

**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. ENVIRONMENTAL PROTECTION))	
AGENCY,))	
1200 Pennsylvania Avenue, NW))	
Washington, DC 20460))	<u>COMPLAINT</u>
)	
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 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. The records sought concern on the reorganization of EPA's Office of Research and Development ("ORD"). Specifically, Plaintiff sought documents from an ORD Directors Meeting that took place in Washington, DC, including 1) the agenda, 2) list of attendees,

3) all PowerPoint presentations, and 4) handouts given to attendees. EPA wrongfully withheld 78 pages in PowerPoint presentations under the FOIA exemption for deliberative process privilege.

3. The documents are a matter of public concern because they relate to a planned restructuring of ORD research resources and involve the scientific future of EPA and the planned public health research capabilities of the agency. The general public has a keen interest in any factor bearing on the protection of public health. In addition, as the underlying subject matter of this request concerns the political control over public agency scientific research, the public has an acute interest in understanding emerging environmental threats and the capacity of public agencies to analyze those threats.
4. 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 the reorganization of ORD.
5. On November 25, 2008, Plaintiff submitted a FOIA request (RIN # 00314-09) to the EPA. The agency responded to the FOIA request in a letter dated March 24, 2009, denying Plaintiff’s request for the PowerPoint presentations based on the claim that they were exempt as “Privileged Inter-Agency or Intra-Agency Records.” Plaintiff appealed the partial denial of its FOIA request on April 17, 2009 (Appeal # 00091-09).
6. EPA’s conduct in withholding item three of the FOIA request is arbitrary and capricious and amounts to a denial of that portion 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.

7. Plaintiff seeks a court order requiring EPA to produce immediately the documents sought in the November 25, 2008 FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

8. 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).
9. This Court has the authority to grant declaratory relief pursuant to 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 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

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, Arizona, New York 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 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

16. On November 25, 2008, Plaintiff filed a FOIA request with the EPA (Request # HQ-RIN-00314-09), seeking all documents from the Office of Research & Development Division Director meeting that took place in Washington, DC Wednesday November 5 through Friday, November 7, 2008. Specifically, Plaintiff sought “Agendas, list of attendees, PowerPoint presentations, and handouts given to attendees.”
17. EPA responded to Plaintiff’s FOIA request in a letter dated March 24, 2009. In its response, EPA provided the first two items (Agenda and List of Attendees) and the fourth item (Handouts), but failed to provide the third item (PowerPoint Presentations) based on the claim that they were exempt as “Privileged Inter-Agency or Intra-Agency Records.” EPA also included an Index of Non-Releasable Records briefly outlining the four PowerPoint presentations as exempted under the deliberative process privilege, but the index failed to give any indication as to how the documents were pre-decisional and deliberative in nature, as required by FOIA. 5 U.S.C. § 522(b)(5).
18. On April 17, 2009, Plaintiff filed an administrative appeal of EPA’s denial of item three of its FOIA request (Appeal # 00091-09). Plaintiff’s appeal stated that EPA had failed to demonstrate with specificity and detail how the documents correlated to a final agency decision or policy made by the agency and how disclosure would disrupt the deliberative and consultative function of the agency. Plaintiff also appealed on the grounds that EPA made no attempt to segregate the record in accordance with 5 U.S.C. § 522(b).
19. On April 24, 2009, the Acting Deputy Assistant Administrator for Management at EPA published a memorandum announcing that all ORD Transformation Taskforce activities would be available to all employees on an intranet web site. The announcement is further

evidence of the claim Plaintiff made in its appeal that the PowerPoint presentations concerning the reorganization are not exempt from disclosure under FOIA as deliberative process.

20. On April 28, 2009, EPA acknowledged receipt of Plaintiff's FOIA appeal.
21. To date, EPA has not responded to or provided the requested documents in response to Plaintiff's April 17, 2009, appeal. Therefore, EPA has 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).
22. 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.
23. On January 21, 2009 President Barack Obama issued an Executive Memo declaring the following policy: "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears....All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA."

CAUSES OF ACTION

Count I: Violation of the Freedom of Information Act

24. Plaintiff repeats the allegations in paragraphs 1 through 23.
25. 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

26. Plaintiff repeats the allegations in paragraphs 1 through 23.
27. 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. 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: May 20, 2009

Respectfully submitted,

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