

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

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)		
RESPONSIBILITY,)		
2000 P Street, NW, Suite 240)		
Washington, D.C. 20036)		
))		
Plaintiff,)		
))		
v.)	Civil Action #	
))		
U. S. Department of Agriculture,)		
1400 Independence Ave, SW)		
Washington, DC 20250)		
))		
Defendant.)	<u>COMPLAINT</u>	
))		
_____)		

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. Department of Agriculture/Animal and Plant Health Inspection Service ("USDA" and "APHIS") to disclose records wrongfully withheld after a FOIA request and subsequent appeal 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. Initially, Plaintiff, in a letter dated November 14, 2007, requested information regarding the National Safety Review of APHIS's Wildlife Services program. Mr. William H. Clay responded to Plaintiff via a letter dated November 19, 2007, in which he described

pending and prior safety reviews of the WS program, including a National Safety Review.

3. Plaintiff submitted the subject FOIA request (including a fee waiver request), attached hereto, to USDA dated January 28, 2008, which the USDA received on January 29, 2008. Plaintiff requested the subject records in order to clarify and detail the pending and prior safety reviews mentioned in Mr. Clay's letter.
4. The requested information will help the public understand the extent and manner in which WS integrates human casualty information into its preventative procedures as well as any inadequate planning by agency official that may be needlessly endangering, or may have endangered, both federal employees and members of the public.
5. On April 15, 2008, the USDA sent Plaintiff a "partial response" to the FOIA request that included thirty-five (35) pages of records involving a tragic boating incident in a file enclosed on a CD-ROM, as well as a notice that the USDA forwarded the FOIA request to the United States Department of Labor's Occupational Safety & Health Administration ("OSHA") and the United States Department of the Interior's Division of Information Resources & Technology Management ("IRTM").
Unfortunately, the 35 pages of records only vaguely related to Plaintiff's FOIA request, they did not in any fashion clarify or discuss the WS safety reviews referred to in Mr. Clay's letter dated November 19, 2007 and requested in Plaintiff's FOIA request of January 28, 2008.
6. Plaintiff appealed this constructive denial in a letter dated April 18, 2008 addressed to the APHIS FOIA Appeals Officer.

7. On May 27, 2008, Plaintiff received a letter from OSHA, dated May 21, 2008, along with a large packet of records that covered two OSHA inspections, 309090314 and 309089597, both of which dealt with the same boating incident included in the records received by Plaintiff on April 15, 2008. The records, approximately two hundred (200) pages in length, included department reports and news articles on the boating incident, as well as boat training materials, boat training logs, radio equipment descriptions, radio frequencies used by WS, several radio training manuals, and a duplicate set of the thirty-five pages received by Plaintiff on April 15, 2008. Again, despite Plaintiff explicitly detailing in its January 28, 2008 FOIA request the specific records it sought, the material produced was only vaguely related to Plaintiff's FOIA request.
8. APHIS never provided Plaintiff with written confirmation that it had received Plaintiff's April 18, 2008 FOIA appeal. Given the lack of response, on June 13, 2008, Plaintiff called the APHIS FOIA Appeals office and received verbal confirmation of receipt of the appeal (affidavit attached hereto). Thus, USDA/APHIS received Plaintiff's FOIA appeal *no later than* June 13, 2008.
9. To date Plaintiff has still not received any response to its FOIA appeal. USDA's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. USDA's conduct frustrates Plaintiff's efforts to educate the public regarding the safety of Wildlife Services' operations and the possible need for further safety reviews. PEER requests that all fees be waived because "disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor" (5 U.S.C. 552 (a) (4)(A))

10. Plaintiff seeks a court order requiring USDA to immediately produce the documents sought in the FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction).

12. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

13. 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).

14. Venue is properly vested in this Court under 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

15. 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, Massachusetts, New Mexico, New Jersey, and Tennessee.

16. 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.

17. 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, 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.
18. Defendant USDA is an agency of the United States as defined by 5 U.S.C. § 551(1) and 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

19. Plaintiff submitted a FOIA request, including a fee waiver request, to USDA dated January 28, 2008.
20. Plaintiff's request sought the following records related to pending and prior safety reviews of Wildlife Services: records relating to the scope of the safety reviews, all communications with prospective or selected safety reviewers; documents and communications indicating how and why particular individuals, firms or other entities were selected to conduct these reviews, including any justifications cited for not conducting competitive bidding; a catalogue of the previous "safety improvements" referred to by Mr. William Clay, Deputy Administrator Wildlife Services, together with the internal or external records or communications which led to those

improvements; and, finally, an index itemizing and describing the documents or portions of documents withheld pursuant to the holding of Vaughn v. Rosen (484 F.2d 820 [D.C. Cir. 1973] cert. denied, 415 U.S. 977 [1974]).

21. USDA responded to request 08-350 in a letter dated January 31, 2008 and assigned Plaintiff's request FOIA #08-350. The USDA informed Plaintiff that it would not meet statutory time limits for responding to the FOIA request, but assured Plaintiff that responding to all FOIA requests as promptly as possible was a "high priority" for the agency.
22. In a show of good faith, Plaintiff afforded USDA ample time beyond that legally required for it to respond to Plaintiff's FOIA request before appealing this constructive denial in a letter to the USDA National Appeals Division ("NAD") dated March 31, 2008. In a letter dated April 10, 2008, the NAD informed Plaintiff that it did not have jurisdiction on this issue.
23. Five days later, on April 15, 2008, Plaintiff received a CD-ROM with 35 pages of documents on it from USDA/APHIS. These 35 pages, which dealt with boating safety training as well as a radio communications manual, were at best only vaguely related to Plaintiff's FOIA request which sought specific information about safety reviews for Wildlife Services.
24. By letter dated April 18, 2008, Plaintiff appealed the constructive denial of its FOIA request to the APHIS FOIA Appeals Officer at USDA and explained why the USDA's response was wholly inadequate.
25. On May 7, 2008, Plaintiff received a letter from Ms. Jennifer A. Ashley, the Director of the OSHA Office of Communications, stating that the FOIA request had been

referred to OSHA and, in turn, that she had forwarded the inquiry to OSHA's Seattle location.

26. On May 12, 2008, Plaintiff received a letter from Mr. David L. Mahlum, the Assistant Regional Administrator in the Office of Federal and State Operations for OSHA's Seattle office stating that the FOIA request had been referred to the OSHA Bellevue Area Office for review and release.

27. On May 21, 2008, Plaintiff received from OSHA the previously described large packet of approximately 200 pages of material that included: an OSHA Notice of Unsafe or Unhealthful Working Conditions and attached documents; detailed reports involving the tragic boating accident of March 2, 2006 in Sedro-Woolley, Washington; news reports and photographs of the same accident and recovery operations; retail advertisements describing the type of boat that was involved in the accident; emails; a final report on the topic; a Wildlife Services policy manual table of contents; a boat training "PowerPoint" presentation; the same Motorboat Operator Certification Course manual that was included on the CD-ROM sent on April 15, 2008; a memorandum on WS Standard Operating Procedures for Boat Operations in Washington and Alaska; documents on a Marine Experience LLC Deck Hand Course given at different times throughout 2006; training rosters of these courses; a Washington state WS Radio/Communications Manual; a USDA/APHIS/WS Radio Training Manual with a Users Guide; and different explanations of different types of radios and their uses. Like the initial materials USDA/APHIS had sent Plaintiff on April 15, 2008, these released documents were at best only vaguely related to Plaintiff's FOIA request #08-350 that specifically asked for details of the WS safety

reviews that were mentioned in Mr. William Clay's letter to Plaintiff dated November 19, 2007, and they certainly do not remedy Defendant's failure to provide an adequate response to Plaintiff's FOIA request.

28. On June 3, 2008, Plaintiff received a packet of ten pages of documents from the United States Department of the Interior Fish and Wildlife Service's FOIA Officer Mr. Johnny R. Hunt that contained a student reference manual from a Motorboat Operator Certification Course and a note regarding boat training for an employee. These documents also were only vaguely related to FOIA request #08-350, and they certainly do not remedy Defendant's failure to provide an adequate response to Plaintiff's FOIA request.
29. Finally, on June 13, 2008, having received no response whatsoever to the FOIA appeal it sent to APHIS on April 18, 2008, Plaintiff contacted Mr. Reet Kaseoru, Program Specialist at the APHIS Legislative and Public Affairs office, who informed Plaintiff that his office had received and is in possession of Plaintiff's FOIA Appeal Letter regarding FOIA request #08-350. Thus, USDA/APHIS received Plaintiff's FOIA appeal *no later than* June 13, 2008, and likely received it much earlier.
30. The documents USDA/APHIS provided do not in any sense adequately respond to Plaintiff's FOIA request, and APHIS has not responded to Plaintiff's appeal of that inadequate response. The USDA forwarded FOIA request #08-350 to an OSHA office in Washington State that had an investigation dealing with a tragic boating accident unrelated to the National Safety Review discussed in Mr. Clay's letter dated November 19, 2007. This National Safety Review pertained to issues of improving Wildlife Services' safety standards because there have been 51 accidents and 106

crashes since 1979 resulting in 10 deaths and 28 injuries involving the Wildlife Services aerial gunning program, as well as inaccurate inventories of dangerous biological agents and toxins. Wildlife Services' safety record is abysmal and it is clear that the agency has not responded properly to Plaintiff's FOIA request considering its actions to date.

31. Defendant USDA did not respond to Plaintiff's April 18, 2008 appeal, nor did it provide the requested documents in response to Plaintiff's FOIA request dated January 28, 2008 – over five (5) months ago. In so doing, USDA failed to meet the twenty (20) day limit FOIA imposes for responding to an appeal. See 5 U.S.C. § 552(a)(6)(A)(ii).
32. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(6) for its FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

CAUSES OF ACTION

Count I: Violation of the Freedom of Information Act: FOIA Request #2008-00350

33. Plaintiff repeats the allegations in paragraphs 1 through 10 and 19 through 32.
34. USDA's failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated there under.

Count II: Violation of the Administrative Procedure Act: FOIA Request #2008-

00350

35. Plaintiff repeats the allegations in paragraphs 1 through 10 and 19 through 32.

36. USDA'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. USDA'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:

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

Dated: Washington, D.C.

July 16, 2008

Respectfully submitted,

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