

**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. Fish and Wildlife Service,)
1849 C Street, NW)
Washington, DC 20240)

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. Fish and Wildlife Service ("FWS") to disclose records wrongfully withheld after two separate 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's first request sought the subject records to clarify and document FWS's actions and policies on

signage and speed limits used in its efforts to prevent boating-induced manatee mortality.

Plaintiff's second request sought the subject records to clarify and document FWS's efforts to protect manatees from harassment caused by "swim-with" interactions with humans. In both instances, the requested information will help the public understand the strategies and policies – and the results of the strategies and policies – FWS uses in its protection of manatees – a much-loved and high profile endangered species. Moreover, the public trust is well served by knowing the extent to which FWS implements, or fails to implement, its key statutory responsibilities.

3. Plaintiff submitted two FOIA requests to FWS dated February 20, 2007 ("signage FOIA"), and February 21, 2007 ("swim FOIA"), and asked for a fee waiver in each instance. After FWS failed to respond to either request, Plaintiff appealed the constructive denial of its requests. The Department of the Interior's ("DOI") Office of the Solicitor ("Solicitor") subsequently informed Plaintiff that FWS claimed that it had never received either of Plaintiff's FOIA requests. The Solicitor advised Plaintiff that it would treat each of Plaintiff's appeals as a new FOIA request and would forward them to FWS. In June 2007, FWS formally acknowledged receipt of each of PEER's "new" FOIA requests.
4. In separate letters dated July 13, 2007, FWS informed Plaintiff that it would not meet statutory time limits for responding to either FOIA request, but assured Plaintiff that all releasable records would be sent at the earliest possible date. Almost two months passed with no further contact from FWS and no response to Plaintiff's telephone inquiries about when to expect delivery of records. On September 7, 2007 and September 10, 2007,

Plaintiff appealed FWS's constructive denial of its signage FOIA and swim FOIA, respectively. In separate letters dated September 11, 2007, FWS provided an "interim response" to each FOIA request, stating in each instance that FWS needed additional time to collate, process, and review before it would release a final response. By letter dated October 11, 2007, the Solicitor advised Plaintiff that FWS had to process one other pending FOIA request before it could finish processing Plaintiff's signage FOIA request. The Solicitor stated that it had directed FWS to issue a response as soon as possible and said it "hope[d]" Plaintiff would delay filing a lawsuit so that FWS could finish processing Plaintiff's signage FOIA. To date, Plaintiff has never received a response to its swim FOIA appeal.

5. In a show of good faith, Plaintiff afforded FWS ample time beyond that legally required to respond to its FOIA requests. It has been over one year since Plaintiff initiated its FOIA requests and over seven (7) months since FWS "officially" received Plaintiff's FOIA requests. Over three (3) months have passed since the Solicitor advised Plaintiff of its right to seek judicial review of the signage FOIA, and over four (4) months have passed with no response whatsoever to Plaintiff's appeal on its swim FOIA.
6. FWS's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA requests. FWS's conduct frustrates Plaintiff's efforts to educate the public regarding FWS's efforts to protect manatees and FWS's overall ability to meet its statutory responsibilities.
7. Plaintiff seeks a court order requiring FWS to immediately produce the documents sought in both the signage and swim FOIA requests, 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 this 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 attorneys' 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 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

12. 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.
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 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.
15. Defendant FWS 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

16. Plaintiff submitted two separate but related FOIA requests to FWS dated February 20, 2007 ("signage FOIA"), and February 21, 2007 ("swim FOIA"), and asked for a fee waiver in each instance. FWS did not respond to either FOIA request and Plaintiff appealed the constructive denial of its requests on April 23, 2007 (signage FOIA), and May 7, 2007 (swim FOIA), respectively. The Department of the Interior ("DOI") Office of the Solicitor ("Solicitor") acknowledged receipt of each appeal in separate letters

dated May 1 and May 15. The Solicitor assigned the signage FOIA appeal number 2007-108, and the swim FOIA appeal number 2007-115.

17. In separate letters dated May 30, 2007, and June 8, 2007, the Solicitor informed Plaintiff that it had contacted FWS and FWS stated that it had never received either the swim FOIA or the signage FOIA, respectively. In the May 30, 2007 letter, DOI advised Plaintiff that it would treat appeal #2007-115 as a new swim FOIA request and would forward the request to FWS. In the June 8, 2007 letter, DOI advised Plaintiff that it would treat appeal #2007-108 as a new signage FOIA request and would forward the request to FWS.
18. Because neither appeal #2007-115 or appeal #2007-108 included the fee waiver request found in each of Plaintiff's original FOIA requests (no reason to appeal something that had not been ruled on), the fee waiver request was not included in either "new" FOIA request forwarded by DOI to FWS. Also found in each of Plaintiff's original FOIA requests but missing from the "new" FOIA requests was Plaintiff's request for an index itemizing and describing any documents or portions of documents FWS 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).
19. The initiation date for each of Plaintiff's original FOIA requests and the eventual FWS Request Number for each of Plaintiff's "new" FOIA requests (the appeals DOI forwarded to FWS) are:
 - (1) February 20, 2007 PEER FOIA; FWS Request #2007-00733
 - (2) February 21, 2007 PEER FOIA; FWS Request #2007-00702

February 20, 2007 PEER FOIA, FWS Request # 2007-00733

20. Plaintiff's FOIA Request #2007-00733 sought the following information relating to FWS's efforts to prevent boating-induced manatee mortality: (1) Status reports concerning the existence, repair needs, or visibility of manatee-related speed limit or warning signs in Florida waters, (2) Summaries of funds expended, regardless of agency source, on erection, replacement, repair or maintenance of such signage, (3) Any evaluations of the efficacy of such signage in preventing death or injuries to manatees, including any evaluation of signage adequacy per the interim agreement based on the settlement of *Save the Manatee Club, et al v. Ballard, et al* (No. 1:00CV00076); describing, in particular, those areas assessed to have inadequate signage, (4) Any interagency agreements relating to construction, installation and maintenance of such signage, and (5) Any FWS recommendations or policies on the setting of specific speed limits in particular water-bodies.
21. Plaintiff's original February 20, 2007 FOIA request limited the requests to all records on the identified topics dating from January 1, 2004. This limitation is not reflected in FWS Request #2007-00733.
22. In a memo date stamped June 15, 2007, FWS FOIA Officer Johnny R. Hunt forwarded Plaintiff's FOIA request to the Region 4 FOIA Officer. Plaintiff did not receive a formal acknowledgment of receipt letter from FWS regarding this FOIA request (unlike Plaintiff's FOIA Request #2007-00702 – see Item 33 below).
23. By letter dated July 13, 2007, FWS informed Plaintiff that it would not meet statutory time limits for responding to the FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(i). FWS

assured Plaintiff that all releasable records would be sent at the earliest possible date and also advised Plaintiff of its right to appeal the delay.

24. By letter to DOI dated September 7, 2007, Plaintiff appealed the constructive denial of its FOIA request, citing FWS's lengthy delays in responding and the lack of a definite compliance date. At that point almost two months had passed with no further contact from FWS and no cogent response to Plaintiff's telephone inquiries about when Plaintiff could expect a response to the FOIA request.
25. In a letter dated September 11, 2007, FWS provided an "interim response" to Plaintiff's FOIA request. FWS stated that it had completed the search portion of the process but that additional time was needed to collate, process, and review before FWS would release a final response.
26. By letter dated September 13, 2007, DOI's Office of the Solicitor acknowledged receipt of Plaintiff's FOIA appeal and assigned it appeal number 2007-183.
27. By letter dated October 11, 2007, the Solicitor advised Plaintiff that FWS had informed the Solicitor that the responsible FWS field office had one other FOIA request to process before it could finish processing Plaintiff's FOIA request. The Solicitor stated that it had directed FWS to issue a response to Plaintiff as soon as possible, and further advised that Plaintiff could pursue judicial review of FWS's constructive denial of its FOIA request under 5 U.S.C. § 552(a)(4)(B). The Solicitor added that it hoped Plaintiff would delay filing a lawsuit so FWS could finish processing Plaintiff's FOIA request.

28. FWS did not adequately respond to Plaintiff's September 7, 2007 appeal, nor did it provide the requested documents. In so doing, FWS 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).
29. It has been almost one year since Plaintiff initiated its signage FOIA request on February 20, 2007. Even assuming this Court gives credence to FWS's claim that it never received Plaintiff's original signage FOIA request, it has still been over seven (7) months since FWS officially received Plaintiff's FOIA request. It has now been over four (4) months since FWS last contacted Plaintiff and over three (3) months since the Solicitor intimated that FWS was close to providing a cogent response to Plaintiff's FOIA request.
30. 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.

February 21, 2007 PEER FOIA, FWS Request # 2007-00702

31. Plaintiff's FOIA Request #2007-00702 sought the following information regarding FWS's position on manatee harassment resulting from "swim-with" interactions with humans: All policy statements, correspondence or other communications between, to and from FWS personnel concerning harassment involving swim-with interactions between manatees and humans.
32. In a memo date stamped June 6, 2007, FWS FOIA Officer Johnny R. Hunt forwarded Plaintiff's FOIA request to the Region 4 FOIA Officer.

33. By letter dated June 15, 2007, FWS acknowledged receipt of Plaintiff's FOIA request and advised that since 20 working days is the normal time for processing a request, Plaintiff should receive a response no later than July 16, 2007.
34. By letter dated July 13, 2007, FWS informed Plaintiff that it would not meet statutory time limits for responding to the FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(i). FWS assured Plaintiff that all releasable records would be sent at the earliest possible date and also advised Plaintiff of its right to appeal the delay.
35. By letter to DOI dated September 10, 2007, Plaintiff appealed the constructive denial of its FOIA request, citing FWS's lengthy delays in responding and the lack of a definite compliance date. At that point almost two months had passed with no further contact from FWS and no cogent response to Plaintiff's telephone inquiries about when Plaintiff could expect a response to its FOIA request.
36. By letter dated September 11, 2007, FWS provided an "interim response" to Plaintiff's FOIA request. FWS stated that it had completed the search portion of the process but that additional time was needed to collate, process, and review before FWS would release a final response.
37. To date, Plaintiff has received no further contact from either FWS or the Solicitor regarding its swim FOIA request or acknowledging its appeal regarding that request.
38. FWS did not adequately respond to Plaintiff's September 10, 2007 appeal, nor did it provide the requested documents. In so doing, FWS 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).

39. It has been almost one year since Plaintiff initiated its swim FOIA request on February 21, 2007. Even assuming this Court gives credence to FWS's claim that it never received Plaintiff's original swim FOIA request, it has still been over seven (7) months since FWS formally acknowledged receipt of Plaintiff's FOIA request on June 15, 2007. It has now been over four (4) months since FWS last contacted Plaintiff and since Plaintiff appealed the constructive denial of its swim FOIA request.
40. 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: FOIA Request # 2007-00733

41. Plaintiff repeats the allegations in paragraphs 1 through 30.
42. FWS'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: FOIA Request #2007-00733

43. Plaintiff repeats the allegations in paragraphs 1 through 30.
44. FWS'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. FWS'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: FOIA Request #2007-00702

45. Plaintiff repeats the allegations in paragraphs 1 through 19 and 31 through 40.
46. FWS'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: FOIA Request #2007-00702

47. Plaintiff repeats the allegations in paragraphs 1 through 19 and 31 through 40.
48. FWS'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. FWS'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 FWS has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing FWS to disclose to Plaintiff all wrongfully withheld documents;

- iii. Maintain jurisdiction over this action until FWS 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 FWS 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.
January 22, 2008

Respectfully submitted,

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