

Sample Government in the Sunshine Act Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENERGY RESEARCH FOUNDATION
537 Harden Street
Columbia, S.C. 29205
(803) 256-7298
NATURAL RESOURCES DEFENSE COUNCIL, INC.
1350 New York Avenue, N.W.
Suite 300
Washington, D.C. 20005
(202) 783-7800, and
MICHAEL F. LOWE,
2430 Terrace Way
Columbia, S.C. 29205,
Plaintiffs,
v.
DEFENSE NUCLEAR FACILITIES SAFETY BOARD
Washington, D.C. 20585
Defendant.

C.A. No. _____

COMPLAINT FOR DECLATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Government-in-the-Sunshine Act, 5 U.S.C. § 552b (“Sunshine Act”), and the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), in order to compel the Defense Nuclear Facilities Safety Board (“the Board”) to provide for public access to its meetings and records, and to comply with other requirements of these statutes.

Jurisdiction

2. This Court has jurisdiction over this action under 5 U.S.C. §§ 552b(g) and (h) (the Sunshine Act), 5 U.S.C. § 552(a)(4)(B) (the FOIA), and 28 U.S.C. § 1331 (federal question jurisdiction).

Parties

3. Plaintiff Energy Research Foundation (“ERF”) is a non-profit public-interest foundation which engages in research and public education on nuclear and other energy issues in South Carolina. ERF is particularly concerned with the effect of nuclear activities at the Department of Energy’s Savannah River site in South Carolina on the environment, public health, and economy of the surrounding community. ERF has closely monitored and sought to participate in federal decision making related to environmental and public health problems at the Savannah River facility. In order to continue this work, ERF seeks access to the Board and its activities, including attending the Board’s meetings and obtaining access to its records.

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4. Plaintiff Natural Resources Defense Council, Inc. (“NRDC”) is a national, nonprofit membership organization incorporated under the laws of the state of New York. NRDC works to preserve, protect, and defend natural resources and the environment against misuse and unreasonable degradation, and to take appropriate legal steps to carry out these purposes. NRDC has a nationwide membership of over 88,000 members of the public dedicated to the defense and preservation of the human environment. Many members have joined NRDC so that they may obtain adequate representation and protection of the environmental interests they share with NRDC.

5. One of NRDC’s objectives is to inform and educate the public about environmental and public safety and health issues at Department of Energy facilities. It has closely monitored and sought to participate in federal decision making related to environmental and public health problems at Department of Energy facilities. In order to continue this work, NRDC seeks access to the Board’s meetings and records.

6. Plaintiff Michael F. Lowe is a resident of South Carolina and Program Coordinator of ERF. He is concerned about the environmental and public health impacts of Department of Energy facilities in his state. He wishes to attend Board meetings, obtain access to Board records, and participate in the Board’s activities in other ways authorized by the Sunshine Act, FOIA, and other open government laws.

7. Defendant Defense Nuclear Facilities Safety Board is an agency of the United States, and is denying plaintiffs access to its meetings and records in contravention of federal law.

Statutory Framework and Facts Giving Rise To Plaintiffs’ Claims for Relief The Board’s Functions and Powers

8. In 1988, Congress created “an independent establishment in the executive branch” called the Defense Nuclear Facilities Safety Board. 42 U.S.C. § 2286(a). The Board is composed of five members appointed by the President with the advice and consent of the Senate. 42 U.S.C. § 2286(b).

9. The Board is authorized and commanded by statute to perform a variety of substantive duties, including (a) investigating any event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety, (b) reviewing and evaluating the content and implementation of standards relating to the design, construction, operation, and decommissioning of defense nuclear facilities, (c) determining whether the Secretary of Energy is adequately implementing health and safety standards in the operation of defense nuclear facilities, and (d) reviewing the design of every new Department of Energy defense nuclear facility before construction. 5 U.S.C. § 2886a.

10. In order to carry out its statutory duties, the Board is empowered to hold hearings, subpoena witnesses and documents, hire employees, impose binding reporting requirements for the Secretary of Energy including the reporting of classified information, and promulgate regulations. 5 U.S.C. § 2286b. The Board’s actions are expressly made subject to the judicial review provisions of the Administrative Procedure Act. 5 U.S.C. § 2286f (“APA”).

The Sunshine Act

11. The Sunshine Act requires that “every portion of every meeting” of a multi-member agency must “be open to public observation,” with narrow exceptions. 5 U.S.C. §§ 552b(b) and (c). The Sunshine Act also requires agencies to announce publicly the time, place, and subject matter of meetings at least a week before the meeting, 5 U.S.C. § 552b(e)(1), and to prepare a complete transcript or electronic recording of meetings that are closed for any reason, 5 U.S.C. § 552b(f). Agencies must also promulgate regulations implementing the requirements of the Sunshine Act. 5 U.S.C. § 552b(g).

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12. The Board has held meetings for the purpose of accomplishing its statutory duties, but has not provided for public access to those meetings nor has it complied with any of the other requirements of the Sunshine Act.

13. The Board will conduct additional meetings in the future, but does not intend to comply with the Sunshine Act.

The Freedom of Information Act

14. Section (a)(1) of the FOIA requires each executive branch agency to publish a number of items in the Federal Register, including the agency's "rules of procedure," "substantive rules of general applicability," and the employees "from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." 5 U.S.C. § 552(a)(1).

15. Section (a)(2) of the FOIA requires agencies to make available for public inspection and copying a number of records, including all "administrative staff manuals and instructions to staff that affect a member of the public," and "final opinions" of the agency. 5 U.S.C. § 552(a)(2).

16. Section (a)(3) of the FOIA authorizes members of the public to submit requests for other agency records. In order to facilitate the exercise of this right, the FOIA requires agencies to publish in the Federal Register, following public notice and comment, regulations specifying the schedule of fees applicable to the processing of FOIA requests and guidelines for determining whether fees for such requests should be waived or reduced. 5 U.S.C. § 552(a)(4)(A).

17. The Board has failed to promulgate any of the regulations required by the FOIA or to make available to the public any of the materials described in paragraphs 14-16.

Plaintiffs' Request to the Board

18. On January 23, 1990, plaintiffs ERF and NRDC sent the Board a detailed letter explaining that the Board was in ongoing violation of the Sunshine Act and the FOIA. Plaintiffs' letter specified seven actions that the Board needed to take in order to comply with those laws and requested a response by February 14, 1990.

19. By letter dated January 24, 1990, the Chairman of the Board informed plaintiffs that the Board did not believe it "is or has been in violation of any Federal laws. . . ." The letter did not discuss the Sunshine Act or the FOIA, nor did it respond to any of the specific requests made by plaintiffs. Plaintiffs were informed by the Department of Justice, which is acting as counsel for the Board, that an additional response to their letter would be forthcoming.

20. On February 16, 1990, plaintiffs' attorney was notified by the Department of Justice that the Board's final position is that it is not required to comply with any of the provisions of the Sunshine Act or the FOIA.

Count One

21. The Board is an agency subject to the requirements of the Sunshine Act but is not complying with any of the provisions of that Act. This failure is injuring and will continue to injure plaintiffs by preventing them from learning about and attending the Board's meetings.

Count Two

22. The Board is an agency subject to the requirements of the FOIA but is not complying with any of the provisions of that Act. This failure is injuring and will continue to injure plaintiffs by preventing them from learning about and obtaining access to Board records.

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Count Three

23. In failing to promulgate regulations, and to take other steps necessary to implement the Sunshine Act and the FOIA, the Board has unlawfully withheld and unreasonably delayed action, and has otherwise acted arbitrarily, capriciously, and contrary to law in violation of the APA, 5 U.S.C. §§ 555(b), 701-706.

WHEREFORE, plaintiffs pray that this Court:

- (1) Enter an order declaring that the Board:
 - (a) is subject to the Sunshine Act but is not complying with any of its requirements;
 - (b) is subject to the FOIA but is failing to promulgate regulations and make agency records available to the public as required by 5 U.S.C §§ 552(a)(1), (a)(2), and (a)(4);
 - (c) is unlawfully withholding and unreasonably delaying agency action, and is acting arbitrarily, capriciously, and contrary to law, in violation of the APA;
- (2) Enter an order preliminarily enjoining the Board from conducting any further meetings unless and until it undertakes to comply with the requirements of sections (b) through (g) of the Sunshine Act, 5 U.S.C. §§ 552b(b) - (g);
- (3) Enter a permanent injunction directing the Board to comply promptly with the requirements of the Sunshine Act and the FOIA;
- (4) Award plaintiffs their costs, reasonable attorneys' fees, and other disbursements in this action; and
- (5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Eric R. Glitzenstein
D.C. Bar No. 358287

Anne Spielberg

Dean R. Tousley
D.C. Bar No. 362678

Harmon, Curran & Tousley
Suite 430
2001 S Street, N.W.
Washington, D.C. 20009
(202) 328-3500

Dan W. Reicher

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D.C. Bar No. 418282
National Resources Defense Council
Suite 300
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7000

Robert Guild
Energy Research Foundation
537 Harden Street
Columbia, S.C. 29205
(803) 256-7298

Attorneys for Plaintiffs

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