

**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.)

UNITED STATES SECTION)
INTERNATIONAL BOUNDARY AND)
WATER COMMISSION, U.S. – MEXICO)
4171 N. Mesa, Building C 100)
El Paso, TX 79902)
Defendant.)

Civil Action No.

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 United States Section, International Boundary and Water Commission (IBWC) 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 USIBWC operations, specifically including certain documents relating the safety of dams on the Rio Grande.

3. The communications are a matter of public concern because they address the manner in which USIBWC is managing the dams, reports concerning the safety of the dams, and emergency action plans (EAPs) and inundation maps for the dams.

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 how the USIBWC is managing the dams, and whether the public is being informed of safety concerns about the dams. The agency initially denied the existence of subject records, then on appeal claimed the maps and other documents were exempt from disclosure as deliberative, under FOIA exemption § 552(b)(5), and as internal agency “critical infrastructure” information, under exemption (b)(2).

5. The FOIA denials by the USIBWC are arbitrary, capricious and an abuse of discretion. A primary limitation on the scope of the deliberative process privilege is that it applies only to "deliberative" documents and is inapplicable to purely factual matters, or to factual portions of otherwise deliberative memoranda, which must be segregated out and released. See, e.g., *EPA v. Mink*, 410 U.S. 73, 91 (1973). The USIBWC application of this exception to technical reports and maps is a violation of the FOIA. Additionally, the USIBWC’s claim that the 77 inundation maps (which the agency failed in the initial request to even acknowledge the existence of), are drafts subject to the deliberative process fails not only because the maps are simply factual representations and not subject to policy deliberation, but also because the documents are in perpetual draft form decades after they were first required, precisely to avoid public disclosure.¹

6. The USIBWC similarly abuses the critical infrastructure exemption. There is a "critical infrastructure" exemption under the FOIA but it not applicable to this FOIA request.

1. The redacted EAP for Amistad which plaintiff received itself suggests this, at p. 27 (“Emergency Action Plans should be considered ‘Living Documents’. This means that: (1) They will never be complete, (2) They should be reviewed not less than annually.”)

The Homeland Security Act of 2002, Public Law 107-296, 6 U.S.C. § 133(a)(1)(A), includes a provision that operates as an "Exemption 3 statute" under the FOIA for "critical infrastructure" information that is obtained by the Department of Homeland Security (DHS). The Exemption 3 statute provides protection under the FOIA for information pertaining to the nation's critical infrastructure that is voluntarily submitted to DHS. The Act contains an extensive definition of the term "critical infrastructure information." This exemption applies to DHS and not to USIBWC, and USIBWC has not claimed exemption 3.

7. The attempt to claim a critical infrastructure exemption under (b)(2) has been routinely denied by courts, especially where the agencies did not sufficiently articulate the potential harm from disclosure. See, e.g., *El Badrawi v. DHS*, 583 F. Supp. 2d 285, 316-17 (D. Conn. 2008) (finding that the agencies' "conclusory," "boilerplate" assertions were insufficiently detailed to support withholdings pertaining to foreign national's alleged placement on FBI terrorist watchlist and subsequent visa revocation and expulsion from United States). A similar claim was rejected by a Federal District Court in Utah, which held that inundation maps are not sufficiently internal to be protected by exemption (b)(2). *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1317-1318 (Utah 2003). Although the Living Rivers court eventually granted a law enforcement exemption under (b)(7), a claim not made by USIBWC, even that decision has been rejected by other courts, because exemption 7 is designed to protect the identity of specific individuals, such as informants, who would be harmed by the release of information. See, e.g., *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59 (2nd Cir. 2008).

8. USIBWC's bad faith conduct and denial of PEER's FOIA requests is arbitrary and capricious and frustrates Plaintiff's efforts to educate the public regarding ongoing activities at USIBWC and is a violation of the FOIA.

9. Plaintiff seeks a court order requiring USIBWC to immediately produce the documents sought in the August 10, 2010 FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

10. 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).

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

12. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E).

13. 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

14. 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 Jersey, and Tennessee.

15. 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.

16. 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 website 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.

17. Defendant USIBWC 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

18. By letter dated August 10, 2010, PEER submitted a request pursuant to the FOIA, seeking several documents relating to USIBWC flood control projects. In an email dated August 20, 2010, USIBWC FOIA Officer, Eric Meza, confirmed receipt of the FOIA request. On September 8, 2010, Mr. Meza sent another email indicating that due to the multiple requests contained within the FOIA request and the agency's substantial subject matter interest in the content of the requests, the agency was invoking its 10-day extension under 5 USC 552 (b)(6). On September 29, 2010, Mr. Meza provided PEER with the agency's final response to the FOIA request. The response provided documents responsive to items #4-8 of the request. However, the response denied PEER documents responsive to items #1-3 of the FOIA request for the following reasons:

(1) A copy of the November 2009 report issued by a panel of technical advisers regarding

the condition of Amistad Dam and a plan of action; *RESPONSE: The agency located no documents responsive to this request.*

(2) All emails and documents that relate in any way to the November 2009 report; *RESPONSE: The agency located no documents responsive to this request.*

(3) Current inundation maps and emergency action plans for areas downstream of Falcon Dam and Amistad Dam; *RESPONSE: The agency located two documents responsive to this request. Such documents are withheld pursuant to 5 USC 552 (b)(5), as the documents are drafts subject to the deliberative process.*

19. By letter dated October 15, 2010, PEER appealed the denial of the three above-described requests. With regard to items (1) and (2), the November 2009 report issued by a panel of technical advisers regarding the condition of Amistad Dam and a plan of action, and related correspondence, PEER alleged on appeal that either the agency is not being truthful about the non-existence of the report, or that the agency has wrongfully destroyed the report subsequent to PEER's FOIA request. In its appeal, PEER pointed out that on August 8, 2010, The *Brownsville Herald* had published an article that discussed the agency's response and plan of action with the issue of sinkholes at Amistad Dam.² The article specifically referred to a November 2009 report issued by a panel of technical advisors regarding the condition of Amistad Dam. The article went on to explain that it requested this report from the agency, but that the agency refused to provide it, claiming Exemption (b)(5). Specifically, the article stated:

The IBWC has refused to release a copy of the November 2009 report on Amistad Dam to The Brownsville Herald, despite a formal request under the Freedom of Information Act. IBWC's FOIA Officer Eric Meza on Thursday declined the request in writing, stating that the report on Amistad Dam is exempted from public disclosure because it falls in the category of "inter-agency or intra-agency

2. <http://www.brownsvilleherald.com/news/water-115220-grande-dams.html>

memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

With regard to Item 3 of the FOIA request, which sought “current inundation maps and emergency action plans for areas downstream of Falcon Dam and Amistad Dam,” the agency indicated that it had located only two responsive documents and that both were being withheld pursuant to Exemption (b)(5). On appeal, PEER pointed out that contrary to the requirements of the FOIA, the agency failed to explain why Exemption 5 would apply to inundation maps or emergency action plans, even in draft form. USIBWC did not show how the withheld documents correlate to a final decision or policy made by the agency and how disclosure would disrupt the deliberative and consultative functions of the agency. In addition, USIBWC made no apparent attempt to segregate the non-exempt portions of the material from the exempt portions in response to PEER’s request.

20. By letter dated November 29, 2010, USIBWC Chief FOIA Officer Steven Fitten partially denied PEER’s FOIA appeal. With regard to Items 1 and 2 of the FOIA request, which pertain to information related to a November 2009 report issued by a panel of technical advisors regarding the condition of Amistad Dam, the agency had previously claimed that no documents responsive to this request exist. In its response to the administrative appeal, USIBWC “re-conducted a search for the ‘*November, 2009*’” report and related documents.

Although the USIBWC had identified and denied the exact same report with the exact same title and date to another requester just days earlier, the USIBWC now claims that it did not know that PEER was requesting the same document. Instead, USIBWC now claims that the document is actually dated “*October, 2009*”, and that USIBWC was “not in a position to assume your request for a ‘*November, 2009*’ report was incorrectly stated or based on misinformation.”

This doubly bad faith response is transparently false for yet another reason: the very document in question is identified on the USIBWC website with the date “November, 2009”.³

Finally forced to acknowledge the existence of the document, USIBWC wrote in response to PEER’s appeal, “if such report is the intended subject of the request, such report is withheld pursuant to exemption (b)(2), specifically because the disclosure of such information could facilitate illegal acts against critical infrastructure. Further, to attempt to release segregable information would in effect render the document meaningless.” Regarding correspondence related to the report, the USIBWC withheld one page as pre-decisional correspondence.

21. With regard to item 3, concerning inundation maps, the USIBWC had previously responded by acknowledging the existence of just two documents which it withheld. On appeal, the USIBWC acknowledged that “the agency located one binder containing 77 drafts of 77 inundation maps. Such documents are withheld both under exemption (b)(5), as pre-decisional, deliberative process documents, and exemption (b)(2), whereby the disclosure of such information could facilitate illegal acts against critical infrastructure.”

Regarding emergency action plans, the agency located and released two documents with numerous redactions made pursuant to exemptions (b)(2), whereby the disclosure of such

3. See http://www.ibwc.gov/Mission_Operations/SoD_Amistad.html:

In June of 2008 the Commission selected and convened a panel of highly qualified "expert" consultants to work under the guidance of agency's Technical Advisors (USACE and CONAGUA) to investigate and evaluate Amistad Dam. The scope of work was written to include aspects of Dam Safety with a primary focus on the embankment foundation in Mexico. The "expert panel" (to include Technical Advisors of the agency) made several site visits, and among other things evaluated current and historical data and documentation, and conducted a potential failure modes analysis for the dam. The final consensus report and a project plan were developed and finalized in November 2009.

information could facilitate illegal acts against critical infrastructure, or (b)(6), because the information constitutes private contact information.

22. Completely redacted from the version of the Emergency Action Plan (EAP) provided in response to the FOIA appeal are the EAP Overview (p. 7); Guidance for Determining the Emergency Level (p. 13); Notifications and emergency service contacts (pp. 18-22); Location and Vicinity Maps, Inundation Map, Resources Available, Summary of People/Structures at Greatest Risk, Plan and Profile View of Dam, Reservoir Elevation Area-Capacity Data, Contact Checklist (pp 39-88); Site-Specific Concerns (p. 99); The Levee System, and Flooding not Caused by Dam Failure (pp. 101-103). There is a partial redaction of Directions to Dam (p. 6).⁴

23. With regard to the EAP for Falcon Dam, the USIBWC completely redacted pages 2-3; 5; and 8-12. It is not possible to identify the nature of the redacted material, due to the absence of a table of contents. The Exhibits are identified, however, so we are able to identify the following redactions: Exhibits C-1, Guidance for Determining the Emergency Level; C-7, Inundation Maps; C-8, Cities at Greatest Risk; C-9, Site Specific Concerns; D-1, Emergency Service Contracts; and D-2, Emergency Communications Directory (partial).

24. 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.

25. 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

4. The contents of redacted pages are deduced by reference to the Table of Contents, at 4-5.

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

26. Plaintiff repeats the allegations in paragraphs 1 through 25.
27. USIBWC’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

28. Plaintiff repeats the allegations in paragraphs 1 through 25.
USIBWC’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. USIBWC’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 USIBWC has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing USIBWC to disclose to Plaintiff all wrongfully withheld documents;

iii. Maintain jurisdiction over this action until USIBWC 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:

Respectfully submitted,

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