January 1, 2009, to the present:

1. Records and correspondence consisting of, describing or concerning the U.S. negotiating position on, U.S. proposals for, and any U.S.-created draft text of any TPP chapters or sections concerning the following topics, including but not limited to proposals offered by USTR to other countries at any of the negotiation rounds or informal side meetings:
 - o IP rights (including but not limited to copyright, patent, trademark, geographical indications (GIs), domain names, design)
 - o E-commerce
 - o Transparency (including but not limited to “Transparency and Procedural Fairness for Healthcare Technologies,” ie the pharmaceutical pricing annex)
 - o Enforcement, including international cooperation
 - o Pharmaceuticals
 - o Medical devices
 - o Telecommunications
 - o Border measures
 - o The establishment of any international “committees” for policing TPP standards.

In addition to the above topics and/or sections, I request any records consisting of, describing or concerning the U.S. negotiating position on, U.S. proposals for, and U.S.-created drafts of provisions of any part of TPP that might implicate IP Watch’s coverage of: access to knowledge, biodiversity, genetic resources, biotechnology, public health, education, research & development, innovation, IP enforcement, environmental impact, finance, human rights, information and communications technology/broadcasting, technological cooperation/technological transfer, and traditional and indigenous knowledge.

2. Records, correspondence, and minutes consisting of, describing, or concerning all communications between USTR or USTR employees and any member of the Industry Trade Advisory Committee (ITAC) on Intellectual Property Rights (ITAC 15), the Industry Trade Advisory Committee On Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3), and the Industry Trade Advisory Committee On Services and Finance Industries (ITAC 10). The requested records, correspondence, and minutes include, but are not limited to, any proposals, policy suggestions, requests, or comments on the U.S. negotiating position, or on proposed or joint drafts of the TPP or any portion thereof, with any of the following individuals (this request is not limited to communications with the following individuals, but is limited to

communications with ITAC 15, ITAC 3, and ITAC 10, and any past or present member thereof): [list of 65 specific individuals omitted here].

3. Any joint texts of the TPP or any of its provisions that have been circulated to negotiating parties during and/or after each negotiation round or informal side meeting, including, but not limited to, texts circulated during and/or after the following meetings: [list of 12 specific meetings, with locations and dates, omitted].
4. Records and correspondence indicating the 2012 schedule of official negotiation rounds (including locations) and the schedule for any informal side meetings (including locations);
5. The full text of, and any records or correspondence referencing, the Memorandum of Understanding dated March 4, 2010 that commits countries not to declassify documents related to negotiations for four years from entry into force of the TPP agreement, and any subsequent documents concerning amendments to this agreement or subsequent related Memoranda of Understanding (MOUs) concerning or establishing classification requirements for negotiating countries.

B. USTR's Responses

By e-mail dated March 19, 2013, USTR provided an initial response to my FOIA request (a copy is attached as Exhibit C). This response indicated that the categories of records responsive to items (1) and (3) were "by their very nature . . . exempt from disclosure under FOIA," that any search for such records would be burdensome, and that all such records would be withheld in full. With respect to the records responsive to item (2) of the request, USTR indicated that it had completed an initial search for documents from the Industry Trade Advisory Committees ("ITAC") members listed in our request, but had not yet completed the process of reviewing those records for responsiveness and releasability. Finally, USTR released two hundred and seventy-seven (277) pages of TPP-related documents in full, in response to items (4) and (5) of the request. As stated in USTR's letter, a majority of these documents were merely copies of material compiled from the USTR website.

By e-mail dated June 21, 2013, USTR issued its final response to the FOIA request (a copy is attached as Exhibit D). With respect items (1) and (3) of the request, USTR confirmed that it did not conduct searches for potentially responsive records on the grounds that all such material would be withheld anyways. USTR offered two reasons for this blanket withholding and failure to conduct a search: (1) "[D]raft text of the TPP, circulated among TPP negotiating parties is classified per Executive Order 13526 and thus exempt from disclosure under Exemption 1 of the FOIA," and (2) "USTR internal proposals and deliberations related to the

United States TPP negotiating positions would be withheld in full pursuant to the deliberative process privilege under FOIA Exemption 5.”

With respect to records responsive to item (2) of the request, USTR stated that it had conducted a review and located 298 responsive emails/attachments reflecting communications between USTR and ITAC members listed in our request. Of these, USTR released 77 emails/attachments. Third party email addresses and phone numbers were redacted from these 77 documents pursuant to FOIA Exemption 6.¹ Two of these 77 documents also included redactions of “business confidential information” pursuant to FOIA Exemption 4. USTR denied release of the other 221 emails/attachments in full, asserting that they constituted deliberative process exempt from disclosure pursuant to FOIA Exemption 5. Additionally, USTR asserted that 13 of these 221 emails/attachments were also being withheld under Exemption 4 as “business confidential.”

Neither USTR’s interim response of March 19 nor its final response of June 21 addressed my requests for expedited processing and a public interest fee waiver. Nevertheless, the June 21 letter stated that it constituted a complete response to my request, subject only to administrative appeal.

II. Basis for Appeal

A. USTR has failed to provide adequate justifications for its withholdings and redactions pursuant to FOIA Exemptions 1, 4, and 5.

USTR has failed to provide sufficient and meaningful explanations for its refusal to produce all of the responsive information. USTR may properly withhold the information sought only if the information falls within one or more of the nine statutorily recognized exemptions to FOIA, and USTR must inform IP Watch which exemption is being claimed for each withholding. *See* 5 U.S.C. § 552(b); 15 CFR § 2004.6(c)(1)(ii). The courts have long emphasized that generalized claims of exemption, such as those USTR provided here, are entirely insufficient. *See, e.g., Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (agencies withholding information must “specifically identify[] the reasons why a particular exemption is relevant and correlate[e] those claims with the particular part of a withheld document to which they apply”). Moreover, to withhold the information requested by IP Watch, USTR must provide both the factual support and “the reasons behind [its] conclusions,” in sufficient detail “that they may be challenged by FOIA plaintiffs and reviewed by the courts.” *Id.* at 261.

In addition, even if part of an agency record is indisputably exempt from disclosure pursuant to one or more statutory exemptions, FOIA requires the agency to disclose any non-

¹ I do not challenge the redaction of email addresses and phone numbers in this appeal.

exempt portions of that record. *See* 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”); *see also, e.g., Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (“It has long been a rule in this Circuit that nonexempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.”).

In the present case, USTR has utterly failed to provide an adequate explanation for its withholdings and redactions under Exemptions 1, 4 and 5, as discussed in more detail below. Moreover, under the applicable law, it is clear that many of USTR’s withholdings and redactions are simply unjustifiable.

1. *USTR has improperly withheld material responsive to items (1) and (3) of the FOIA Request.*

With regard to the materials responsive to items (1) and (3) of the FOIA request, USTR has invoked Exemptions 1 and 5 in only the most conclusory manner. Invoking Exemption 1, USTR simply asserts, with no explanation, that “draft text of the TPP, circulated among TPP negotiating parties is classified confidential . . . and thus exempt from disclosure under Exemption 1.” *See* Exhibit D. USTR offers no inkling why such material is “in fact properly classified pursuant to . . . Executive order,” 5 U.S.C. § 552(b)(1), or why no portions of any records responsive to items (1) and (3) can be segregated from material that is properly classified. Similarly, USTR’s invocation of Exemption 5 simply states, without any supporting rationale or segregability analysis, that “USTR internal proposals and deliberations related to the United States TPP negotiating positions would be withheld in full pursuant to the deliberative process privilege under FOIA Exemption 5.” *See* Exhibit D. These conclusory assertions are patently inadequate justifications for USTR’s blanket withholdings.

USTR’s explanations for the claimed exemptions are particularly inadequate because, as discussed below, USTR has not even searched for – and therefore has not reviewed – the records it possesses that are responsive to items (1) and (3) of the request. USTR’s blanket invocation of Exemptions 1 and 5 therefore necessarily fail to provide the document-by-document explanation for withholding that is generally required under FOIA. Moreover, because USTR has not even identified the responsive documents, it is likewise impossible that it has conducted the segregability analysis required by law.

Moreover, separate from the inadequacy of USTR’s explanations for invoking Exemption 1 and 5, applicable case law interpreting those exemptions forecloses USTR from withholding some or all of the material responsive to items (1) and (3).

With respect to Exemption 1, the negotiating positions of the United States, shared with foreign governments, are not properly classified. In 2012, a district court specifically rejected the application of Exemption 1 to information shared with other governments in the course of

treaty negotiations, reasoning that the disclosure to the public of U.S. positions that have already been shared with foreign governments could not plausibly harm foreign relations or national security. See *Ctr. for Int'l Env'tl. Law v. Office of U.S. Trade Representative*, 845 F. Supp. 2d 252, 257-58, 260 (D.D.C. 2012).

While this decision has since been reversed on appeal, *Ctr. for Int'l Env'tl. Law v. Office of U.S. Trade Representative*, 718 F.3d 899, 903 (D.C. Cir. 2013), the particular facts and rationales relied upon by the court of appeals to reverse do not apply to the present FOIA request. First, the court of appeals emphasized the fact that the document at issue in that case related to the legal interpretation of a particular term or a clause of a treaty, and that public disclosure of that interpretation could put at risk the U.S.'s position before an international arbitrator. My FOIA request, by contrast, does not ask for private legal interpretations of particular treaty terms, but simply seeks the U.S. proposals and negotiating positions regarding a treaty that has not yet entered into force. Second, the notion that disclosure of U.S. proposals and negotiating positions could harm future U.S. negotiations is particularly implausible in the present case given that particular positions of the U.S. in the TPP have already been disclosed to 12 countries that are parties to the negotiations, during 18 rounds held over a timeframe of more than three years. Moreover, the complete text of the U.S. proposal for the TPP Intellectual Property Rights chapter has already been leaked and published, making it even less plausible that disclosure of the material sought could cause harm to national security. See Knowledge Ecology International, *The complete Feb 10, 2011 text of the US proposal for the TPP IPR chapter* (March 10, 2011), <http://keionline.org/node/1091>. As the District Court for the District of Columbia has observed, “[i]t is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to ‘cause damage to the national security’” so that “if the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent disclosure will cause no *further* damage to the national security.” *Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991). USTR's invocation of Exemption 1 is therefore invalid, at least in the absence of a compelling justification for why disclosure would harm national security even though the existing public record is extensive and detailed.

With respect to Exemption 5, FOIA allows for nondisclosure of matters 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.” The U.S. District Court for the District of Columbia has recognized that information shared with a foreign country does not qualify as inter-agency communications and “necessarily fall[s] beyond the scope of Exemption 5.” See *Ctr. for Int'l Env'tl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 26 (D.D.C. 2002). Accordingly, with respect to U.S. proposals concerning the TPP negotiation that have been shared with foreign countries, USTR cannot provide a valid reason why they would qualify for protection under Exemption 5. Put differently, to the extent my FOIA request seeks draft texts of the TPP and U.S. proposals or documents about U.S. negotiating positions that have been circulated among negotiating parties, they cannot qualify for protection under Exemption 5.

Moreover, the deliberative process privilege, which USTR has invoked pursuant to Exemption 5 to protect USTR's "internal proposals and deliberations," cannot protect materials that reflect decisions or positions that the USTR has ultimately adopted. The courts have recognized that predecisional documents lose their confidentiality when they are adopted as the agency's position on an issue or are used by the agency in its external dealings. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). In other words, "a pre-decisional document should be stripped of its privilege when it becomes, in effect, *the decision* of the agency." *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 546 (S.D.N.Y. 2013) (emphasis in original).

The positions that USTR has actually adopted in its negotiations reflect a decision of the USTR – they do not reflect "predecisional" deliberations. Accordingly, under controlling law, that information cannot be withheld pursuant to the deliberative process privilege. For the same reason, USTR cannot withhold any materials reflecting the parts of the TPP drafts that have already been agreed upon by the negotiating parties, as they too reflect positions that have been adopted.

2. *USTR has improperly withheld material responsive to item (2) of the FOIA Request.*

With regard to materials responsive to item (2) of my request concerning USTR interactions with ITACs, USTR states, without any explanation, that it has "segregate[d] any releasable communications from those that qualify for protection under FOIA exemption (b)(5) as deliberative communications and/or exemption (b)(4) which shields third party commercial and/or financial information from disclosure." *See* Exhibit D. As explained before, generalized claims of exemption, such as those USTR has provided here, are entirely insufficient. Regarding both the deliberative process privilege and business confidentiality, USTR has not given any explanation about the nature of the information withheld nor why it qualifies for protection. Indeed, USTR has failed to provide any substantive description of the material withheld whatsoever, making it impossible to discern whether the exemptions have been properly invoked. USTR has thus failed to provide an adequate justification, as required by law, to justify its withholding of materials responsive to item (2) that have been withheld under Exemptions 4 and 5.

Moreover, under applicable law, USTR cannot justify most or all of its withholdings. Regarding USTR's invocation of Exemption 5, as explained already, it applies only to inter-agency or intra-agency documents that are both predecisional and part of the deliberative or decision making process. Documents relating to ITACs, however, cannot qualify as "inter-agency" or "intra-agency" records because ITACs are simply not "agencies" within the meaning of Exemption 5. *See Dep't of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 9 (2001) (observing that "agency" means "each authority of the Government of the United

States,' § 551(1), and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency') (quoting 5 U.S.C. §§ 551(1), 552(f)); *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990). To the contrary, ITACs are "advisory committees" under the Federal Advisory Committee Act. 5 U.S.C. App. 2 § 3(2). The case law clearly establishes that Exemption 5 and the deliberative process privilege cannot be invoked to withhold information about advisory committees because their records are not "inter-agency" or "intra-agency." See *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 36 (D.D.C. 2006) ("[Exemption 5] is not available to documents revealing an advisory committee's deliberative process because the exemption applies only to agencies."); *Wolfe v. Weinberger*, 403 F.Supp. 238, 242 (D.D.C.1975) ("[A]n advisory committee cannot have a 'double identity' as an agency and thus cannot invoke [Exemption 5]."); *Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973). Communications with, or within, ITACs are therefore not "intra-agency" or "inter-agency" records and so cannot be withheld under Exemption 5. USTR's position to the contrary is unsupported.

* * *

For these reasons, USTR has failed to justify any of its withholdings and redactions pursuant to Exemptions 1, 4 and 5. USTR must produce all materials so withheld or, in the event that it continues to refuse to disclose some portion of these materials, it must provide the specific and detailed justifications required by law.

B. USTR has failed to conduct an adequate search for records responsive to each item of the request.

Under FOIA, USTR is obligated to conduct a search for all records responsive to the request. 5 U.S.C. § 552(a)(3); *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) ("It is elementary that an agency responding to a FOIA request must "conduct[] a search reasonably calculated to uncover all relevant documents"); see also *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). USTR has failed to conduct an adequate search with respect to all five categories of records requested. As a result, USTR has failed to process and disclose, without any justification at all, numerous records responsive to my FOIA request.

By its own admission, USTR has conducted no search whatsoever for documents responsive to items (1) and (3), in clear violation of its FOIA obligations. It is no response for USTR to say – in advance of conducting an adequate search that would identify the universe of responsive records – that all such documents would be exempt from disclosure. USTR cannot know in advance whether all responsive documents are properly withheld in full. As the D.C. Circuit has stated, "even if . . . protected records could be withheld under one of the FOIA exemptions, that does not absolve the [agency] of its duty to identify responsive documents,

claim the relevant exemptions in the *Vaughn* index, and explain its reasoning for withholding the documents in its affidavit.” *Morley v. C.I.A.*, 508 F.3d 1108, 1120 (D.C. Cir. 2007); *see also El Badrawi v. Dep’t of Homeland Sec.*, 583 F. Supp. 2d 285, 292 (D. Conn. 2008) (agency must submit “[a]ffidavits . . . supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption”).

USTR’s search for records responsive to item (2) was also deficient. USTR has apparently searched only for emails between USTR and the various individuals named in the FOIA request. But the request asked for more than just emails – it asked for any “records, correspondence, and minutes consisting of, describing, or concerning all communications between USTR . . . and any member of [certain Industrial Trade Advisory Committees (“ITACs”).” *See* Exhibit B. The request therefore plainly encompasses such materials as minutes, summaries, transcripts, or other records describing meetings with ITACs. It also encompasses any and all non-email communications with ITACs and ITAC members. USTR’s search, which was apparently limited to emails, is therefore plainly inadequate. Moreover, even with respect to its search for emails, USTR has not provided sufficient information about the methods that it used to conduct the search in order to determine whether it was adequate. *See Oglesby*, 920 F.2d at 68 (“A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search . . .”).

Finally, USTR’s searches for records responsive to items (4) and (5) of the FOIA request were also patently inadequate. While USTR has produced 277 pages of pages in response to these portions of the request, those pages do not contain most of the key information requested. Specifically, those records include nothing whatsoever reflecting the schedules and locations of “any informal side meetings,” which were specifically requested in item (4). *See* Exhibit A. Similarly, the pages released to date do not include “[t]he full text of . . . the Memorandum of Understanding dated March 4, 2010 that commits countries not to declassify documents related to negotiations for four years from entry into force of the TPP agreement,” as specifically requested in item (5). *Id.* Nor does USTR’s response include “any subsequent documents concerning amendments to this agreement or subsequent related . . . MOUs,” also specifically requested in item (5). *Id.* Moreover, nothing in USTR’s response suggests that it has searched for “any records or correspondence referencing” the March 4, 2010 MOU, as requested. *Id.* USTR’s apparent failure to search for, let alone produce, information specifically requested in items (4) and (5) constitutes a further clear violation of its obligations under FOIA.

C. USTR erred in failing to adjudicate, and to grant, the requests for expedited processing and a public interest fee waiver.

USTR has failed to issue a decision on my applications for expedited processing and a fee waiver. My FOIA request explained in detail the factual basis for my eligibility for both expedited process and a public interest fee waiver. *See* Exhibit A. In short, the information I seek concerns ongoing trade negotiations that are of current and ongoing interest to the American public. Moreover, I serve as Director and Editor-in-Chief of Intellectual Property Watch, a publication well known for its coverage of international intellectual property law and policy. The information that I have requested will contribute significantly to the public's understanding of the government's activities in relation to the TPP, which remains a matter of significant urgency and public interest. Because I satisfy the requirement of the applicable statutes and regulations, I am entitled to expedited processing and a waiver of fees. *See* 5 U.S.C. §§ 552(a)(6)(E), 552(a)(4)(a)(iii); 15 C.F.R. §§ 2004.6(c)(2)(i); 2004.11(b).²

III. Request for Relief

For the foregoing reasons, we respectfully submit that USTR has failed to meet its legal obligation to search for and to disclose the documents and information requested. We trust that you will reverse the denial of disclosure, remedy the failure to conduct adequate searches, and grant my request in full.

To the extent that you affirm, in whole or in part, the denial of disclosure, we ask that USTR provide us with an itemized list describing with specificity each document or portion thereof that has been withheld and explaining the grounds for the withholding. *See generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

We again advise you that the information is sought in connection with reporting by IP Watch on a continuing news story of great public interest. Therefore we respectfully request expedited treatment of this appeal pursuant to 15 CFR § 2004.6(c)(2)(i). Likewise, because disclosure of the requested information is in the public interest, we respectfully request a public interest waiver of all fees. In any event, we trust that we will receive your decision within 20 business days as required by 15 CFR § 2004.6(c)(1) and 5 U.S.C § 552(a)(6)(A)(ii).

² The FOIA request mistakenly cited the Department of Homeland Security regulations regarding expedited processing and public interest fee waivers, 6 C.F.R. §§ 5.5(d)(1)(ii), 5.11(k), rather than the parallel USTR regulations found at 15 C.F.R. §§ 2004.6(c)(2)(i)(b); 2004.11(b). This technical error has no effect on my entitlement to expedited processing or a fee waiver. The two sets of regulations are identical in substance and, in any case, they both implement the same statutory mandates found at 5 U.S.C. §§ 552(a)(6)(E), 552(a)(4)(A)(iii), which I specifically invoked in my FOIA request.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "wnew", written in black ink.

William E. New
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Enclosures