

**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.)

U.S. DEPARTMENT OF THE AIR FORCE)
1670 Air Force Pentagon)
Washington, D.C. 20330-1670)

Defendant.)

Civil Action #

COMPLAINT

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 the Air Force Air Force Office of Special Investigation (“AFOSI”) to disclose records withheld wrongfully 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. Plaintiff requested the subject records in order to review and evaluate AFOSI's investigation and conclusions regarding the compliance of Tyndall Air Force Base with federal environmental requirements. At the time of Plaintiff's request, AFOSI had concluded its investigation and issued a report, yet neither the results of the investigation nor the report itself were made available to the public. Release of the requested information is in the interest of the general public, in order for the public to understand both the environmental compliance history at Tyndall AFB and the effectiveness and integrity of the federal government's enforcement of environmental laws at Tyndall.

3. Plaintiff submitted a FOIA request to AFOSI dated December 3, 2007 (AFOSI 2008-FOIA-00101). By letter dated January 9, 2008, AFOSI confirmed receipt of Plaintiff's FOIA request and stated that a backlog of requests would delay production of the requested materials, and that a cogent response could be expected within 180 days. In a letter also dated January 9 but sent before it received AFOSI's confirmation letter, Plaintiff appealed the constructive denial of its December 3, 2007 FOIA request.
4. By e-mail dated March 7, 2008, Plaintiff confirmed receipt of AFOSI's January 9 letter and requested a firm date by which AFOSI would respond to the request. Later that same day, AFOSI responded that Plaintiff's request was "placed on our Fast Track[,] but that a response was still up to 90 days away. On June 30, 2008, Plaintiff emailed AFOSI asking for an update on the status of the request. AFOSI responded the next day, stating that the request required further review before the "package" would be sent back to AFOSI and then mailed to Plaintiff. AFOSI did not provide an estimated completion date.

5. July 1, 2008 is the last time Plaintiff heard from AFOSI regarding its FOIA request. AFOSI has had ample time beyond that legally required to respond to Plaintiff's request and subsequent appeal. In a show of good faith, Plaintiff even allowed AFOSI well in excess of the substantial extra time AFOSI stated was needed (up to 180 days) to respond. It has now been almost one year since Plaintiff filed its FOIA request and over ten (10) months since Plaintiff filed an appeal, yet there is no indication from AFOSI that the requested materials are forthcoming in the foreseeable future.
6. AFOSI's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. AFOSI's conduct frustrates Plaintiff's efforts to educate the public regarding environmental compliance at Tyndall Air Force Base and is a violation of the FOIA.
7. Plaintiff seeks a court order requiring AFOSI to immediately produce the documents sought in the December 3, 2007 FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

8. 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 the action under 28 U.S.C. § 1331 (federal question jurisdiction).
9. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
10. This court has the authority to award costs and attorney's fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).
11. Venue is properly vested in this Court under 5 U.S.C. § 552 (a)(4)(B).

PARTIES

12. Plaintiff PEER is a non-profit public interest organization, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, New Mexico, New Jersey, and Tennessee.
13. 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.
14. 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 website www.peer.org, which draws 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.
15. Defendant 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 FOIA and is denying Plaintiff access to its records in contravention of federal law.

FACTS

16. By letter dated August 31, 2006, PEER's Florida office submitted a Request for Investigation to the Criminal Investigation Division of the United States Environmental Protection Agency (EPA) in Tampa, Florida. PEER requested that EPA investigate

Tyndall AFB's alleged consistent pattern of knowingly failing to obtain environmental permits and follow environmental regulations prior to embarking upon construction projects on the base.

17. EPA transferred PEER's request to AFOSI, which subsequently investigated the allegations against Tyndall AFB. AFOSI completed its investigation and Special Agent Ursula Penn (SA AFOSI/Det 419) submitted an investigative report to the Base Commander at Tyndall Air Force Base in November 2007.
18. On December 3, 2007, Plaintiff filed a FOIA request with AFOSI, seeking agency records. AFOSI eventually designated this request AFOSI 2008-FOIA-00101.
19. Plaintiff's request sought a copy of the complete investigative report (with supporting documents) that SA Ursula Penn submitted to the Base Commander at Tyndall Air Force Base in November 2007, along with an index itemizing and describing any documents or portions of documents AFOSI chose 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)).
20. By letter dated January 9, 2008, AFOSI confirmed receipt of Plaintiff's request, stating that a backlog of requests had delayed delivery of the requested materials and that Plaintiff's request had been placed on their "Fast Track." That same day, having not yet received AFOSI's confirmation letter, Plaintiff filed an administrative appeal of AFOSI's constructive denial of Plaintiff's FOIA request, citing Defendant's failure to respond.
21. On March 7, 2008, Plaintiff sent an e-mail to Elizabeth E. Johnson, AFOSI FOIA/PA Queue Manager, confirming receipt of AFOSI's letter, objecting to the expected further lengthy delay in response, and seeking a firm date for fulfillment of the request. AFOSI

responded that same day with an e-mail stating that the request was on their “Fast Track” but that mailing the requested materials may still take up to 90 days.

22. More than eight (8) months have passed since AFOSI’s March 7, 2008 e-mail stating that Plaintiff’s request would be completed within 90 days.
23. On June 30, 2008, Plaintiff requested an update on the status of the request via e-mail. On July 1, 2008, AFOSI responded via e-mail, stating that the request had been “processed by the specialist,” but still needed to be reviewed by the Chief of Information Release and then sent to their legal office for review before the package could be sent back to AFOSI and then mailed to Plaintiff. The e-mail provided no firm date by which the requested materials would be mailed.
24. Since its July 1, 2008 email, AFOSI has not sent Plaintiff anything and has not communicated with Plaintiff in any manner.
25. AFOSI did not adequately respond to Plaintiff’s January 9, 2008 appeal, nor did it provide the requested documents. In so doing, AFOSI 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).
26. As of this writing, it has been almost one year since Plaintiff initiated its December 3, 2007 FOIA request, over ten (10) months since AFOSI acknowledged receipt of Plaintiff’s request and Plaintiff appealed AFOSI’s lack of response, and over eight (8) months since AFOSI responded to Plaintiff’s request for a status update by stating that it may take up to 90 more days for a cogent response. It has now been over four (4) months since the last communication from AFOSI regarding Plaintiff’s FOIA request, and there is no indication that record production is forthcoming in the foreseeable future.

27. 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.

CAUSES OF ACTION

Count I: Violation of the Freedom of Information Act

28. Plaintiff repeats allegations in paragraphs 1 through 27.
29. AFOSI'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

30. Plaintiff repeats the allegations in paragraphs 1 through 27.
31. AFOSI'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. AFOSI'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 AFOSI has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing AFOSI to disclose to the Plaintiff all wrongfully withheld documents;

- iii. Maintain jurisdiction over this action until AFOSI is in compliance with FOIA, APA and every other order of this Court;
- iv. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E);
and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: Washington, D.C.
November 19, 2008

Respectfully submitted,

/s/ Paula Dinerstein
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