

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL )	)	
RESPONSIBILITY, )	)	
2001 S Street, NW, Suite 570 )	)	
Washington, D.C. 20009 )	)	
	)	
Plaintiff, )	)	
	)	
v. )	)	Civil Action #
	)	
U. S. ENVIRONMENTAL PROTECTION )	)	
AGENCY, )	)	
1200 Pennsylvania Avenue, NW )	)	
Washington, DC 20460 )	)	<b><u>COMPLAINT</u></b>
	)	
Defendant. )	)	

**PRELIMINARY STATEMENT**

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, in order to compel the U.S. Environmental Protection Agency ("EPA") to disclose records withheld wrongfully after FOIA requests and subsequent appeals from Plaintiff. FOIA requires that federal agencies respond to public requests for documents, including files maintained electronically, in order to increase public understanding of the workings of government and access to government information.
  
2. Plaintiff Public Employees for Environmental Responsibility ("PEER") is a non-profit organization with tax-exempt status dedicated to research and public education

concerning the activities and operations of the federal government. Plaintiff requested the subject records in order to learn about how EPA regulates scientific activities, promotes scientific integrity, allocates resources within EPA's Office of Research and Development ("ORD"), and assesses the impacts of science policy, resources and other factors on employee morale.

3. Plaintiff submitted two FOIA requests to EPA dated November 2, 2004, and November 3, 2004. The agency failed to respond after more than forty (45) business days. Plaintiff appealed the constructive denials of its FOIA requests on January 13, 2005, and January 14, 2005. EPA acknowledged the appeals in January but has not responded to the appeals. By letter dated March 11, 2005, from the ORD Office of Resources, Management and Administration, the agency belatedly denied release of all records requested in both FOIA requests, claiming the records are exempt from mandatory disclosure by 5 U.S.C. § 552 (b), privileged inter-agency or intra-agency records, deliberative process privilege.
4. EPA's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. EPA's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at EPA and is a violation of the FOIA.
5. Plaintiff seeks a court order requiring EPA to produce immediately the documents sought in the November 2, 2004, and November 3, 2004, FOIA requests, as well as other appropriate relief.

## **JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).
7. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
8. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).
9. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), because the Defendant resides in this district and a substantial part of the events and omissions which gave rise to this action occurred in this district. Venue is also proper under 5 U.S.C. § 552(a)(4)(B).

## **PARTIES**

10. Plaintiff PEER is a non-profit public interest organization, with its main office located Washington, D.C., and field offices located in California, Colorado, Florida, Maine, Massachusetts, New Mexico, New York, Tennessee, Texas, and Washington.
11. PEER is not a commercial enterprise for purposes of the fee waiver provisions of FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues, focusing on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.
12. Informing the public about these important public policy issues is central to PEER's mission. PEER educates and informs the public through news releases to the media, PEER's web site [www.peer.org](http://www.peer.org), which draws between 1,000 and 10,000 viewers per day, and PEER's newsletter which has a circulation of approximately 20,000, including 1,500 environmental journalists.
13. Defendant EPA is an agency of the United States as defined by 5 U.S.C. § 552(f)(1), and is charged with the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and is denying Plaintiff access to its records in contravention of federal law.

## **FACTS**

14. During the first week of November 2004 Plaintiff filed two related but separate FOIA requests, seeking agency records. The initial date of each of Plaintiff's separate request and corresponding EPA Request numbers assigned to each request are:

(1) November 2, 2004 PEER FOIA; EPA Request # HQ-RIN-00216-05

(2) November 3, 2004 PEER FOIA; EPA Request # HQ-RIN-00237-05

**November 2, 2004 PEER FOIA, EPA Request # HQ-RIN-00216-05**

15. Plaintiff's November 2, 2004, FOIA Request # HQ-RIN-00216-05 sought the following information regarding ORD's employee climate surveys administered in 1999, 2001, and 2003: (1) A copy of the original climate survey presented to all ORD employees from each of the three years, (2) Any cumulative totals and result tabulations compiled from the responses to the surveys in each of the three years, broken down by year and office/center/laboratory, and (3) An index itemizing and describing the documents or portions of documents EPA chooses to withhold, commonly referred to as a *Vaughn* Index. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

16. EPA acknowledged receipt of Plaintiff's November 2, 2004, FOIA request in a letter dated November 3, 2004 and requested additional information for justification of a fee waiver in a letter dated November 3, 2004.

17. Plaintiff properly and within a reasonable time provided justification for a fee waiver in a letter to EPA dated November 18, 2004, describing Plaintiff, the importance of the

documents sought to the public interest, and reasons why Plaintiff should be exempt from all fees. *See* 5 U.S.C. § 552(a)(4)(A)(iii). EPA failed to communicate to Plaintiff any determination on the request for a fee waiver.

18. EPA failed to respond to Plaintiff's FOIA request within the twenty (20) day limit imposed by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). EPA also failed to request an extension of the twenty (20) day limit in writing. *See* 5 U.S.C. § 552(a)(6)(B).
19. In the two month period, December 2004 through January 2005, Plaintiff engaged EPA in several communications via telephone and e-mail. During these communications the parties discussed EPA's progress in processing the request, the possibility of EPA separating nonexempt materials from exempt materials, and whether the request would be denied. Despite these communications EPA was unable to provide any indication of when any response, providing records or justification of a denial, would be delivered to Plaintiff.
20. By letter dated January 13, 2005, Plaintiff filed an administrative appeal of EPA's constructive denial, citing the Defendant's failure to respond to Plaintiff's November 2, 2004, FOIA request within the statutory period.
21. EPA Headquarters Freedom of Information Operations Office acknowledged receipt of this appeal in a letter dated January 24, 2005. EPA Office of General Counsel acknowledged receipt of this appeal in a letter dated January 27, 2005.

22. EPA did not respond to Plaintiff's January 13, 2005, appeal nor did it provide the requested documents. In so doing, EPA failed to meet the twenty (20) day limit imposed by FOIA for responding to an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii).
23. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.
24. Subsequently, in a letter dated March 11, 2005, the Office of Resources, Management and Administration in ORD belatedly responded to Plaintiff's November 2, 2004, request for employee climate surveys and results, but refused to provide the requested documents, claiming the records were exempt from mandatory disclosure by virtue of 5 U.S.C. § 552(b)(5), privileged inter-agency or intra-agency records, deliberative process privilege. This letter failed to acknowledge Plaintiff's January 13, 2005, appeal.
25. In addition, EPA's March 11, 2005, response letter did not provide any justification for the application of the exemption to the withheld materials, nor did it specify by affidavit a *Vaughn* Index of the documents being withheld. EPA has not provided Plaintiff any information on the documents withheld, refusing even to state the volume of the documents withheld.

**November 3, 2004 PEER FOIA, EPA Request # HQ-RIN-00237-05**

26. Plaintiff's November 3, 2004, FOIA Request # HQ-RIN-00237-05 sought the following information regarding ORD's employee climate surveys administered in 1999, 2001, and 2003: 1) Any documents generated between January 1, 2001 and November 3, 2004

presenting analysis of the results and trends (such as diversity and job satisfaction) of ORD climate surveys administered in 1999, 2001, and 2003, and 2) A *Vaughn* Index itemizing and describing the documents or portions of documents EPA chooses to withhold.

27. EPA acknowledged receipt of Plaintiff's November 3, 2004, FOIA request in a letter dated November 5, 2004 and requested additional information for justification of a fee waiver in a letter dated November 5, 2004.
28. Plaintiff properly and within a reasonable time provided justification for a fee waiver in a letter to EPA dated November 18, 2004, describing Plaintiff, the importance of the documents sought to the public interest, and reasons why Plaintiff should be exempt from all fees. *See* 5 U.S.C. § 552(a)(4)(A)(iii).
29. EPA improperly denied Plaintiff's request for a fee waiver in a letter dated November 19, 2004. EPA subsequently stated in a letter dated December 2, 2004, that the EPA official handling the request had determined that Plaintiff would not be charged fees for EPA's response to its November 3, 2004, FOIA request, however, a response to the request was never provided.
30. EPA failed to respond to Plaintiff's FOIA request within the twenty (20) day limit imposed by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). EPA also failed to request an extension of the twenty (20) day limit in writing. *See* 5 U.S.C. § 552(a)(6)(B).
31. In the two-month period, December 2004 through January 2005, Plaintiff engaged EPA in several communications via telephone and e-mail. During these communications the



parties discussed EPA's progress in processing the request, the possibility of EPA separating nonexempt materials from exempt materials, and whether the request would be denied. Despite these communications EPA was unable to provide any indication of when a response, providing records or justification of a denial, would be delivered to Plaintiff.

32. By letter dated January 14, 2005, Plaintiff filed an administrative appeal of EPA's denial, citing the Defendant's failure to respond to Plaintiff's November 3, 2004, FOIA request within the statutory period.
33. EPA Headquarters Freedom of Information Operations Office acknowledged receipt of this appeal in a letter dated January 19, 2005. EPA Office of General Counsel acknowledged receipt of this appeal in a letter dated January 26, 2005.
34. EPA did not respond to Plaintiff's January 14, 2005, appeal nor did it provide the requested documents. In so doing, EPA failed to meet the twenty (20) day limit imposed by FOIA for responding to an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii).
35. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.
36. Subsequently, in a letter dated March 11, 2005, the Office of Resources, Management and Administration in ORD belatedly responded to Plaintiff's November 3, 2004, request for employee climate surveys and results, but refused to provide the requested documents, claiming the records were exempt from mandatory disclosure by virtue of 5 U.S.C. §§

552(b)(5), privileged inter-agency or intra-agency records, deliberative process privilege.

This letter failed to acknowledge Plaintiff's January 14, 2005, appeal.

37. In addition, EPA's March 11, 2005, response letter did not provide any justification for the application of the exemption to the withheld materials, nor did it specify by affidavit a *Vaughn* Index of the documents being withheld. EPA has not provided Plaintiff any information on the withheld documents, refusing even to state the volume of the documents withheld.

### **CAUSES OF ACTION**

#### **Count I: Violation of the Freedom of Information Act: November 2 Request**

38. Plaintiff repeats the allegations in paragraphs 1 through 25.
39. EPA's failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated thereunder.

#### **Count II: Violation of the Administrative Procedure Act: November 2 Request**

40. Plaintiff repeats the allegations in paragraphs 1 through 25.
41. EPA's failure to disclose documents responsive to Plaintiff's request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. EPA's failure in this matter is arbitrary,

capricious, an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

**Count III: Violation of the Freedom of Information Act: November 3 Request**

42. Plaintiff repeats the allegations in paragraphs 1 through 14 and 26 through 37.
43. EPA's failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. 552, and the agency's own regulations promulgated thereunder.

**Count IV: Violation of the Administrative Procedure Act: November 3 Request**

44. Plaintiff repeats the allegations in paragraphs 1 through 14 and 26 through 37.
45. EPA's failure to disclose documents responsive to Plaintiff's request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. EPA's failure in this matter is arbitrary, capricious, an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that EPA has wrongfully withheld the requested agency

- records;
- ii. Issue a permanent injunction directing EPA to disclose to Plaintiff all wrongfully withheld documents;
  - iii. Maintain jurisdiction over this action until EPA is in compliance with FOIA, APA and every order of this Court;
  - iv. Enter an Order declaring that Plaintiff is entitled to a full fee waiver under 5 U.S.C. § 552 (a)(4)(A)(iii) for both of Plaintiff's FOIA requests to the extent that EPA does not provide a full fee waiver for both of Plaintiff's requests;
  - v. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
  - vi. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: Washington, D.C.  
March \_\_, 2005

Respectfully submitted,

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