

**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 LABOR, )		
Rm N-2428 )		
200 Constitution Ave, NW )		
Washington, D.C. 20210 )		
) )		
) )		
Defendant. )		<b><u>COMPLAINT</u></b>

**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 Department of Labor to disclose records wrongfully withheld after two 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 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 effectiveness of

Occupational Safety and Health Administration (“OSHA”) administered whistleblower programs.

3. On July 14, 2010, Plaintiff submitted a FOIA request to the DOL requesting documents provided by OSHA to GAO in connection with a report on the agency’s whistleblower protection program (FOIA #1). On August 5, 2010, DOL sent Plaintiff an email requesting an extension to fulfill the request until August 20, 2010, and informing Plaintiff that Congress had put a hold on the GAO report accompanying the study. Defendant failed to officially respond or follow up with Plaintiff after August 20, 2010. On August 31, 2010, Plaintiff filed an administrative appeal of the constructive denial of the request with the DOL. In a letter dated September 14, 2010, DOL acknowledged Plaintiff’s appeal. On September 17, 2010, GAO released its report on OSHA’s whistleblower protection program. To date, Plaintiff has not received a response from DOL on the FOIA appeal.
4. On July 20 , 2010, Plaintiff submitted a second FOIA request to the DOL request documents related to surveys completed by investigators and managers working within the agency’s whistleblower protection program (FOIA #2). On July 30, 2010, DOL provided a response to Plaintiff concerning the request and denying all documents pursuant to Exemption 5 of the FOIA 5 U.S.C. § 552(b)(5) as deliberative process. On August 4, 2010, Plaintiff appealed the denial of the FOIA request on the grounds that the documents were not pre-decisional or deliberative and that the agency failed to segregate any non-exempt portions of the materials as required by FOIA. On August 19, 2010,

DOL acknowledged receipt of the appeal. To date, Plaintiff has not received a response from Defendant on the FOIA request or the appeal.

5. DOL's conduct is arbitrary and capricious and constitutes a violation of the FOIA and the APA. DOL's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at OSHA and is a violation of the FOIA.
6. Plaintiff seeks a court order requiring DOL to immediately produce the documents sought in the July 14, 2010 and July 20, 2010 FOIA requests, as well as all other appropriate relief, including attorney's fees and costs.

### **JURISDICTION AND VENUE**

7. 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).
8. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
9. 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).
10. 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**

11. 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.
12. 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.
13. 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](http://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.
14. Defendant DOL, 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**

15. The Labor Department's Occupational Safety and Health Administration is responsible for regulating workplace safety and health. Its mission involves preventing work-related injuries, illnesses, and fatalities, as well as protecting workers from retaliation for making whistleblower disclosures.
16. On July 14, 2010, Plaintiff submitted a FOIA request to the DOL requesting documents provided by OSHA to GAO in connection with a report on the agency's whistleblower protection program (FOIA #1). Specifically, Plaintiff sought "all documents provided by OSHA to GAO during calendar year 2010, including correspondence, e-mails, memos, budgetary papers and other records concerning whistleblower protection programs administered by OSHA, including but not limited to materials sent to GAO in connection with its proposed report on this program."
17. By email dated August 5, 2010, DOL requested an extension to fulfill the request until August 20, 2010, and informed Plaintiff that Congress had put a hold on the GAO report accompanying the whistleblower protection program study.
18. On August 31, 2010, after Defendant DOL failed to respond or follow up with Plaintiff, Plaintiff filed an administrative appeal of the constructive denial of the request.
19. In a letter dated September 14, 2010, DOL acknowledged Plaintiff's appeal.
20. On September 17, 2010, GAO released its report on OSHA's whistleblower protection program to the public.
21. On July 20, 2010, Plaintiff submitted a second FOIA request to the DOL request documents related to surveys completed by investigators and managers working within the agency's whistleblower protection program (FOIA #2). Specifically, Plaintiff requested all documents relating OSHA's survey of investigators, supervisors, and

managers concerning the whistleblower protection program, including “(1) the tabulation or compilation of all the responses to multiple choice questions. In the event that the multiple choice results have not been tabulated, please provide a copy of each completed survey; (2) copies of all essays or narratives submitted (PEER does not seek names or other identifying information about any survey participant but request to see all employee comments that do not disclose identities); and (3) any analyses, comparisons or other communications concerning the need for such a survey or what the results indicate.”

22. On July 30, 2010, DOL provided a response to Plaintiff concerning the request and denying all documents pursuant to Exemption 5 of the FOIA 5 U.S.C. § 552(b)(5) as protected by the deliberative process privilege.
23. On August 4, 2010, Plaintiff appealed the denial of the FOIA request, maintaining that the agency failed to show how the documents requested were pre-decisional and deliberative. Plaintiff also maintained that the agency failed to segregate any non-exempt portions of the materials as required by FOIA.
24. On August 19, 2010, DOL acknowledged receipt of the appeal.
25. To date, Defendant has not responded to or provided the requested information in response to Plaintiff’s August 4, 2010 (FOIA #2), and August 31, 2010 (FOIA #1) appeals. In so doing, DOL 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).
26. 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.

27. 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**

28. Plaintiff repeats the allegations in paragraphs 1 through 27.
29. Defendant’s failure to respond to both of Plaintiff’s FOIA 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.
30. DOL has not demonstrated with specificity and detail how the documents withheld under the July 20, 2010, FOIA request are pre-decisional and deliberative under Exemption 5.
31. DOL’s initial denial of the July 20, 2010, FOIA request constitutes a conclusory assertion as to the nature of the requested information.

#### **Count II: Violation of the Administrative Procedure Act**

32. Plaintiff repeats the allegations in paragraphs 1 through 27.
33. Defendant'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. Defendant'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 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: September 30, 2010

Respectfully submitted,

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