

**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. )

U.S. DEPARTMENT OF AGRICULTURE )  
FOREST SERVICE, )  
1400 Independence Ave., SW )  
Washington, D.C. 20250 )

Defendant. )

Civil Action #

Date: September 9, 2010

**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. Forest Service ("USFS") 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. 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 about any restrictions placed on USFS employees when contacted by media representatives and how the USFS handles or responds to requests from the news media in general.

3. On February 16, 2010, Plaintiff submitted a Freedom of Information Act request to the USFS regarding directives to its employees concerning coordination or handling of news media inquiries. USFS acknowledged receipt of the request on February 23, 2010. On April 2, 2010, USFS partially responded to the FOIA and provided 57 pages of responsive documents. On April 26, 2010, USFS sent its final response, attaching one additional document. The additional document was a one-page memo from Thomas L. Tidwell, Chief of the Forest Service to his leadership directorate dated August 25, 2009 concerning media contacts. The memo referred to “disturbing information” the Chief had received concerning contact between employees and the news media. USFS, failed, however, to provide the documents reflecting the “disturbing information” referenced in the memo. In addition, USFS failed to produce any documents explaining the origin or basis of the August 25 memo. On May 24, 2010, Plaintiff filed an administrative appeal the partial denial. On May 25, 2010, USFS acknowledged receipt of the appeal (Appeal # 4557-A). On August 26, USFS sent Plaintiff an email explaining that the agency was still searching for responsive documents.
4. To date, USFS has not provided documents or a final response to Plaintiff’s appeal regarding the partial denial of its February 16, 2010, FOIA request.

5. USFS's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. USFS's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at USFS and is a violation of the FOIA.
6. Plaintiff seeks a court order requiring USFS to produce immediately the documents sought in the February 16, 2010 FOIA request, as well as other appropriate relief.

### **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. § 2412(d) and 5 U.S.C. § 552(a)(4)(E).
10. 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

11. Plaintiff PEER is a non-profit public interest organization, with its main office located Washington, D.C., and field offices located in California, Colorado, Florida, Massachusetts, New Mexico, 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 USFS 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

15. On February 16, 2010, Plaintiff submitted a Freedom of Information Act request to the USFS regarding directives to its employees concerning coordination or handling of news media inquiries. Specifically, Plaintiff requested the following: (1) any memo, directive or reminder from the Chief of the USFS concerning “National Media Contacts” or similar subject in which USFS employees are provided guidance in how to handle media inquiries; (2) any communications to or from the Chief of the USFS concerning how a specific actual media request or reporter was to be handled or was in fact handled; (3) any memo, directive or reminder issued to USFS employees within the Law Enforcement and Investigations Division concerning how they are to respond to requests or inquiries from media representatives; (4) any documents which reflect the rationale or basis for items 1 through 3, above; and (5) records of any media contact which originated with or was initiated by the USFS Director of Law Enforcement and Investigations.
16. USFS acknowledged receipt of the request in a letter dated February 23, 2010.
17. On April 2, 2010, USFS Office of Law Enforcement and Investigations sent Plaintiff a transmittal letter indicating that it was providing a partial response to the FOIA request. With the letter, USFS provided 57 pages of responsive documents.
18. On April 26, 2010, USFS sent Plaintiff its final response and provided one additional document. The additional document was a one-page memo from Thomas L. Tidwell, Chief of the Forest Service to his leadership directorate dated August 25, 2009 concerning media contacts. The memo contained the following statement: “I have

received disturbing information concerning contacts by some employees with national media, without coordination as codified in our directives.” USFS did not provide any documents reflecting this “disturbing information” nor did it provide any other document reflecting or explaining the origin or basis for the Chief’s 8/25/09 memo.

19. On May 24, 2010, Plaintiff filed an administrative appeal of the partial denial. Plaintiff asserted that responsive documents about the incidents that precipitated the aforementioned Chief’s memo, as well as intra-agency communications concerning the need for or basis of this memo were wrongfully withheld from the FOIA request. On that basis, Plaintiff appealed USFS’s final response to its FOIA request.
20. On May 25, 2010, USFS acknowledged receipt of the appeal (Appeal # 4557-A).
21. Several months later, by email dated August 26, 2010, USFS sent Plaintiff an email explaining that the agency was still searching for responsive documents.
22. To date, USFS has not provided responsive documents or a final response to Plaintiff’s FOIA appeal. In so doing, USFS 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).
23. 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.

## **CAUSES OF ACTION**

### **Count I: Violation of the Freedom of Information Act**

24. Plaintiff repeats the allegations in paragraphs 1 through 23.
25. Plaintiff would draw attention to the January 21, 2009 memo by President Barack Obama 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.”
26. USFS’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**

27. Plaintiff repeats the allegations in paragraphs 1 through 23.
28. USFS’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. USFS’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 the USFS has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing the USFS to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until the USFS is in compliance with FOIA, APA and every order of this Court;
- iv. Enter an Order declaring that Plaintiff is entitled to a full fee waiver under 5 U.S.C. § 552 (a)(4)(A)(iii) for Plaintiff's FOIA request to the extent that the USFS does not provide a full fee waiver for Plaintiff's request.
- v. Award Plaintiff its attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- vi. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: September 9, 2010

Respectfully submitted,

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