

**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. FISH AND WILDLIFE SERVICE,)
4401 North Fairfax Drive)
Arlington, VA 22203)
)
Defendant.)

Civil Action #

COMPLAINT

PRELIMINARY STATEMENTS

1. Plaintiff Public Employees for Environmental Responsibility (“PEER”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, against Defendant U.S. Fish & Wildlife Service (“FWS”), a division of the Department of Interior. Specifically, PEER seeks injunctive and other appropriate relief including the disclosure and release of agency records that FWS improperly withheld in responding to PEER’s FOIA request.
2. FOIA requires that federal agencies 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 directs agencies to “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).

3. 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.
4. Plaintiff submitted a FOIA request on May 1, 2013, (Request No. DOC-FWS 2013-00776), seeking records related to Defendant’s Office of the Science Advisor (“OSA”) reports. Plaintiff requested (1) any reviews or reports of investigation completed by OSA personnel, (2) any responses or decisions issued in response to those reviews or reports issued by the FWS Director or his deputies; and (3) any summary or analysis of the activities of the OSA.
5. When Defendant refused to release certain of the requested records, PEER brought an administrative appeal, resulting in Defendant’s ordered release of withheld records and subsequent decision on remand to release further records. However, the continued insufficiency of Defendant’s response led PEER to bring a second appeal, to which Defendant has failed to respond within the statutory period. Defendant continues to fail to provide any documents on FWS’s handling of and responses to scientific misconduct.
6. Defendant’s failure to provide any documents on agency responses to scientific misconduct reports and handling of scientific misconduct when found is arbitrary and capricious and amounts to a denial of Plaintiff’s FOIA request. This conduct frustrates the public’s right to know about scientific integrity at FWS, how the agency protects scientists from political pressure, and how the agency reforms and responds to scientific misconduct.
7. Similarly, Defendant’s failure to provide the Appendices (A-P) of Report ESO-S0000340 (described below) is arbitrary and capricious and amounts to a denial of Plaintiff’s FOIA request. Although the agency released portions of this report after PEER’s first appeal, it withheld key portions without providing a rationale. This conduct frustrates the public’s

right to know about scientific integrity at FWS and how the agency protects scientists from political pressure.

8. Plaintiff constructively exhausted its administrative remedies under FOIA, 5 U.S.C. § 552(a)(6)(C), and now seeks an order from this Court requiring Defendant to immediately produce the records sought in its FOIA requests as well as other appropriate relief.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
10. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
11. This Court is a proper venue because Plaintiff resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(C) (where defendant is the government or a government agent, a civil action may be brought in the district where the plaintiff resides if there is no real property at issue). Venue is also proper under 5 U.S.C. § 552(a)(4)(B).
12. 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).

PARTIES

13. 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 Jersey, and Tennessee.
14. 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. PEER focuses on the environment, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government.

15. In fulfilling its mission, PEER has an interest in ensuring that government agencies like FWS properly execute the new and developing scientific integrity policies. Plaintiff's FOIA request sought to uncover how Defendant handled the first two cases where scientific misconduct was found: Case ESO-S0000328 concerning an improperly-used map related to the American burying beetle range and Case ESO-S0000340 involving a deliberate decision to move a contaminant monitoring site further away from the suspected contaminant. Plaintiff's request would help serve the public because the records sought will shed direct light on scientific integrity at FWS, how the agency protects scientists from political pressure, and how the agency reforms and responds to scientific misconduct.
16. Defendant, FWS, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).
17. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

FACTS

18. Under the Department of Interior's Scientific Integrity Policy developed in response to the President's scientific integrity policies, a Department Scientific Integrity Officer (DSIO) or Bureau Scientific Integrity Officer (BSIO) investigates allegations of scientific misconduct. When the DSIO or BSIO finds that misconduct occurred or that scientific integrity was lost, he or she prepares a Scientific Integrity Summary Report. The DSIO may also convene a Scientific or Scholarly Integrity Review Panel (SIRP), which will write a report only if it

finds scientific misconduct by consensus. Department of Interior Department Manual, 305 DM §§ 3.8(E), (F), Appendix D.

19. When the DSIO, BSIO or applicable Integrity Review Panel finds scientific misconduct and issues a Scientific Integrity Report, managers “will take steps” to correct the loss of integrity and prevent similar future occurrences. 305 DM 3.8(G)(1).
20. Within the FWS, scientific integrity investigations fall under the OSA.
21. Plaintiff submitted a FOIA request to Defendant on May 1, 2013, seeking records related to any investigations concerning scientific misconduct. Specifically, Plaintiff sought: (1) any reviews or reports of investigation completed by OSA personnel, (2) any responses or decisions issued in response to those reviews or reports issued by the FWS Director or his deputies; and (3) any summary or analysis of the activities of the OSA.
22. On May 2, 2013, Ray McLaughlin, FWS’s Alternate FOIA Officer, acknowledged receipt of Plaintiff’s FOIA request and assigned it request number DOC-FWS 2013-00776.
23. In a letter dated July 22, 2013, Richard A. Coleman, Senior Science Advisor and Scientific Integrity Officer responded in full to Plaintiff’s FOIA request, providing ninety-one pages of documents. FWS also withheld fifty-seven pages citing 5 U.S.C. §§ 552(b)(5) and (b)(6) (Exemptions 5 and 6). FWS stated that these documents were Scientific Integrity Summary Reports and Scientific Integrity Review Panel Reports (collectively, “Scientific Integrity Reports”) on two cases. FWS did not provide documents on management’s steps to correct losses of scientific integrity and prevent future losses.
24. On August 19, 2013, with supplement submitted on September 20, 2013, Plaintiff appealed the Exemption 5 withholdings and also requested that FWS conduct an adequate search for Scientific Integrity Reports on Case ESO-S0000340.

25. On January 24, 2014, Darrell Strayhorn, FOIA Appeals Officer, issued a decision on Plaintiff's appeal, granting it in part and denying it in part. As a result, FWS released to Plaintiff redacted versions of four reports on Case ESO-S0000328: a final report and a summary report by the BSIO and a final report and summary report by the SIRP. Additionally, FWS was directed on remand to review its withholding Scientific Integrity Reports on Case ESO-S0000340. Despite the documented losses of scientific integrity, FWS provided no records showing management's steps to correct losses of scientific integrity and prevent future losses.
26. In a letter dated April 16, 2014, Richard A. Coleman, Scientific Integrity Officer, transmitted to Plaintiff the redacted versions of two DSIO Scientific Integrity Reports on Case ESO-S0000340 on remand, without Appendices (A-P) to one report.
27. According to the Scientific Integrity Policy, Scientific Integrity Reports include "[a]ppendices as needed containing supporting documents and written statements." 305 DM Appendix D.
28. On April 17, 2014, Plaintiff wrote an email to agency representatives inquiring about the absence of: "any responses or decisions issued in response to those reviews or reports issued by the FWS Director or his deputies" and Appendices (A-P) from one full Scientific Integrity Report on Case ESO-S0000340 in the last production. The agency failed to respond within twenty working days, as provided in 5 U.S.C. § 552(a)(6)(A)(ii).
29. Plaintiff appealed this constructive denial of the FOIA request on May 14, 2014.
30. To date, Plaintiff has not received any records responsive to its May 1, 2013 request for agency responses or decisions in response to Scientific Integrity Reports, nor has it received

Appendices (A-P) to one Scientific Integrity Report on Case ESO-S0000340. Defendant has not given any indication that such production is imminent.

31. Plaintiff has afforded Defendant ample time beyond that which is legally required to respond to the appeal. Nearly thirty-nine working days, two months, have passed since Plaintiff submitted its May 14, 2014, FOIA appeal to Defendant; the twenty work-day time frame for responding to FOIA appeals has passed.
32. Because administrative remedies under FOIA are deemed exhausted whenever an agency fails to comply with the applicable time limits, 5 U.S.C. § 552(a)(6)(C)(i), Plaintiff has constructively exhausted all administrative remedies.
33. Plaintiff now turns to this Court to enforce FOIA's remedies and its guarantee of public access to agency records.

CAUSE OF ACTION

Violation of the Freedom of Information Act

34. Plaintiff incorporates the allegations in paragraphs 1 through 33.
35. Defendant's failure to disclose the records requested under Request No. DOC- FWS 2013-00776 within the time frames mandated by statute is a constructive denial and wrongful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the Agency's own regulations promulgated thereunder.

Relief Requested

WHEREFORE, Plaintiff respectfully requests 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 records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with FOIA, the Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiff 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 8, 2014

Respectfully submitted,

/s/
Paula Dinerstein, DC Bar # 333971

Public Employees for Environmental
Responsibility,
200 P Street, NW Suite 240
Washington, D.C. 20036
(202) 265-7337
Attorney for Plaintiff