

**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,))	
Ariel Rios Building))	
1200 Pennsylvania Avenue, NW))	
Washington, D.C. 20004))	
)	
)	<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 wrongfully withheld after two FOIA requests and a 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's FOIA requests sought records relating to the DuPont Resource Conservation and Recovery Act ("RCRA") site in Pompton Lakes, New Jersey. Plaintiff submitted

simultaneous, although slightly different, FOIA requests to EPA Headquarters and EPA Region 2.

3. The sought records are a matter of public interest because they concern the operations or activities of the Government, and their disclosure is likely to contribute significantly to public awareness and understanding of these government activities.
4. Plaintiff 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 raise public awareness and understanding regarding Hazardous Ranking System (“HRS”) scores prepared by EPA, or its contractors, for the Dupont RCRA site and other New Jersey RCRA sites, and information related to listing hazardous waste sites on the National Priority List (“NPL”).
5. On July 27, 2011, Plaintiff submitted a FOIA request to EPA Region 2. Through an email and attached letter sent to Plaintiff on July 28, 2011, Wanda Calderon, EPA Region 2 FOIA Specialist, acknowledged Plaintiff’s request, assigned it tracking number 02-FOI-01215-11, and stated that Plaintiff’s request for a fee waiver was referred to headquarters for determination. In a letter dated August 3, 2011, Larry Gottesman, EPA National FOIA Officer, granted Plaintiff’s fee waiver for the Region 2 request (No. 02-FOI-01215-11).
6. Plaintiff has yet to receive any responsive documents to this FOIA request (No. 02-FOI-01215).

7. On July 27, 2011, Plaintiff submitted a FOIA request to EPA headquarters. EPA has not acknowledged or responded to Plaintiff's request to headquarters.
8. On September 19, 2011, Plaintiff submitted a letter to EPA jointly appealing EPA's failure to respond within the twenty work day statutory time limit for both requests.
9. To date, Plaintiff has not received an acknowledgment or response from EPA on the FOIA appeal.
10. EPA's conduct is arbitrary and capricious and constitutes a violation of the FOIA and the APA. EPA's conduct frustrates Plaintiff's efforts to educate the public regarding hazardous ranking system scores and clean-up at contaminated sites and is a violation of the FOIA.
11. Plaintiff seeks a court order requiring EPA to immediately produce the documents sought in the July 27, 2011 FOIA requests, as well as all other appropriate relief, including attorney's fees and costs.

JURISDICTION AND VENUE

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

14. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412(d) and 5 U.S.C. § 552(a)(4)(E).
15. Venue is properly vested in this Court pursuant to 5 U.S.C. § 552(a)(4)(B). Venue is also proper under 28 U.S.C. § 1391(e), because a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

16. Plaintiff Public Employees for Environmental Responsibility is a national non-profit organization with tax-exempt status, with its main office located in Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, Arizona, New Jersey and Tennessee.
17. 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.
18. 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.

19. 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.

STATEMENT OF FACTS

20. The EPA has authority under both RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to manage the cleanup of contaminated sites. Although some sites are suitable for cleanup under both RCRA and CERCLA, EPA defers certain sites to be cleaned up under RCRA.
21. The EPA uses the Hazardous Ranking System ("HRS") as a mechanism to place waste sites on the National Priority List ("NPL"). NPL sites are managed under CERCLA. HRS scores are numerical scores that assess a particular site's potential threat to human health and the environment.
22. On July 27, 2011, Plaintiff submitted a FOIA request (02-FOI-01215-11) to EPA Region 2 seeking documents related to the DuPont RCRA site at Pompton Lakes, New Jersey and other New Jersey RCRA sites. Specifically, Plaintiff asked for: 1) the HRS score and scoring sheet documents for the DuPont RCRA site in Pompton Lakes, New Jersey; 2) The HRS scores and scoring sheets for all New Jersey sites reviewed but not listed as National Priority List ("NPL") sites for the past 5 years, including all scores prepared by

the Environmental Protection Agency (“EPA”), its contractors, or any other entity to which EPA delegated HRS scoring; and 3) the HRS scores and scoring sheets for all New Jersey RCRA sites not listed as NPL sites, due to the RCRA deferral policy, including draft HRS scores and scoring sheets prepared by the Environmental Protection Agency (“EPA”), its contractors, or any other entity to which EPA delegated HRS scoring.

23. Through an email and attached letter sent to Plaintiff on July 28, 2011, Wanda Calderon, EPA Region 2 FOIA Specialist, acknowledged Plaintiff’s request, assigned it tracking number 02-FOI-01215-11, and stated that Plaintiff’s request for a fee waiver was referred to headquarters for determination. In a letter dated August 3, 2011, Larry Gottesman, EPA National FOIA Officer, granted Plaintiff’s fee waiver for the Region 2 request (No. 02-FOI-01215-11).
24. To date, Defendant has not responded to or provided the requested information in response to Plaintiff’s July 27, 2011 FOIA to Region 2. In so doing, EPA has failed to meet the twenty (20) day limit imposed by FOIA for responding to a request.
25. On July 27, 2011, Plaintiff submitted a FOIA request to EPA headquarters requesting documents related to the Dupont RCRA site in Pompton Lakes, New Jersey. Specifically, Plaintiff requested the “HRS score and scoring sheet documents for the Dupont RCRA site in Pompton Lakes, New Jersey.”
26. To date, Plaintiff has yet to receive any acknowledgement or documents responsive to Plaintiff’s FOIA request to headquarters. In so doing, EPA has failed to meet the twenty (20) day limit imposed by FOIA for responding to a request.

27. On September 19, 2011, Plaintiff submitted a letter to EPA headquarters jointly appealing EPA's failure to respond within the twenty work day statutory time limit to Plaintiff's FOIA requests. Plaintiff viewed the delay in responding as a constructive denial of its requests.
28. EPA has failed to acknowledge or respond to Plaintiff's appeal. In so doing, EPA has violated the twenty (20) day time limit in responding to an appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii).
29. 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.
30. 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

31. Plaintiff repeats the allegations in paragraphs 1 through 29.
32. Defendant's failure to respond to Plaintiffs FOIA requests and subsequent appeal, or to provide the requested information is a violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated thereunder.
33. Plaintiff's FOIA requests have been constructively denied and information responsive to Plaintiff's FOIA request has been improperly withheld.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- i. Enter an Order declaring that Defendant has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until Defendant 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: October 24, 2011

Respectfully submitted,

Kathryn Douglass

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