

SUPPORTING STATEMENT
United States Patent and Trademark Office
Legal Processes
OMB CONTROL NUMBER 0651-0046
(May 2010)

A. JUSTIFICATION

1. Necessity of Information Collection

The purpose of this collection is to cover information requirements related to civil actions and claims involving current and former employees of the United States Patent and Trademark Office (USPTO). The rules for these legal processes may be found under 37 CFR Part 104, which outlines procedures for service of process, demands for employee testimony and production of documents in legal proceedings, reports of unauthorized testimony, employee indemnification, and filing claims against the USPTO under the Federal Tort Claims Act (28 U.S.C. 2672) and the corresponding Department of Justice regulations (28 CFR Part 14). The Federal Tort Claims Act offers a limited waiver of the sovereign immunity of the Federal Government in certain circumstances. The public may also petition the USPTO Office of General Counsel under 37 CFR 104.3 to waive or suspend these rules in extraordinary cases.

The procedures under 37 CFR Part 104 ensure that service of process intended for current and former employees of the USPTO is handled properly. The USPTO will only accept service of process for an employee acting in an official capacity. When a summons is served on a current or former USPTO employee, the employee should note the time, place, and method of service on the summons. The employee should then immediately notify and forward the summons to the Office of General Counsel at the USPTO. The Office of General Counsel will determine to what extent an employee may comply with a demand for testimony or documents. The USPTO will not authorize employee testimony on the validity of a patent grant or registered trademark. The rules governing production of documents do not affect any rights granted under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), or the Trade Secrets Act (18 U.S.C. 1905). In cases involving unauthorized testimony or requests for indemnification, the employee must forward the relevant information or documentation to the Office of General Counsel.

There are no forms provided by the USPTO for this collection. For filing claims under the Federal Tort Claims Act, the public may use Standard Form 95 "Claim for Damage, Injury, or Death," which is provided by the Department of Justice and approved by the Office of Management and Budget (OMB) under OMB Control Number 1105-0008.

Table 1 provides the specific statutes and regulations authorizing the USPTO to collect the information discussed above:

Table 1: Information Requirements for Legal Processes

Requirement	Statute	Rule
Petition to Waive Rules	35 U.S.C. 2(b)(2) and 3(a)(2)	37 CFR 104.3
Service of Process	35 U.S.C. 2(b)(2)	37 CFR 104.11 and 104.12
Forwarding Service and Demands	35 U.S.C. 2(b)(2)	37 CFR 104.12(b) and 104.22(a)
Employee Testimony and Production of Documents in Legal Proceedings	35 U.S.C. 2(b)(2)	37 CFR 104.22 and 104.23
Report of Unauthorized Testimony	35 U.S.C. 2(b)(2)	37 CFR 104.23(c)
Possible Indemnification Cases	35 U.S.C. 2(b)(2)	37 CFR 104.31 and 104.32
Employee Indemnification	35 U.S.C. 2(b)(2)	37 CFR 104.31 and 104.32
Tort Claims	28 U.S.C. 2672, 35 U.S.C. 2(b)(2)	37 CFR 104.41 and 104.42

2. Needs and Uses

The public uses this collection to submit information required by USPTO regulations covering legal processes. This information collection is necessary so that respondents or their representatives may serve a summons or complaint on the USPTO, demand employee testimony and documents related to a legal proceeding, or file a claim under the Federal Tort Claims Act. Respondents may also petition the USPTO to waive or suspend these rules for legal processes. This collection is also necessary so that current and former USPTO employees may properly forward service and demands to the Office of General Counsel, report unauthorized testimony, and request indemnification.

The USPTO covers current employees as respondents under this information collection, even though their responses do not require approval under the Paperwork Reduction Act. In those instances where both current and former employees may respond to the USPTO, the agency estimates that the number of respondents will be small.

The Information Quality Guidelines from Section 515 of Public Law 106-554, Treasury and General Government Appropriations Act for Fiscal Year 2001, apply to this information collection and comply with all applicable information quality guidelines, i.e. OMB and specific operating unit guidelines.

This proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with all applicable OMB and USPTO Information Quality Guidelines.

Table 2 outlines how this collection of information is used by the public and the USPTO:

Table 2: Needs and Uses of Information Collected for Legal Processes

Function	Form Number	Needs and Uses
Petition to Waive Rules	No Form Associated	<ul style="list-style-type: none"> Used by the public to petition the USPTO to either waive or suspend a rule. Used by the USPTO to determine whether the circumstances warrant the suspension of the rules.
Service of Process	No Form Associated	<ul style="list-style-type: none"> Used by the public to serve process on current and former USPTO employees. Used by the USPTO to accept service for current and former employees who are summoned in their official capacities.
Forwarding Service of Process and Demands	No Form Associated	<ul style="list-style-type: none"> Used by current or former USPTO employees to forward service of process or demands for testimony or documentation to the Office of General Counsel. Used by the USPTO to accept service of process or demands forwarded by employees.
Employee Testimony and Production of Documents in Legal Proceedings	No Form Associated	<ul style="list-style-type: none"> Used by the public to demand testimony or documents from current or former USPTO employees as part of a legal proceeding. Used by the USPTO to determine whether to authorize the testimony or release the documents.
Report of Unauthorized Testimony	No Form Associated	<ul style="list-style-type: none"> Used by current and former USPTO employees to report testimony given in a legal proceeding that was not reviewed by the Office of the General Counsel prior to the proceeding. Used by the USPTO Office of General Counsel to review unauthorized testimony.
Possible Indemnification Cases	No Form Associated	<ul style="list-style-type: none"> Used by current and former USPTO employees to report possible indemnification cases to the USPTO in order to start indemnification proceedings. Used by the USPTO Office of General Counsel to determine whether indemnification proceedings are needed.
Employee Indemnification	No Form Associated	<ul style="list-style-type: none"> Used by current and former USPTO employees to request indemnification from the Office of General Counsel in instances where a verdict, judgment, or award has been entered against them in a civil action or proceeding related to their official capacities at the USPTO. Used by the USPTO Office of General Counsel to determine whether to grant employee indemnification and to ensure that copies of the verdict, judgment, appeal bond, award or settlement proposal, and the employees' statements have been submitted regarding their actions and whether they have insurance or other sources of indemnification.
Tort Claims	No Form Associated	<ul style="list-style-type: none"> Used by the public to file claims against the USPTO under the Federal Tort Claims Act. Used by the USPTO Office of General Counsel to determine whether to settle or deny a claim.

3. Use of Information Technology

Currently, the USPTO does not use automated, electronic, mechanical, or other technologies to collect the information for this collection. The USPTO believes that it would not be practical to collect all of the information associated with the various legal proceedings electronically. It is unlikely that the documents associated with service of process or subpoenas requesting testimony or documents will be delivered to USPTO employees or the Office of General Counsel electronically, unless the servers themselves start delivering them electronically. Although it is conceivable for current or former employees to submit the actual request for indemnification to the Office of General Counsel electronically, they must also submit any associated documentation with it. Since this documentation can include the verdict, judgment, appeal bonds, awards, or settlement proposals, it is unlikely that this information will be submitted electronically unless the judicial system starts using this means of communication on a regular basis.

The USPTO believes that these circumstances also apply to the claims filed under the Federal Tort Claims Act. The Department of Justice has created a standard form that can be used to submit claims, although it is not mandatory for claimants to do so. In addition to the form, there are also statements, reports, bills, and other information that must be submitted with this form as appropriate. Since the USPTO rarely receives a claim under the Federal Tort Claims Act (it is rare for more than two to be submitted each year), it would not be practical to collect this information electronically.

At this time, the USPTO is not collecting the information covered under this collection electronically. As the USPTO expands the use of electronic filing, it may determine that it is feasible for the petitions and demands to be submitted to the USPTO electronically. If the USPTO does determine that these or other documents related to legal processes can be submitted electronically, the USPTO will develop and submit the associated electronic forms or formats for these items to OMB for review and approval as necessary.

The USPTO does not disseminate the information in this collection to the general public, electronically or otherwise.

4. Efforts to Identify Duplication

This information is collected when the public submits petitions to the USPTO to waive legal process rules, demands or subpoenas for testimony or documents, or claims under the Federal Tort Claims Act. The information associated with service of process is collected only when a summons is served on a current or former employee and the employee forwards the necessary information to the Office of General Counsel. The information associated with employee indemnification is collected only when a current or former employee requests indemnification and forwards the necessary documentation to the Office of General Counsel. When current or former USPTO employees report unauthorized testimony or possible cases for indemnification, they provide only the information pertaining

to the testimony or indemnification to the Office of the General Counsel. This information is not collected elsewhere and does not result in a duplication of effort.

5. Minimizing Burden to Small Entities

The USPTO does not believe that this collection will have a significant impact on a substantial number of small businesses or other small entities. Historically, the USPTO has received very few filings for these proceedings, and very few of the filings involve small businesses or other small entities. The same information is required from every respondent, and this information is not available from any other source.

6. Consequences of Less Frequent Collection

This information is collected only at the initiation of the requestor and is not found elsewhere. Therefore, this collection of information could not be conducted less frequently. If the information were not collected, the USPTO would not be able to ensure compliance with case law and protect its legal interests related to service of process, demands for employee testimony and production of documents, unauthorized employee testimony, employee indemnification, and claims submitted under the Federal Tort Claims Act. The USPTO also would not be able to consider petitions to waive these rules in the interest of justice in extraordinary situations.

7. Special Circumstances in the Conduct of Information Collection

There are no special circumstances associated with this collection of information.

8. Consultations Outside the Agency

The 60-Day Notice was published in the *Federal Register* on January 25, 2010 (75 Fed. Reg. 3893). The comment period ended on March 26, 2010. No public comments were received.

The USPTO has long-standing relationships with groups from whom information concerning the patent application and appeal process is collected, such as the American Intellectual Property Law Association, as well as patent bar associations, independent inventor groups, and users of our public facilities. Their views are expressed in regularly scheduled meetings and considered in developing proposals for information collection requirements. There have been no comments or concerns expressed by these or similar organizations concerning the time required to provide the information under this program.

9. Payment or Gifts to Respondents

This information collection does not involve a payment or gift to any respondent.

10. Assurance of Confidentiality

The confidentiality of patent applications is governed by statute (35 U.S.C. 122) and regulation (37 CFR 1.11 and 1.14). The USPTO has a legal obligation to maintain the confidentiality of the contents of unpublished patent applications and related documents. Upon publication of an application or issuance of a patent, the patent application file is made available to the public, subject to the provisions for providing only a redacted copy of the file contents.

When respondents submit demands in legal proceedings for the testimony of employees or the production of documents regarding information protected by the confidentiality provisions of the Patent Act (35 U.S.C. 122), the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), or any other confidentiality statute, the demands must satisfy the requirements for disclosure as stated in those statutes and associated rules before the testimony may be given or the documents provided.

11. Justification for Sensitive Questions

None of the required information in this collection is considered to be sensitive.

12. Estimate of Hour and Cost Burden to Respondents

Table 3 calculates the burden hours and costs of this information collection to the respondents, based on the following factors:

- **Respondent Calculation Factors**
The USPTO estimates that it will receive approximately 291 responses per year for this collection.
- **Burden Hour Calculation Factors**
The USPTO estimates that it will take the public from 5 minutes (0.08 hours) to 1 hour to gather the necessary information, prepare the appropriate documents, and submit the information required for this collection.
- **Cost Burden Calculation Factors**
In 2009 the Committee on Economics of Legal Practice of the American Intellectual Property Law Association published a report that summarized the results of a survey with data on hourly billing rates. The professional rate of \$325 per hour is the median rate for attorneys in private firms as published in that report. The USPTO expects that the information in this collection will be prepared by attorneys and former employees, except for the requests for employee indemnification. Since many of the former employees affected by this collection are attorneys, the attorney rate will be used for former employees as well. Using the professional rate of \$325 per hour for attorneys in private firms, the USPTO estimates that the respondent

cost burden for attorneys and former employees submitting the information in this collection will be \$16,575 per year.

Requests for employee indemnification generally come from professional and supervisory staff at the estimated hourly rate of \$59.30 for a GS-15, step 1 employee. When 30% is added to account for a fully-loaded hourly rate (benefits and overhead), the hourly rate for a GS-15, step 1 is \$77.09 (\$59.30 + \$17.79). Using the estimate of \$77.09 per hour for professional and supervisory staff, the USPTO expects that the respondent cost burden for submitting requests for employee indemnification will be approximately \$77 per year.

Table 3: Burden Hour/Burden Cost to Respondents for Legal Processes

Item	Hours (a)	Responses (yr) (b)	Burden (hrs/yr) (c) (a x b)	Rate (\$/hr) (d)	Total Cost (\$/yr) (e) (c x d)
Petition to Waive Rules	0.50	5	3	\$325.00	\$975.00
Service of Process	0.08	243	19	\$325.00	\$6,175.00
Forwarding Service	0.17	7	1	\$325.00	\$325.00
Employee Testimony and Production of Documents in Legal Proceedings	1.00	22	22	\$325.00	\$7,150.00
Forwarding Demands	0.17	7	1	\$325.00	\$325.00
Report of Unauthorized Testimony	0.50	1	1	\$325.00	\$325.00
Report of Possible Indemnification Cases	0.50	3	2	\$325.00	\$650.00
Employee Indemnification	0.50	1	1	\$77.09	\$77.00
Tort Claims	1.00	2	2	\$325.00	\$650.00
Totals	.....	291	52	.....	\$16,652.00

13. Total Annualized (Non-hour) Cost Burden

There are no capital start-up, maintenance, or recordkeeping costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of filing fees and postage costs.

This collection has filing fees associated with the petition to waive or suspend the legal process rules under 37 CFR 104.3. The USPTO estimates that approximately 5 petitions will be filed per year with a fee of \$130, for a total filing cost of \$650. There are no other filing fees associated with this information collection.

Customers may incur postage costs when submitting the information in this collection to the USPTO by mail. The USPTO estimates that the average first-class postage for a mailed

submission, other than a Service of Process, will be 88 cents and that up to 48 of these submissions will be mailed to the USPTO per year, for a postage cost of \$42. The USPTO estimates that the average postage for a Service of Process will be \$10.00 (Priority Mail flat-rate envelope with Certified Mail service and Return Receipt) and that up to 243 of these submissions will be mailed to the USPTO per year, for a postage cost of \$2,430. The total estimated postage cost for this collection is approximately \$2,472 per year.

48 responses (not including Service of Process) @ \$0.88 postage = \$42
243 responses for Service of Process @ \$10.00 postage = \$2,430
Total postage costs are \$42 + \$2,430 = \$2,472

The total annual (non-hour) respondent cost burden for this collection in the form of filing fees (\$650) and postage costs (\$2,472) is approximately \$3,122 per year.

14. Annual Cost to the Federal Government

The USPTO estimates that it takes a GS-15, step 1 employee 1.5 hours to process a petition to waive the rules or a request for employee indemnification; 30 minutes (0.5 hours) to process a demand for employee testimony and the production of documents, a report of unauthorized testimony, or a report of a possible indemnification case; and 3.0 hours to process a claim filed under the Federal Tort Claims Act. The rules impose no burden on the USPTO with regard to receiving service of process or forwarding service and demands for testimony or documents. The hourly rate for a GS-15, step 1 employee is currently \$59.30. When 30% is added to account for a fully-loaded hourly rate (benefits and overhead), the hourly rate for a GS-15, step 1 is \$77.09 (\$59.30 + \$17.79).

Table 4 calculates the burden hours and costs to the Federal Government for processing this information collection:

Table 4: Burden Hour/Burden Cost to the Federal Government for Legal Processes

Item	Hours (a)	Responses (yr) (b)	Burden (hrs/yr) (c) (a x b)	Rate (\$/hr) (d)	Total Cost (\$/yr) (e) (c x d)
Petition to Waive Rules	1.50	5	8	\$77.09	\$617.00
Service of Process	0.00	243	0	\$0.00	\$0.00
Forwarding Service	0.00	7	0	\$0.00	\$0.00
Employee Testimony and Production of Documents in Legal Proceedings	0.50	22	11	\$77.09	\$848.00
Forwarding Demands	0.00	7	0	\$0.00	\$0.00
Report of Unauthorized Testimony	0.50	1	1	\$77.09	\$77.00
Report of Possible Indemnification Cases	0.50	3	2	\$77.09	\$154.00

Employee Indemnification	1.50	1	2	\$77.09	\$154.00
Tort Claims	3.00	2	6	\$77.09	\$463.00
Totals	.....	291	30	.....	\$2,313.00

15. Reason for Change in Burden

Summary of Changes Since the Previous Renewal

This information collection was previously approved by OMB in August 2007 with a total of 176 responses and 31 burden hours per year.

For this renewal, the USPTO estimates that the total annual responses will be 291 and the total annual burden hours will be 52, which is an increase of 115 responses and 21 burden hours from the currently approved burden for this collection. This increase in burden hours is due to administrative adjustments.

The total annual (non-hour) cost burden for this renewal of \$3,122 is an increase of \$1,109 over the currently approved total of \$2,013 in annual costs for this collection. This increase in annual costs is due to administrative adjustments.

Change in Respondent Cost Burden

When this collection was previously approved in August 2007, the estimated hourly rate for attorneys preparing the information in this collection was \$304, and the rate for professional and supervisory staff preparing requests for employee indemnification was based on the GS-15, step 1 fully-loaded hourly rate of \$68.74. In the current renewal, the estimated hourly rate for attorneys has been updated to \$325, and the fully-loaded rate for professional and supervisory staff has been updated to \$77.09 as noted above in Section 12. These increased hourly rates, along with the increase of 21 burden hours for this collection, yield a respondent cost burden of \$16,652, which is an increase of \$7,463 over the previously approved respondent cost burden of \$9,189.

Changes in Responses and Burden Hours

For this renewal, the USPTO estimates that the total annual responses for this collection will increase by 115 and that the total burden hours for this collection will increase by 21. These increases are due to administrative adjustments, as follows:

- The USPTO is adjusting the estimated annual responses for the Petition to Waive Rules to 5, which is a decrease of 2 from the previous estimate of 7. **Therefore, this collection takes a burden decrease of 1 hour as an administrative adjustment.**

- The USPTO is adjusting the estimated annual responses for Service of Process to 243, which is an increase of 113 from the previous estimate of 130. **Therefore, this collection takes a burden increase of 9 hours as an administrative adjustment.**
- The USPTO is adjusting the estimated annual responses for Employee Testimony and Production of Documents in Legal Proceedings to 22, which is an increase of 4 from the previous estimate of 18. The USPTO is also adjusting the estimated time per response for this item from 30 minutes (0.5 hours) to 1 hour. **Therefore, this collection takes a burden increase of 13 hours as an administrative adjustment.**
- The USPTO does not expect any changes in the estimated annual responses or burden hours for the remaining items in the collection.

In sum, this information collection has a total net burden increase of 21 hours due to administrative adjustments.

Changes in Annual (Non-hour) Costs

For this renewal, the USPTO estimates that the total annual (non-hour) cost burden will increase by \$1,109. This increase in annual costs is due to administrative adjustments, as follows:

- This collection is currently approved with a total of \$910 in filing fees. For this renewal, the USPTO estimates that the total filing fees will decrease to \$650 due to a decrease in the estimated responses for the Petition to Waive Rules. **Therefore, this collection has a burden decrease of \$260 in filing fees as an administrative adjustment.**
- This collection is currently approved with a total of \$1,103 in postage costs for submitting the information in this collection to the USPTO by mail. For this renewal, the USPTO estimates that the total postage costs will increase to \$2,472 due to increases in the estimated number of responses as well as increases in rates for the U.S. Postal Service. **Therefore, this collection has a burden increase of \$1,369 in postage costs as an administrative adjustment.**

In sum, this information collection has a total net increase in annual (non-hour) cost burden of \$1,109 due to administrative adjustments.

16. Project Schedule

The USPTO does not plan to publish this information for statistical use or for any special purpose.

17. Display of Expiration Date of OMB Approval

There are no USPTO forms associated with this collection. Therefore, the display of the expiration date is not applicable.

18. Exceptions to the Certificate Statement

This collection of information does not include any exceptions to the certificate statement.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection of information does not employ statistical methods.

REFERENCES

- A. Standard Form 95 "Claim for Damage, Injury, or Death" (OMB Control Number 1105-0008)
- B. The USPTO Information Quality Guidelines