

**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. )

US DEPARTMENT OF AGRICULTURE )  
OFFICE OF INSPECTOR GENERAL )  
Room 117-W Jamie Whitten Bldg. )  
1400 Independence Ave., SW )  
Washington, D.C. 20250-2308 )

Defendant. )

Civil Action #

**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 U. S. Department of Agriculture, Office of Inspector General ("USDA OIG") to disclose records wrongfully withheld 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. Plaintiff's FOIA request sought a copy of a USDA OIG report of investigation or other report by the USDA OIG concerning a now-former U.S. Forest Service ("USFS")

employee named Joe E. Hardy II in connection with sexual assaults he allegedly committed against USFS female employees.

3. In 2010, Mr. Hardy was found guilty of three counts of fourth-degree criminal sexual conduct and one count of assault and battery. The State of Michigan Court of Appeals upheld Mr. Hardy's conviction.
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 PEER is a nonprofit service organization that works on behalf of public employees to address agency wrongdoing.
5. 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. Specifically, the report addresses the adequacy of the USFS agency response to the sexual assaults and its handling of the perpetrator as well as of his victims.
6. On November 21, 2011, Plaintiff submitted the FOIA request to USDA OIG's Chief Counsel. In a letter dated December 29, 2011, USDA OIG Assistant Counsel Allison Decker responded by denying PEER's FOIA request by invoking the Privacy Act, 5 U.S.C. §§ 552a and 552a(b). In this response, USDA OIG stated that "Section 552(a) of the PA prohibits the release of information unless a court order has been issued or prior written consent has been provided by the person to whom the records pertain. Therefore, we are prohibited from releasing the information you requested without the consent of the

person who is the subject of your request.” USDA OIG denied the disclosure of all requested documents, claiming exemption from disclosure under the Privacy Act section 552a(b).

7. On January 5, 2012, Plaintiff appealed USDA OIG’s denial of Plaintiff’s FOIA request. Plaintiff appealed USDA OIG’s denial on the following grounds: 1) OIG failed to show that the Privacy Act exempts the requested document from disclosure; 2) OIG failed to adequately explain why the agency’s basis for nondisclosure applies to the requested report; 3) OIG made no attempt to segregate nonexempt from exempt material; and 4) OIG failed to show that privacy rights outweighed disclosure as required by Exemption 6.
8. USDA OIG acknowledged receipt of Plaintiff’s appeal by a letter dated January 30, 2012 and assigned the appeal number 12-0043.
9. USDA OIG responded to the FOIA Appeal in a letter dated May 18, 2012. In this letter, Phyllis K. Fong, Inspector General of the USDA, affirmed the decision to deny PEER’s FOIA request. Invoking 5 U.S.C. §§ 552(b)(6), (7)(C), and 552a(b), the letter stated “FOIA requires the release of agency records, except where one or more of the nine enumerated exemptions apply. See 5 U.S.C. § 552(b). After carefully considering your appeal, I am affirming, on modified grounds, Ms. Decker’s decision to deny your request.” In its appeal denial, USDA OIG additionally invoked FOIA exemptions 6 and 7(C), but did not adequately explain why the privacy interests of Mr. Hardy outweighed the public’s interest in this case. Additionally, the USDA OIG failed to provide adequate explanation for the USDA OIG’s lack of attempt to segregate exempt material from nonexempt material.

10. USDA OIG's conduct constitutes a violation of FOIA. USDA OIG's conduct frustrates Plaintiff's efforts to educate the public regarding how government agencies operate.
11. Plaintiff seeks a court order requiring USDA OIG to immediately produce the documents sought in the November 21, 2011 FOIA request, 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 ("PEER") 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](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.
19. Defendant USDA OIG 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. On November 21, 2011, Plaintiff submitted a FOIA request (No. 12-00025) to USDA OIG seeking a copy of a report of investigation or other report by the USDA OIG concerning a now-former U.S. Forest Service ("USFS") employee named Joe E. Hardy II in connection with sexual assaults he allegedly committed against other USFS employees.

21. In a letter dated December 29, 2011, USDA OIG's Assistant Counsel, Alison Decker, denied Plaintiff's FOIA request, invoking the Privacy Act ("PA"), 5 U.S.C. § 552a(b). In refusing to release the requested report, the USDA OIG stated that "[s]ection 552a(b) of the PA prohibits the release of information unless a court order has been issued or prior written consent has been provided by the person to whom the record pertain." No mention was made of any applicable FOIA exemptions to the request report.
22. On January 5, 2012, Plaintiff appealed USDA OIG's denial of Plaintiff's FOIA request. Plaintiff appealed USDA OIG's denial on multiple grounds.
23. Plaintiff appealed USDA OIG's denial on the grounds that USDA OIG's failed to show that the Privacy Act exempts the requested document from disclosure. Disclosure of information otherwise excluded by the Privacy Act is required where the records are properly disclosable under FOIA. 5 U.S.C. § 552a(b)(2).
24. Plaintiff also appealed USDA OIG's denial stating that USDA OIG has no basis for nondisclosure under the privacy exemption of FOIA. Specifically, the USDA OIG failed to set forth any basis for nondisclosure under FOIA in its initial response dated December 29, 2011.
25. Plaintiff also appealed on the grounds that USDA OIG failed to show that privacy rights outweighed disclosure as required by FOIA Exemption 6. Specifically, USDA OIG failed to address any FOIA exemptions in its letter dated December 29, 2011.
26. Plaintiff also appealed on the grounds that USDA OIG made no apparent attempt to segregate nonexempt from exempt material.

27. USDA OIG acknowledged receipt of Plaintiff's appeal by a letter dated January 30, 2012 and assigned the appeal number FOIA Appeal 12-0043.
28. On May 18, 2012, USDA OIG's Inspector General Phyllis K. Fong responded to Plaintiff's appeal and denied it in total.
29. In this May 18, 2012 denial of the appeal, USDA OIG affirmed on modified grounds the initial decision to deny the request. In the May 18 letter, USDA OIG reaffirmed the denial under the Privacy Act and additionally invoked FOIA exemptions 7(C) and 6.
30. USDA OIG reaffirmed the denial under the Privacy Act, explaining "[t]he PA states that '[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains,' or if one or more exceptions apply." Citing to 5 U.S.C. § 552a(b). The USDA OIG further stated "[y]ou have not produced evidence that the person to whom the records relate has given written consent to their disclosure." This requirement is overcome by the authorization of disclosure of records that are required to be released under FOIA, even if they are protected by the Privacy Act. 5 U.S.C. § 552a(b)(2).
31. USDA OIG's May 18 denial also cited FOIA Exemption 7(C) and Exemption 6 as additional justifications for refusing to disclose the requested report of investigation. In order to exempt a record from release under FOIA, it must be established that a privacy interest exists through an exemption (such as 7(C) and 6), and that this privacy interest outweighs the public interest.

32. USDA OIG invoked FOIA Exemption 7(C), stating that “disclosure of law enforcement records concerning an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Citing to 5 U.S.C. §552(b)(7)(C). They further argued that ““when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted.”” However, Plaintiff asserts that the requested documents would inform the public “what the Government is up to” in relation to internal investigations of incidents of sexual assault allegedly perpetrated by an agency employee upon other agency employees. No further justification for protecting Mr. Hardy’s privacy at the expense of agency transparency was provided under 7(C). Such explanations are insufficient to meet the USDA OIG’s burden of justifying applying Exemption 7(C) to withhold the requested records.
33. USDA OIG also invoked FOIA Exemption 6 in denying the request. The USDA OIG broadly denied the request on the grounds that these records fulfill the exemption if they “contain [ ] information regarding a particular individual”. No explanation was made as to whether this is an “unwarranted” invasion of privacy. Plaintiff asserts that the USDA OIG provided inadequate justification for valuing Mr. Hardy’s privacy over the public’s interest in the transparency of USFS’s handling of a sexual assault case involving its employees. USDA OIG’s explanations are insufficient to meet its burden of justifying the application of Exemption 6 to withhold the requested records.
34. In its May 18 appeal denial, USDA OIG also attempted to balance the public’s right to disclosure against privacy rights, and found that because the information contained



names, identifying information, and other personal information, privacy rights outweighed the public interest. USDA OIG claimed that the OIG investigations did not deal with the behavior of the USFS, but with Mr. Hardy's actions. USDA OIG further asserts that "[e]ven if there is a public interest in the U.S. Forest Service's actions... it is unlikely that releasing information relating to OIG's investigations of Mr. Hardy would advance such an interest." The USDA OIG does not provide any further reasoning. Plaintiff asserts that a criminal investigation involving its own employees would necessarily involve details pertaining to the actions of the agency itself, and would reveal any misconduct by the USFS in the handling of such incidents. USDA OIG's explanations are insufficient to meet its burden of justifying the application of Exemptions 7(C) and 6 to withhold the requested records.

35. Lastly, in the May 18 denial, USDA OIG asserted that the factual material was inextricably intertwined with deliberative material and thus could not be segregated. Plaintiff asserts that the segregated report would reveal any misconduct by the USFS in their handling of Mr. Hardy's actions, specifically, whether the investigation was timely, what support was provided to the victims, and the adequacy of employee background checks performed by the agency.
36. USDA OIG's reasons for withholding the report are insufficient and in violation of FOIA because USDA OIG is withholding information properly requested by Plaintiff under FOIA without adequately justifying the withholding.

37. 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 access to agency records guaranteed by FOIA.
38. 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**

39. Plaintiff repeats the allegations in paragraphs 1 through 38.
40. Defendant’s failure provide the requested information is a violation of FOIA, 5 U.S.C. § 552, and the agency’s own regulations promulgated thereunder.
41. Plaintiff’s FOIA request has been wrongfully denied and information responsive to Plaintiff’s FOIA request has been improperly withheld.

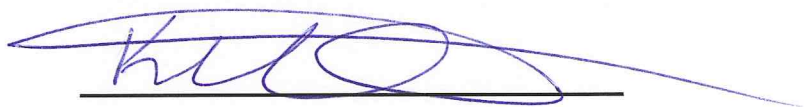
### **RELIEF REQUESTED**

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, the 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: July 5, 2012

Respectfully submitted,



Kathryn Douglass  
DC Bar No. 995841  
Staff Counsel  
Public Employees for Environmental Responsibility  
2000 P Street, NW, Suite 240  
Washington, D.C. 20036  
(202) 265-7337