

**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. ENVIRONMENTAL PROTECTION)		Civil Action No.
AGENCY,)		
1200 Pennsylvania Avenue NW)		
Washington, DC 20460)		<u>COMPLAINT</u>
Defendant.)		

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. Environmental Protection Agency ("EPA") 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 sought records concern the promulgation of updated Protective Action Guides ("PAGs") currently under consideration for radiation protection decisions. Specifically, Plaintiff sought

all comments and communications within the EPA Office of Radiation and Indoor Air, as well as between government and private entities, concerning the development of PAGs.

3. The communications are a matter of public concern because they address whether EPA is meeting its mission of protecting the environment and public health with respect to radiation releases.
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 about the depth of environmental planning and consideration of alternatives that EPA has undertaken in preparing an important official guidance for safeguarding public health in the event of a nuclear incident.
5. On June 11, 2009, Plaintiff submitted a FOIA request (HQ-RIN # 01421-09) to the EPA. The agency constructively denied the June 2009 request by failing to respond within twenty (20) working days. Plaintiff appealed the constructive denial of its FOIA request on September 17, 2009 (HQ-APP # 00171-09). EPA acknowledged that it received the September 2009 appeal but failed to respond to it within 20 working days as required by law.
6. EPA’s conduct is arbitrary and capricious and amounts to a denial of Plaintiff’s FOIA request. EPA’s conduct frustrates Plaintiff’s efforts to educate the public regarding ongoing activities at EPA and is a violation of the FOIA.

7. Plaintiff seeks a court order requiring EPA to produce immediately the documents sought in the June 11, 2009 FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

8. 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).
9. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
10. 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).
11. 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

12. 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 York, New Jersey, and Tennessee.

13. 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.
14. 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.
15. Defendant EPA 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

16. On June 11, 2009, Plaintiff filed a FOIA request with the EPA OIG (Request # HQ-RIN-01421-09), seeking the agency's records regarding promulgation of updated Protective Action Guides ("PAGs") for radiation protection decisions. Specifically, Plaintiff sought "(1) all comments or communications, whether formal or informal, by state or local government officials or any other public agency officials, including federal officials,

concerning the development of updated EPA PAGs, (2) all comments or communications, whether formal or informal, by individuals or representatives of private corporations or trade associations concerning the development of updated EPA PAGs, and (3) all internal communications, including e-mails, meeting notes and other records, from EPA staff members both inside and outside the Office of Radiation and Indoor Air concerning the development of updated EPA PAGs.”

17. EPA acknowledged receipt of Plaintiff’s FOIA request in a letter dated the same day, June 11, 2009. After the statutory period for responding to the FOIA request had elapsed, in a letter dated July 15, 2009, the EPA indicated that due to the voluminous nature of responsive documents, it planned to make an interim release of information over a sixty (60) day time period and provide Plaintiff with “milestones” as they continued the review process.
18. On July 28, 2009, the EPA Office of Radiation and Indoor Air sent Plaintiff a letter it considered an “interim response” to Plaintiff’s FOIA request. However, the letter was not responsive to Plaintiff’s FOIA request, but rather concerned a phone call the agency had with an intern regarding the historical and legal basis for EPA’s role in preparing and updating PAGs. EPA provided no other documents in response to Plaintiff’s June 11, 2009 FOIA request.
19. On September 17, 2009, after the sixty (60) day time period in which EPA assured that it would provide documents had lapsed, Plaintiff filed an administrative appeal of EPA’s constructive denial of its FOIA request (HQ Appeal # 00171-09).
20. EPA acknowledged receipt of the appeal on the same day, September 17, 2009.

21. To date, EPA has not responded to or provided the requested documents in response to Plaintiff's September 17, 2009 appeal. In so doing, EPA 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).
22. 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.
23. 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

24. Plaintiff repeats the allegations in paragraphs 1 through 23.
25. EPA'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

26. Plaintiff repeats the allegations in paragraphs 1 through 23.
27. EPA'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. EPA'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 EPA has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing EPA to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until EPA 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: October 28, 2009

Respectfully submitted,

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