

**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.)

Civil Action #

OFFICE OF MANAGEMENT AND BUDGET)
725 17th Street, NW)
Washington, D.C. 20503)

&)

U.S. DEPARTMENT OF STATE)
2201 C Street, NW)
Washington, D.C. 20520)

Defendants.)

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 Office of Management and Budget (“OMB”) and the U.S. Department of State to disclose records withheld wrongfully after FOIA requests and subsequent appeals 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 OMB’s and the Department of State’s communications regarding the cultivation of genetically engineered or genetically modified crops (“GE”) on national wildlife refuges.
3. Plaintiff submitted a FOIA request to OMB dated April 19, 2011 requesting communications OMB had with both governmental and non-governmental entities regarding the cultivation of GE crops on national wildlife refuges. By an email dated April 20, 2011, OMB confirmed receipt of Plaintiff’s FOIA request and assigned it OMB FOIA number 11-106. On June 9, 2011, after the statutory period for responding to the FOIA request elapsed, Plaintiff filed an administrative appeal of the constructive denial of its request. OMB has never acknowledged or responded to Plaintiff’s administrative appeal. It has now been well over the twenty day statutory time limit for OMB to produce documents responsive to Plaintiff’s FOIA request.
4. OMB’s conduct is arbitrary and capricious and amounts to a denial of Plaintiff’s FOIA request. OMB’s conduct frustrates Plaintiff’s efforts to educate the public regarding ongoing activities as OMB and is a violation of the FOIA.
5. Plaintiff submitted a FOIA request to the Department of State dated April 20, 2011 requesting communications the Department of State had with both governmental and non-governmental entities regarding the cultivation of GE crops on national wildlife

refuges. On May 11, 2011, the Department of State confirmed receipt of Plaintiff's FOIA request and assigned it Case Control Number 201103186. On June 10, 2011, after the statutory period for responding to the FOIA request elapsed, Plaintiff filed an administrative appeal of the constructive denial of its request.

6. The Department of State acknowledged Plaintiff's administrative appeal in a letter dated June 23, 2011, but did not respond to the original FOIA request. In that letter, the Department of State claimed that the Plaintiff's FOIA request was not subject to administrative appeal at that time, as the agency had not denied any specific material in response to Plaintiff's request. In this letter, the Department of State stated that Plaintiff is not required to file an administrative appeal prior to instituting suit in federal court concerning the Department of State not meeting the statutory time frame to respond.
7. On July 12, 2011, well over the twenty day statutory time limit for the Department of State to produce documents responsive to Plaintiff's FOIA request, the agency sent Plaintiff a letter and indicated that it had identified five responsive documents, but referred them to other unspecified government offices to respond.
8. The Department of State's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. The Department of State's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at the Department of State and is a violation of the FOIA.
9. Plaintiff seeks a court order requiring OMB and the Department of State to produce immediately the documents sought in the April 19, 2011 FOIA request to OMB and the April 20, 2011 FOIA request to the Department of State, as well as other appropriate relief.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over the action under 28 U.S.C. § 1331 (federal question jurisdiction).
11. This Court has the authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
12. This court has the authority to award costs and attorney's 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, Arizona, Colorado, Florida, Massachusetts, 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 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. Defendants are agencies of the United States as defined by 5 U.S.C. § 552(f)(1), and are charged with the duty to provide public access to documents in their possession consistent with the requirements of FOIA. They are denying Plaintiff access to its records in contravention of federal law.

FACTS

18. In April of 2011, Plaintiff filed two separate but related FOIA requests seeking agency records of communications regarding the cultivation of GE crops on national wildlife refuges. The initial date of each of Plaintiff's separate requests and corresponding request numbers are:

- (1) April 19, 2011 PEER FOIA; OMB Request No. 11-106; and
- (2) April 20, 2011 PEER FOIA; Department of State Case Control No. 201103186.

April 19, 2011 PEER FOIA; OMB Request No. 11-106

19. On April 19, 2011, Plaintiff submitted a Freedom of Information Act request to the OMB requesting records relating to the cultivation of GE crops on national wildlife refuges. Specifically Plaintiff requested the following: (1) All communications to and from outside (non-federal) entities, including corporations or individuals, concerning cultivation of GE crops on national wildlife refuges; and (2) All communications to and

from other federal agencies, including the U.S. Fish and Wildlife Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges. These requests covered communications from January 1, 2009 to the date Plaintiff filed its FOIA request.

20. OMB acknowledged receipt of Plaintiff's FOIA request by an email dated April 20, 2011.
21. On June 9, 2011, following the statutory time-limit for producing documents, Plaintiff filed an administrative appeal of OMB's constructive denial of its FOIA request.
22. OMB did not send an acknowledgment, respond to, or provide the requested documents to Plaintiff's June 9, 2011 appeal in the statutory time required.
23. To date, OMB has still not responded to the FOIA request or appeal. In doing so, OMB 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).*
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.

April 20, 2011 PEER FOIA; Department of State Case Control No. 201103186

25. On April 20, 2011, Plaintiff submitted a Freedom of Information Act request to the Department of State requesting records relating to the cultivation of GE crops on national wildlife refuges. Specifically Plaintiff requested the following: (1) All communications to and from outside (non-federal) entities, including corporations or individuals, concerning cultivation of GE crops on national wildlife refuges; and (2) All communications to and from other federal agencies, including the U.S. Fish and Wildlife

Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges. These requests covered communications from January 1, 2009 to the date Plaintiff filed its FOIA request.

26. The Department of State acknowledged receipt of Plaintiff's FOIA request by a letter dated May 11, 2011.
27. On June 10, 2011, following elapse of the statutory time-limit for producing documents, Plaintiff filed an administrative appeal of the Department of State's constructive denial of its FOIA request.
28. The Department of State acknowledged Plaintiff's administrative appeal in a letter dated June 23, 2011, but did not respond to the original FOIA request. The Department of State claimed that although it had not met the FOIA imposed deadline for responding to a FOIA request, Plaintiff could not file an administrative appeal of its FOIA request at that time, as it had not denied any specific material. The Department of State stated that Plaintiff is not required to file an administrative appeal prior to instituting suit in federal court concerning the Department of State not meeting the statutory time frame to respond.
29. On July 12, 2011, the Department of State sent Plaintiff another letter indicating that it had found five documents within the scope of Plaintiff's FOIA request. The agency did not provide Plaintiff with those documents, but rather referred them to other unspecified offices. The agency has still not produced documents responsive to Plaintiff's request and it is well over the twenty day statutory time limit.

30. By refusing to send all records in its possession which meet the criteria of the FOIA request, the Department of State has constructively denied the FOIA request in violation of FOIA. 5 U.S.C. § 552.
31. 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

32. Plaintiff repeats allegations in paragraphs 1 through 31.
33. The OMB and the Department of State's failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agencies' own regulations promulgated thereunder.

Count II: Violation of the Administrative Procedure Act

34. Plaintiff repeats the allegations in paragraphs 1 through 31.
35. The OMB and Department of State'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. Their 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 OMB and the Department of State have wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing OMB and the Department of State to disclose to the Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until both the OMB and the Department of State are in compliance with FOIA, APA and every other 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 either the OMB or the Department of State 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: July 21, 2011

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

**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.)	Civil Action #
)	
U. S. TRADE REPRESENTATIVE,)	
600 17th Street NW)	
Washington, D.C. 20508)	<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 United States Trade Representative ("USTR") to disclose records withheld wrongfully after FOIA requests and subsequent appeals 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 potential planting of Genetically Engineered (GE) crops in national wildlife refuges.

3. Plaintiff submitted a FOIA request to the USTR dated April 25, 2011. USTR acknowledged receipt of PEER's FOIA request in a letter dated June 8, 2011. They stated that they had located twenty documents within the scope of the request, but that they would not produce any documents. USTR indicated that the agency was withholding one document pursuant to 5 U.S.C. § 522(b)(5) of the Freedom of Information Act (Exemption 5), and that they had referred sixteen additional documents to the Office of Science and Technology Policy (OSTP) and three documents to the Department of the Interior (DOI) for final disclosure determinations. Plaintiff appealed the Exemption 5 claim and the constructive denial of its FOIA request on June 13, 2011. USTR has not responded to the appeal.
4. USTR's conduct is arbitrary and capricious and amounts to a denial of Plaintiff's FOIA request. USTR's conduct frustrates Plaintiff's efforts to educate the public regarding ongoing activities at the USTR and is a violation of the FOIA.
5. Plaintiff seeks a court order requiring USTR to produce immediately the documents sought in the April 25, 2011 FOIA request, as well as other appropriate relief.

JURISDICTION AND VENUE

6. 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).

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

10. Plaintiff PEER is a non-profit public interest organization, with its main office located Washington, D.C., and field offices located in California, Arizona, Colorado, Florida, Massachusetts, New Jersey, and Tennessee.
11. 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.
12. 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, 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.

13. Defendant USTR 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

14. On April 25, 2011, PEER filed a FOIA request seeking agency records. The USTR number assigned to the request is Case File # 11042618.
15. Plaintiff's FOIA Request sought the following information from the USTR on the topic of the cultivation of genetically modified or genetically engineered crops (hereafter "GE") on national wildlife refuges: (1) all communications to and from outside (non-federal) entities, including corporations, or individuals concerning cultivation of GE crops on national wildlife refuges, and (2) all communications to and from other federal agencies, including the US Fish and Wildlife Service and the Department of Interior, concerning cultivation of GE crops on national wildlife refuges.
16. USTR acknowledged receipt of Plaintiff's FOIA request in a letter dated June 8, 2011, outside of the twenty day limit imposed by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i).
17. Within that same communication, USTR stated that they had located twenty documents within the scope of the request, but that they would not produce any documents. USTR indicated that the agency withheld one document pursuant to 5 U.S.C. § 522(b)(5) of the Freedom of Information Act (Exemption 5), and that they had referred sixteen documents

to the Office of Science and Technology Policy (OSTP) and three documents to the Department of the Interior (DOI) for final disclosure determinations.

18. By letter dated June 13, 2011, Plaintiff filed an administrative appeal of USTR's response to its FOIA request, citing USTR's failure to provide any justification for withholding documents under Exemption 5, and USTR's constructive denial of the request by referring documents to other agencies.
19. USTR did not respond to Plaintiff's June 13, 2011 appeal, nor did it provide the requested documents. In so doing, USTR 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).
20. The DOI sent Plaintiff a letter on June 30, 2011, saying that they had received USTR's referral, and that they had located the three documents which the USTR has referred to them. The DOI released those three documents to Plaintiff in full. The OSTP has not acknowledged the referral or done anything to provide Plaintiff with the sixteen referred documents. Plaintiff has not heard anything further from the USTR or the OSTP regarding the documents referred to the OSTP.
21. 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

22. Plaintiff repeats the allegations in paragraphs 1 through 21.

23. USTR'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. 15 C.F.R. §§ 2004.1-2004.11 (2011).

Count II: Violation of the Administrative Procedure Act

24. Plaintiff repeats the allegations in paragraphs 1 through 21.

25. USTR'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. USTR'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 USTR has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing USTR to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until USTR 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 both of Plaintiff's FOIA requests to the extent that USTR does not provide a full fee waiver for both of Plaintiff's requests;

- 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: July 21, 2011

Respectfully submitted,

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