

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR )  
ENVIRONMENTAL RESPONSIBILITY, )  
962 Wayne Ave, Suite 610 )  
Silver Spring, MD 20910 )  
*Plaintiff,* )  
v. )  
U.S. CHEMICAL SAFETY AND )  
HAZARD INVESTIGATION BOARD )  
1750 Pennsylvania Ave. NW, Suite 910 )  
Washington, D.C. 20006 )  
*Defendant.* )

---

Civil Action No. 18-cv-1720

**AMENDED COMPLAINT**

**PRELIMINARY STATEMENT**

1. Plaintiff Public Employees for Environmental Responsibility (“PEER” or “Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the U.S. Chemical Safety and Hazard Investigation Board, (“CSB” or “Defendant”) to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff’s FOIA appeal.
2. Plaintiff is a non-profit organization dedicated to research and public education concerning the activities and operations of federal, state, and local governments.
3. In February 2018, an online staff survey concerning employee morale and communication was distributed to CSB personnel via [surverymonkey.com](http://surverymonkey.com). This survey received 39 responses which included written comments.

4. On March 13, 2018, Plaintiff mailed, e-mailed, and faxed a FOIA request to Defendant.

This request sought (1) a copy of any survey, including all questions and accompanying instructions, distributed to CSB personnel concerning internal CSB communications or management conducted since January 1, 2018, including but not limited to a copy of the online surveymonkey.com survey distributed to CSB personnel in February 2018; (2) A copy of the full report to CSB from surveymonkey.com containing anonymous survey responses, including all numerical and narrative responses and comments, provided from the survey(s) conducted under part (1) above; (3) Any tabulation, summary, or analysis of the survey results developed by surveymonkey.com and provided to the CSB; (4) Any summary, report, memorandum, analysis, or recommendations related to or arising from the survey responses and developed by any CSB board member, executive, manager, or contractor and provided to the CSB chairperson or board members; (5) Any communications with any outside contractor concerning any survey described in part (1); (6) Any communications between the chairperson or board members with any external party concerning any survey described in part (1); and (7) All contracts, including associated task orders, which the CSB has issued since October 1, 2015, related to preparing reports, analyses, recommendations and/or training materials related to CSB management, employee morale, mediation, teambuilding, internal communications, communications training, human resources, facilitation of internal meetings, professional coaching and/or organizational development.

5. On April 10, 2018, CSB responded to PEER's request via letter. This letter stated that the request (FOIA Request R18-029), as submitted, was assigned to the "complex" queue, that no responsive records existed for request subparts (4) through (6), and that PEER's

request for a fee waiver would be denied due to the request being “not meaningfully informative about government operations or activities because they concern individual staff preferences for internal communications methods.”

6. On April 12, 2018, Plaintiff sent a letter via email to Defendant narrowing its request and withdrawing its request for a fee waiver. The amended request sought: (1) A copy of any survey, including all questions and accompanying instructions, distributed to U.S. Chemical Safety and Hazard Investigation Board (CSB) personnel concerning internal CSB communications or management conducted since January 1, 2018, including but not limited to a copy of the online surveymonkey.com survey distributed to CSB personnel in February 2018; (2) A copy of the full report to CSB from surveymonkey.com containing anonymous survey responses, including all numerical and narrative responses and comments, provided from the survey(s) conducted under part (1) above; and (3) Any tabulation, summary, or analysis of the survey results developed by surveymonkey.com and provided to the CSB.
7. On May 1, 2018, CSB provided twenty-two pages of production to Plaintiff containing the questions and numerical results to three survey questions, but withheld employee comments from release, arguing that they were exempt under the deliberative process privilege of 5 U.S.C. §552(b)(5).
8. On May 21, 2018, Plaintiff submitted an administrative appeal of CSB’s partial denial of its FOIA request R-18-029. In its appeal, Plaintiff alleged (1) that CSB’s partial denial constituted a conclusory assertion as to the nature of the requested documents; (2) that CSB’s failure to identify a related decision rendered Exemption 5 inapplicable to the withheld documents; (3) that the survey responses concerned intra-agency morale and

communication, not policy, rendering Exemption 5 inapplicable; (4) that the anonymous nature of the withheld responses obviates any “chilling effect” on CSB staff; (5) that the withheld responses constitute non-exempt factual statements that CSB failed to segregate in accordance with 5 U.S.C. § 552(b); and (6) that CSB’s partial disclosure is inconsistent with the purpose of the FOIA.

9. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
10. The FOIA requires agencies to make a determination on a FOIA appeal within twenty working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(ii). Agencies may extend this twenty-day time period only upon written notice of “unusual circumstances,” and then for no longer than ten days. 5 U.S.C. § 552(a)(6)(B).
11. Defendant denied the appeal without adequate legal justification and has not produced any records that were the subject of Plaintiff’s May 21, 2018, FOIA appeal.
12. Defendant’s improper denial of Plaintiff’s FOIA appeal is frustrating Plaintiff’s efforts to shed light on the concerns and perceptions of CSB staff.
13. Plaintiff exhausted its administrative remedies and now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff’s FOIA appeal, as well as other appropriate relief, including attorneys’ fees and costs.

## JURISDICTION AND VENUE

14. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
15. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
16. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, where the records are located, or in the District of Columbia).
17. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

## PARTIES

18. Plaintiff, PEER, is a non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in California, Colorado, Florida, Massachusetts, and Tennessee.
19. Among other public interest projects, PEER engages in advocacy, research, education, and litigation to promote public understanding and debate concerning key current public policy issues. PEER focuses on the environment, including the regulation and remediation of toxic substances, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.

PEER educates and informs the public through news releases to the media, through its website, [www.peer.org](http://www.peer.org), and through publication of the PEER newsletter.

20. Defendant, CSB, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).

21. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

### **STATEMENT OF FACTS**

22. Employee morale inside the U.S. Chemical Safety and Hazard Investigation Board (CSB) has been the subject of congressional hearings, U.S. Environmental Protection Agency Office of Inspector General reviews, and media reports.

23. Plaintiff received accounts of a recent CSB-directed internal survey related to employee morale and communications. On March 13, 2018, as a result of concern about the perceptions and concerns of CSB staff and the public's interest in the significance and meaning of the survey's results, Plaintiff requested records of any morale- and communications- related surveys distributed to CSB employees. Specifically, PEER requested:

1. *A copy of any survey, including all questions and accompanying instructions, distributed to CSB personnel concerning internal CSB communications or management conducted since January 1, 2018, including but not limited to a copy of the online surveymonkey.com survey distributed to CSB personnel in February 2018;*
2. *A copy of the full report to CSB from surveymonkey.com containing anonymous survey responses, including all numerical and narrative responses and comments, provided from the survey(s) conducted under part (1) above;*

3. *Any tabulation, summary, or analysis of the survey results developed by surveymonkey.com and provided to the CSB;*
4. *Any summary, report, memorandum, analysis, or recommendations related to or arising from the survey responses and developed by any CSB board member, executive, manager, or contractor and provided to the CSB chairperson or board members;*
5. *Any communications with any outside contractor concerning any survey described in part (1);*
6. *Any communications between the chairperson or board members with any external party concerning any survey described in part (1); and*
7. *All contracts, including associated task orders, which the CSB has issued since October 1, 2015, related to preparing reports, analyses, recommendations and/or training materials related to CSB management, employee morale, mediation, teambuilding, internal communications, communications training, human resources, facilitation of internal meetings, professional coaching and/or organizational development.*

In addition to these items, PEER requested both a *Vaughn* index, justifying any claimed exemptions, and a fee waiver.

24. On April 10, 2018, the Acting General Counsel and FOIA Public Liaison at CSB sent PEER an initial response to the March 13, 2018 FOIA request. In this response, CSB stated that the initial FOIA request was placed in a “complex” queue due to “the need for the CSB to search for, collect, and appropriately examine a number of separate and distinct records to identify and process those that would be responsive to your request.” Due to this “complex” designation, CSB extended the length of time it would need to satisfy the request.

25. The response letter also informed PEER that its requested fee waiver was denied.

According to the letter, the denial was based on the grounds that (1) the requested information was not clearly connected to an identifiable operation of the Federal Government and that (2) the requested records were not meaningfully informative about government activities. Finally, the response stated that Plaintiff could narrow the scope of its request and potentially obtain some records free of charge.

26. On April 12, 2018, PEER notified CSB that it would take advantage of its offer to narrow the request and submitted a revised FOIA request to CSB. In this revised submission, Plaintiff requested documents relating to surveys completed by CSB personnel. Specifically, Plaintiff requested the following:

1. *A copy of any survey, including all questions and accompanying instructions, distributed to U.S. Chemical Safety and Hazard Investigation Board (CSB) personnel concerning internal CSB communications or management conducted since January 1, 2018, including but not limited to a copy of the online surveymonkey.com survey distributed to CSB personnel in February 2018;*
2. *A copy of the full report to CSB from surveymonkey.com containing anonymous survey responses, including all numerical and narrative responses and comments, provided from the survey(s) conducted under part (1) above; and*
3. *Any tabulation, summary, or analysis of the survey results developed by surveymonkey.com and provided to the CSB.*

PEER also withdrew its request for a fee waiver because the revised request would not require CSB to perform significant further search or review.



27. In a letter dated May 1, 2018, CSB responded by producing some records of the survey and its responses, with the notable exception of any narrative employee comment responses. CSB stated that the agency was withholding three records pursuant to 5 U.S.C. 522(b)(5), because those portions of the survey contain internal agency communications that “were pre-decisional and expressed opinions on ongoing policy matters.”
28. On May 21, 2018, Plaintiff appealed CSB’s partial production, and requested the withheld narrative survey responses. In this appeal, Plaintiff alleged (1) that CSB’s denial constituted a conclusory assertion as to the nature of the requested documents; (2) that CSB’s failure to identify a related decision rendered Exemption 5 inapplicable to the withheld documents; (3) that the survey responses concerned intra-agency morale and communication, not policy, rendering Exemption 5 inapplicable; (4) that the anonymous nature of the withheld responses obviates any “chilling effect” on CSB staff; (5) that the withheld responses constitute non-exempt factual statements that CSB failed to segregate in accordance with 5 U.S.C. § 552(b); and (6) that CSB’s partial disclosure is inconsistent with the purpose of FOIA.
29. Pursuant to 5 U.S.C. 552(a)(6)(A)(ii), Defendant had twenty working days from the date of receipt of PEER’s appeal to respond, or to assert the need to extend this time limit due to unusual circumstances. *See also* 40 C.F.R. § 1601.20. The FOIA also provides that upon request, agencies are to make records “promptly available.” 5 U.S.C. § 552(a)(3)(A).
30. Twenty working days from May 21, 2018 (the date that Plaintiff’s appeal was sent) was June 19, 2018. As of July 24, 2018, Plaintiff had not received an acknowledgement of

the May 21, 2018 FOIA appeal, a determination on that appeal, or any responsive records, and therefore filed the original Complaint in this case.

**POST-FILING RESPONSE FROM CSB**

31. After the filing of this action, PEER was notified on August 2, 2018 by email from the CSB that the agency believed it had already responded to PEER's appeal. The email included as an attachment a letter to PEER dated June 17, 2018 from Mr. Thomas E. Zoeller, a FOIA Appeals Officer with CSB.
32. The letter (the "Appeal Decision"), attached as *Exhibit A*, states that it was delivered via email. A search of PEER's received emails from June 2018 period revealed that PEER had not received it. PEER did not receive this communication by any other means or know of its existence until August 2018.
33. The August 2 email which delivered the Appeal Decision, attached as *Exhibit B*, included a message from Mr. Zoeller<sup>1</sup> stating that he "believed in good faith that the determination was sent out on June 18, 2018."
34. To the extent that the Appeal Decision can be viewed as an effective and timely determination under 5 U.S.C. § 552(a)(6)(A)(ii), PEER appeals its denial of PEER's FOIA request under 5 U.S.C. § 552(a)(4)(B). This Amended Complaint challenges the Appeal Decision.
35. The Appeal Decision abandoned the Exemption 5 argument set forth in CSB's May 1, 2018 response for all but one category of survey responses, the sixth survey question: "Please use this space to voice any concerns over using any of these communication

---

<sup>1</sup> The email was actually sent by Ray Porfiri, another CSB employee, as Mr. Zoeller was not in the office that day.

methods or responding to this survey.” The decision justifies the Exemption 5 claim because “this question seeks input on the ongoing agency initiative to improve internal communication through a variety of approaches.” *Exhibit A 4*.

36. While the initial response from CSB did not contain an Exemption 6 analysis, the appeal decision upheld the response letter’s withholding of narrative responses from employees based on Exemption 6. Exemption 6 generally protects “personnel and similar files” from “clearly unwarranted invasion of personal privacy” by balancing privacy interests against the public interest in the requested information. 5 U.S.C. § 552(b)(6).
37. The justification for the privacy findings is twofold: that the authors of the documents are anonymous, and that certain of the documents say unpleasant things about agency leadership. This analysis is based in citation to the DEPARTMENT OF JUSTICE FREEDOM OF INFORMATION ACT GUIDE, EXEMPTION 6 (“FOIA Guide”), for the proposition that federal employees have an expectation of privacy in assessments of their performance, whether positive or negative. While a citation to a specific page was not provided, it is worth noting that the first sentence under the section header “Federal Employees” states that “federal employees who are not involved in law enforcement or sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees,” which itself then cites to a series of decisions holding that information related to job function and performance awards are not protected by Exemption 6. *See* FOIA Guide at 21.
38. In its discussion of the refusal to release any records in response to questions 4, 5, and 6 of PEER’s FOIA Request, the CSB notes that the staff answers to CSB’s internal survey

are anonymous and that PEER specifically did *not* request the identity of the authors, or any personally identifiable information. *Exhibit A 5*. This anonymity, the agency reasons, *creates* a privacy interest instead of protecting one: even though no names or other identifying information are attached to *any* document, based on the content of a comment, a familiar reader could potentially “winnow down the identity of a commenter to one or two people.” *Id.* From any one document it is impossible to ascertain *whose* privacy interest, if any, is intruded upon, if at all.

39. While the CSB is willing to conduct the logical gymnastics necessary to find “at least a minimal privacy interest in the comments not being shared in raw form”<sup>2</sup> from the very lack of any personally attributable information in the documents sought, the Appeal Decision makes no such effort to find a public interest in any of their contents. *Exhibit A 6-8*. In fact, CSB believes that there is no public interest whatsoever in the mechanisms used to facilitate internal communications and improve morale at CSB. *Id.* This reasoning is fatuous and self-serving, and willfully ignores overwhelming public interest in such information:

- a. In 2015, CSB Board Member Manuel Ehrlich acknowledged at a House Oversight and Government Reform Committee hearing that the agency had morale issues that needed to be addressed.
- b. In June 2016, the EPA Office of Inspector General Issued a report concluding that the agency had significant management and performance challenges relating to employee morale which threatened the accomplishment of the

---

<sup>2</sup> As courts have long recognized under FOIA Exemption 6, “a trivial invasion simply cannot be an unwarranted invasion.” *Alirez v. NLRB*, 676 F.2d 423, 427 (10th Cir. 1982).

agency's investigative mission; FY 2016 U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD MANAGEMENT CHALLENGES, 16-N-0221 (2016).

- c. In October 2017, after dramatically improved scoring in the Federal Employee Viewpoint Survey ("FEVS") for employees at CSB, rising 22 points in one year, two employees of CSB anonymously reported that Mr. Zoeller, the author of the Appeal Decision, wrongfully pressured staff into positively responding to the FEVS by directly threatening their jobs. *See* Charles S. Clark, *Small Agency's Employees Say They Felt Pressured to Report Improved Job Satisfaction*, GOVERNMENT EXECUTIVE (Oct. 19, 2018). The same report included an admission by the CSB Chairperson, Vanessa Sutherland, that the very existence of the agency could be threatened by "our governance issue."
- d. Also in Fall 2017, Chairperson Sutherland issued a public statement touting the CSB's improved morale results, underlining the agency's own opinion that the agency's morale is an issue of public concern. *See* STATEMENT FROM CSB CHAIRPERSON VANESSA ALLEN SUTHERLAND ON CSB FEDERAL EMPLOYEE VIEWPOINT SURVEY RESULTS, <https://www.csb.gov/statement-from-csb-chairperson-vanessa-allen-sutherland-on-csb-federal-employee-viewpoint-survey-results/> (accessed Aug. 28, 2018).
- e. Eight days after PEER submitted its FOIA request, the U.S. House of Representatives Committee on Oversight and Government Reform requested, *inter alia*, the very same documents requested by PEER: all documents referring or relating to any surveys or polls, responses, results, comments, or

feedback, and the activities of the workplace improvement committee. A copy of that request is attached as *Exhibit C*.

- f. In June 2018, the Houston Chronicle reported concerns that the CSB would be unable to adequately investigate chemical disasters in Houston due to “an exodus of investigators and management’s more lenient treatment of industry” which has resulted in “a successful unionization effort in response to low morale and reduced benefits.” Matt Dempsey, *Loss of investigators slows key federal chemical safety agency*, HOUSTON CHRONICLE (June 8, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Loss-of-investigators-slows-key-federal-chemical-12978972.php>.
40. The CSB, despite its professed concern for the privacy interests implicated by each one of the survey comments, discloses the content of several in attempting to justify the claim that there cannot be any public interest in them. From the examples provided, and the fact that they are provided at all, it is impossible to claim that there is a privacy interest in all of the survey responses, even a minimal one. Examples of such comments include:
- a. “some of these items [on survey list] are tied for best or worst. The scale does not account for that”;
  - b. three comments described as “basically ‘no comment responses’”; and
  - c. four responses that were either “none” or non-responsive.
41. Finally, the CSB argues that because it has only 40 employees, selective redaction or release of comments would be inadequate to protect the privacy of its employees. This

unreasonable decision is based on the example of *Alirez v. NLRB*, 676 F.2d 423 (10th Cir. 1982), in which removing the names alone from 14 informant interviews from an investigatory file containing tales of assault, physical violence, sexual deviancy, and political activity was found insufficient to protect privacy interests, a case far removed from this one.

42. The inescapable conclusion is that the CSB's actual concern is to avoid public embarrassment of agency leaders and public examination of how their decisions have led to employee attrition and diminished mission effectiveness.

#### **CAUSE OF ACTION**

43. Plaintiff incorporates the allegations in the preceding paragraphs.
44. Defendant's denial of Plaintiff's FOIA appeal and failure to disclose the records requested is a wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the Chemical Safety Board regulations promulgated thereunder, 40 C.F.R. § 1601 *et seq.*

#### **RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;
- iv. Award Plaintiff 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.

Respectfully submitted on August 28, 2018,

/s/ Paula Dinerstein  
Paula Dinerstein, DC Bar # 333971  
Public Employees for Environmental Responsibility  
962 Wayne Ave, Suite 610  
Silver Spring, MD 20910  
(202) 265-7337  
pdinerstein@peer.org

*Counsel for Plaintiff*