

**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.

DAVID BERNHARDT, in his official
capacity as Secretary of the U.S.
Department of the Interior; and U.S. FISH &
WILDLIFE SERVICE
1849 C Street, N.W.
Washington, DC 20240

Defendant

CIVIL ACTION NO.

COMPLAINT

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 Defendants David Bernhardt, the Secretary of the Interior, and the U.S. Fish and Wildlife Service (“USFWS”) to provide records that have not been provided pursuant to FOIA and its implementing regulations.

PARTIES

3. 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.

4. 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, and through publication of the PEER newsletter.

5. Defendant, David Bernhardt, is the U.S. Secretary of the Interior. He is sued here in his official capacity. Defendant USFWS, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). It is within the Department of the Interior (“DOI”) and supervised by the Secretary.

6. Defendants are charged with the duty to provide public access to records in their possession consistent with the requirements of FOIA. Here, Defendants are denying Plaintiff access to their records in contravention of federal law.

STATEMENT OF FACTS

7. The USFWS, under the direction and control of the Secretary of the Interior, manages the National Wildlife Refuge System, with over 400 System units across the country. In 2014 the USFWS adopted a ban, effective Jan. 1, 2015, on the use of any genetically modified crops (GMOs) and any neonicotinoid insecticides in agriculture conducted anywhere in the System via a Refuge System Director’s Memorandum titled, “Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System” (July 17, 2014).

8. Between 2010 and 2015, PEER conducted extensive litigation under the National Environmental Policy Act against the USFWS for improperly allowing GMO crops and neonicotinoid insecticides within the National Wildlife Refuge System. That litigation was a major factor in the USFWS’s decision in 2014 to adopt its ban.

9. The USFWS rescinded the ban on GMOs and neonicotinoid insecticides via a Memorandum dated August 2, 2018, from Gregory Sheehan, the Fish and Wildlife Service's Principal Deputy-Director, to Service Directorate, titled: "Withdrawal of Memorandum Titled, 'Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System.'" "

10. As a result, PEER determined to file FOIA requests to understand how the rescission of the ban was being implemented by the USFWS and the Secretary of the Interior.

PEER's First FOIA Request

11. On April 11, 2019, PEER submitted its FOIA request (later designated as OS-2019-0071), which sought the following documents from the Office of the Secretary of the Interior:

Copies of any and all documents and communications received, or generated, in the Department of the Interior (DOI) Office of the Secretary since August 2, 2018, regarding the Memorandum dated August 2, 2018, from Gregory Sheehan, then the Fish and Wildlife Service's Principal Deputy-Director, titled: Withdrawal of Memorandum Titled, "Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System" (July 17, 2014), (copied in full at this link: https://www.peer.org/assets/docs/fws/8_6_18_New_FWS_GMO_memo.pdf).

This request also includes, but is not limited to:

- a) Copies of any and all documents and communications that any DOI Office of the Secretary official sent to any Fish and Wildlife Service Headquarters official regarding the Memorandum and its implementation, and vice versa.*
- b) Any written description of the criteria to be used by the Fish and Wildlife Service for the "case-by-case basis" decisions regarding the use of any genetically modified crops or neonicotinoid pesticides described in the eighth and ninth paragraphs of the Memorandum.*
- c) Copies of any and all documents and communications that the DOI Office of the Secretary generated related to the Memorandum.*

12. In a letter dated April 15, 2019, the Office of the Secretary acknowledged receiving Plaintiff's April 11 FOIA request, assigned it reference number OS-2019-00710, and stated it was taking a "10-workday extension under 43 C.F.R. § 2.19. For the same reason, we are placing your request under the 'Complex' processing track. See 43 C.F.R. § 2.15."

13. On Aug. 5, Plaintiff sent a reminder that the response was overdue and requested a prompt response to the FOIA request. On Aug. 6, the Office of the Secretary acknowledged receiving Plaintiff's reminder but provided no estimated date for compliance.

14. On Sept. 3, Plaintiff sent another reminder and request. On Sept. 4, the Office of the Secretary again acknowledged receiving Plaintiff's reminder but provided no estimated date for compliance.

15. To date, the Secretary of the Interior has not responded by providing any of the requested documents.

PEER's Second FOIA Request

16. On Apr. 11, 2019, PEER submitted its second FOIA request, (later designated as FWS-2019-00645), which sought the following documents from the USFWS:

Copies of any and all documents and communications received, or generated, in the Fish and Wildlife Service Headquarters since August 2, 2018, regarding the Memorandum dated August 2, 2018, from Gregory Sheehan, then the Fish and Wildlife Service's Principal Deputy-Director, titled: Withdrawal of Memorandum Titled, "Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System" (July 17, 2014), (copied in full at this link: https://www.peer.org/assets/docs/fws/8_6_18_New_FWS_GMO_memo.pdf).

This request also includes, but is not limited to:

- a) Copies of any and all documents and communications that any Department of the Interior Headquarters official sent to any Fish and Wildlife Service Headquarters official regarding the Memorandum and its implementation, and vice versa.*
- b) Any written description of the criteria to be used by the Fish and Wildlife Service for the "case-by-case basis" decisions regarding the use of any genetically modified*

crops or neonicotinoid pesticides described in the eighth and ninth paragraphs of the Memorandum.

c) Copies of any and all documents and communications that the Fish and Wildlife Service Headquarters generated related to the Memorandum.

d) Copies of any and all documents and communications that any of the individual National Wildlife Refuges sent to the Fish and Wildlife Service Headquarters that relate to implementation of the Memorandum. and vice versa.

e) Copies of any and all documents and communications generated to comply with the National Environmental Policy Act, Endangered Species Act or any other Federal law in order to initiate the use of any genetically modified crop or neonicotinoid pesticide in the Refuges.

17. In an email dated April 12, 2019, the USFWS acknowledged receiving Plaintiff's April 11 FOIA request and assigned it reference number OS-2019-00645.

18. On July 10, the USFWS sent an acknowledgement letter indicating the FOIA request had been assigned to the "Complex" processing track and estimating a "1st interim release by August 1, 2019."

19. The USFWS did not release any responsive records by August 1, 2019.

20. On August 28, 2019 Plaintiff sent a reminder that the response was overdue and requested a prompt response to the FOIA request.

21. On August 29, 2019 the USFWS sent a letter, after receiving Plaintiff's reminder, suggesting an initial "interim release" may be provided by October 1, 2019.

22. On September 3, 2019 Plaintiff emailed another reminder and request for immediate response. However, to date, the USFWS has not responded by providing any of the requested documents.

CAUSE OF ACTION: FREEDOM OF INFORMATION

23. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.

24. 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).

25. The FOIA requires agencies to determine within 20 working days after the receipt of any FOIA request whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Agencies may only extend this time period for an additional 10 working days in “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i); see also 43 C.F.R. § 2.19 (DOI FOIA regulations specifying circumstances in which the agency may extend its deadline to reply). The FOIA also provides that upon request, agencies are to make records “promptly available.” 5 U.S.C. § 552(a)(3)(A).

COUNT I: Secretary of the Interior, Request OS-2019-0710
(Violation of FOIA, 5 U.S.C. § 552)

26. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.

27. PEER’s first FOIA request was received by the Office of the Secretary on April 11, 2019. A response to PEER’s FOIA Request was due by statute thirty working days—with the 10-day extension—from that date on May 27, 2019 (counting all weekdays).

28. As of this filing, Plaintiff has not received any documents responsive to its FOIA request, OS-2019-0710, or any communications from Defendant Secretary of the Interior regarding this request other than those described herein.

29. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.

30. Defendant Secretary of the Interior's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding how the rescission of the 2015 Refuges ban is being implemented by the Secretary of the Interior.

31. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the Secretary of the Interior to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

32. Defendant Secretary of the Interior's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful withholding of records in violation of 5 U.S.C. § 552.

COUNT II: USFWS, Request FWS-2019-00645
(Violation of FOIA, 5 U.S.C. § 552)

33. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.

34. PEER's second, similar, FOIA request was received by the USFWS on April 12, 2019. A response to PEER's FOIA Request was due by statute thirty working days—with the 10-day extension—from that date on May 28, 2019 (counting all weekdays).

35. As of this filing, Plaintiff has not received any documents responsive to its FOIA request, FWS-2019-00645, or any communications from Defendant USFWS regarding this request other than those described herein.

36. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.

37. Defendant USFWS's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding how the rescission of the 2015 Refuges ban is being implemented by the USFWS.

38. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the USFWS to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

39. Defendant USFWS's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful withholding of records in violation of 5 U.S.C. § 552.

JURISDICTION AND VENUE

40. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.

41. 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.

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

43. This Court is a proper venue because Defendants are in a government agency, the U.S. DOI, 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).

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

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter an order declaring that Defendants Secretary of the Interior and USFWS have wrongfully withheld the requested records;

2. Issue a permanent injunction directing Defendants to disclose to Plaintiff all wrongfully withheld documents;

3. Maintain jurisdiction over this action until Defendants are in compliance with the FOIA and every order of this Court;

4. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and

5. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on September 10, 2019,

/s/ Peter T. Jenkins

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