



Public Employees for Environmental Responsibility

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September 17, 2014

Sonny Hashmi
Office of the Chief Information Officer
Attention: Section 515
U.S. General Services Administration
1800 F Street, NW, Room 2024
Washington, DC 20405

section515@gsa.gov

Re: Administrative Appeal of GSA's Sept. 11, 2014 response to an Information Quality Act complaint against GSA's *Categorical Exclusion for the Peace Bridge Commercial Building Expansion Project in Buffalo, New York*

By U.S. Mail & Email

Dear Mr. Hashmi:

Public Employees for Environmental Responsibility ("PEER") hereby submits this administrative appeal to the U.S. General Services Administration ("GSA") in response to GSA's recent rejection of PEER's May 21, 2014 Information Quality Act Complaint ("Complaint") against GSA's *Categorical Exclusion ("CATEX") for the Peace Bridge Commercial Building ("Commercial Building") Expansion Project in Buffalo, New York*, dated Nov. 15, 2012.¹ The Complaint was filed pursuant to the Data Quality Act of 2000,² the Office of Management and Budget ("OMB") Guidelines for Ensuring and Maximizing the Quality, Utility, and Integrity of Information disseminated by Federal Agencies ("OMB Guidelines"),³ and the GSA Information Quality Guidelines—Section 515 ("GSA Guidelines").⁴

PEER's Complaint was prompted by widespread media reports that raised questions about the integrity of GSA's CATEX for the Commercial Building Expansion Project and the possibility that pressure from elected officials—namely New York Gov. Andrew M. Cuomo, U.S. Sen. Charles E. Schumer, and U.S. Rep. Brian Higgins—influenced GSA's findings.^{5,6,7,8}

¹ U.S. General Services Administration, *Categorical Exclusion Checklist Documentation for Renovations and Addition to the Commercial Building, Peace Bridge Plaza, Buffalo, New York* (2012), available at <http://buffalorising.com/wp-content/uploads/2014/02/GSA-Categorical-Exclusion-2012.pdf>.

² Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554, Sec. 515.

³ Office of Mgmt. & Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (Feb. 22, 2002).

⁴ U.S. General Services Administration, *Information Quality Guidelines—Section 515* (2002), available at <http://www.gsa.gov/portal/category/21547>.

⁵ Jerry Zremski, *GSA review process for expansion called deficient*, The Buffalo News, Jan. 25, 2014, available at <http://www.buffalonews.com/city-region/gsa-review-process-for-expansion-called-deficient-20140125>.

⁶ Matthew Ricchiazzi, *Feds stonewall questions on thwarted Peace Bridge investigation*, Buffalo Rising, Feb. 18, 2014, available at <http://buffalorising.com/2014/02/feds-stonewall-questions-on-thwarted-peace-bridge-investigation>.

⁷ Matthew Ricchiazzi, *Federal document exposes frivolous environmental review on Peace Bridge project, GSA deception apparent*, Buffalo Rising, Feb. 26, 2014, available at <http://buffalorising.com/2014/02/federal-document-exposes-frivolous-environmental-review-on-peace-bridge-project-gsa-deception-apparent/>

One hundred thirteen days after PEER submitted a detailed 15-page Complaint (dated May 21, 2014), GSA responded with a 2-page rejection letter (dated Sept. 11, 2014). GSA bases its rejection on the claim that GSA's CATEX for the Commercial Building Expansion Project falls outside the scope of documents subject to the application of OMB and GSA Guidelines regarding information quality. For this reason, GSA unilaterally dismissed the entirety of PEER's Complaint. Specifically, GSA's rejection letter states the following as the basis for their rejection:

Regarding PEER's information quality objections to GSA's NEPA analysis, GSA does not agree that our CATEX falls within the scope of documents subject to the application of OMB's established information quality standards. Our Checklist CATEXes are not intended for public dissemination.

Unfortunately, the basis of GSA's rejection constitutes an obfuscation of the law and GSA's responsibility to the American people. GSA officials in fact disseminated GSA's CATEX for the Commercial Building Expansion Project to the public in a manner that subjects the CATEX to the legally binding provisions of OMB and GSA Guidelines on information quality. To demonstrate this point, PEER offers the following three examples:

1. In a Feb. 1, 2014 Letter to the Editor of The Buffalo News, Denise L. Pease, Regional Administrator for GSA's Northeast and Caribbean Region, states that GSA's CATEX for the Commercial Building Expansion Project "was shared with local stakeholders when it was completed in 2012."⁹
2. On Mar. 11, 2014, Lisa A. Austin, Associate Administrator for GSA's Office of Congressional and Intergovernmental Affairs, sent GSA's CATEX for the Commercial Building Expansion Project to Buffalo Common Council Member Joseph Golombek, Jr. as an email attachment; GSA's dissemination of the CATEX was unsolicited.
3. On Mar. 12, 2014, Dan Cruz, GSA Press Secretary, sent GSA's CATEX to reporters at Buffalo Rising as an email attachment; GSA's dissemination of the CATEX was unsolicited.

With these above examples in mind, consider the definition of "dissemination" articulated in OMB Guidelines, which contains five possible exemptions for information furnished by a federal agency:¹⁰

'Dissemination' means agency initiated or sponsored distribution of information to the public.... Dissemination does not include distribution limited to [Exemption 1] government employees or [Exemption 2] agency contractors or grantees; [Exemption 3] intra- or inter-agency use or sharing of government information; and [Exemption 4] responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include [Exemption 5] distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or

⁸ Denise Jewell Gee, *Federal agency gives green light for renovation of Peace Bridge building*, The Buffalo News, Nov. 17, 2012, available at <http://www.buffalonews.com/article/20121117/CITYANDREGION/121119238>.

⁹ Denise Pease, *GSA carefully followed the law in review of bridge plaza work* [Letter to the Editor], The Buffalo News, Feb. 1, 2014, available at <http://www.buffalonews.com/opinion/letters-to-the-editor/letter-gsa-carefully-followed-the-law-in-review-of-bridge-plaza-work-20140201>.

¹⁰ Office of Mgmt. & Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (Feb. 22, 2002).

adjudicative processes.

GSA's Sept. 11, 2014 letter uses the exemptions identified in OMB Guidelines' definition of "dissemination" as the basis for their rejection of PEER's Complaint. GSA, however, has incorrectly applied these exemptions, especially in light of the three examples provided. In all cases, GSA's dissemination of the CATEX for the Commercial Building Expansion Project represented an unsolicited, agency-initiated distribution of information to the public.

- **Exemption 1:** The distribution to "government employees" exemption does not apply to any of the three examples, including GSA's distribution of the CATEX to Council Member Golombek. Council Member Golombek is an employee of the government of the City of Buffalo in the State of New York, whereas OMB Guidelines repeatedly affirms that the term "government" refers to the federal government.
- **Exemption 2:** The distribution to "agency contractors or grantees" exemption does not apply to any of the three examples because none of the recipients are GSA contractors or GSA grantees.
- **Exemption 3:** The "intra- or inter-agency use or sharing of government information" exemption does not apply to any of the three examples, including GSA's distribution of the CATEX to Council Member Golombek, because "intra- or inter-agency" refers to agencies of the federal government. In sending the CATEX to Council Member Golombek, GSA, a federal agency, shared information with the City of Buffalo, a local government, thus performing an act of "inter-governmental" sharing of government information, which is not an exemption under OMB Guidelines.
- **Exemption 4:** The "responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law" exemption does not apply to any of the three examples because GSA sent their CATEX to Council Member Golombek and reporters at Buffalo Rising without solicitation, and there is no indication that the "local stakeholders" referenced by Ms. Pease in her Letter to the Editor made any official legal-binding request for this specific information.
- **Exemption 5:** The "distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes" does not apply to any of the three examples. GSA was aware that Council Member Golombek was acting on behalf of his constituents and colleagues on the Buffalo Common Council and that the information sent by GSA to Council Member Golombek was part of a public process following the Buffalo Common Council's request that GSA officials testify before the Council on matters regarding the Peace Bridge. GSA was also aware that the reporters from Buffalo Rising were members of the press and that Buffalo Rising is a media outlet; GSA was also aware that Buffalo Rising published a story that provides a link to GSA's CATEX.¹¹ Finally, there is no indication that GSA's sharing of the CATEX with "local stakeholders" as referenced by Ms. Pease in her Letter to the Editor would qualify under this exemption.

In its Sept. 11, 2014 rejection of PEER's Complaint, GSA states that:

¹¹ Matthew Ricchiazzi, *Federal document exposes frivolous environmental review on Peace Bridge project, GSA deception apparent*, Buffalo Rising, Feb. 26, 2014, available at <http://buffalorising.com/2014/02/federal-document-exposes-frivolous-environmental-review-on-peace-bridge-project-gsa-deception-apparent/>

GSA's Region 2 Administrator has responded to similar complaints by others. And Ms. Denise Pease, GSA Administrator, Region 2 has stated, in every case, that GSA's position is: NEPA was done correctly.

PEER fully appreciates that this is GSA's position. However, this position is grossly incorrect and is the entire reason why PEER submitted its Complaint, which details how GSA's CATEX for the Commercial Building Expansion Project rely on false and unsubstantiated information. GSA's rejection letter offers no rebuttal.

PEER's Complaint specifies how GSA violated its own NEPA implementation procedure guidelines and effectively established that the CATEX for the Commercial Building Expansion Project provides no quantifiable and verifiable analysis proving that the proposed use of the Commercial Building will not substantially increase the number of motor vehicles at the facility. In addition, GSA had in its possession evidence of both community controversy and other environmental issues but failed to note either in its CATEX. GSA does not even mention these contentions.

Finally, GSA's Sept. 11, 2014 rejection letter tries to minimize the failings enumerated in PEER's Complaint by stating:

Finally, we must add that most of PEER's concerns, set forth in your 15 page analysis, deal with Peace bridge Plaza development projects and activities over which GSA has no involvement.

That statement is disingenuous at best. As stated in our Complaint, GSA had complete knowledge that numerous projects related to the Commercial Building Expansion Project were planned for the Peace Bridge complex, meaning that GSA's CATEX for the Commercial Building Expansion Project erroneously reported that, "there would be no significant impacts, either individually or cumulatively, to the local environment or quality of life associated with implementation of Proposed Project." GSA's CATEX contained no qualifying cumulative impacts analysis that is inclusive of these other projects as defined and required under NEPA. PEER's Complaint cited emails and other written correspondence supporting this contention.

For these reasons, PEER demands that GSA overturn its rejection of our May 21, 2014 Complaint, appropriately respond to the Complaint in full, and fulfill all terms articulated in the Complaint, which include taking the following steps to comply with the Information Quality Act:

1. Immediately notify all applicable federal, state, and local agencies and the Buffalo and Fort Erie Public Bridge Authority that any and all proposed or ongoing actions associated with the Peace Bridge complex should be suspended until GSA satisfies the demands of this Complaint to prevent further violations of NEPA and the Information Quality Act.
2. Rescind the CATEX for the Commercial Building Expansion Project, dated Nov. 15, 2012.
3. Issue a public statement, posted on official websites, announcing that GSA has rescinded its CATEX for the Commercial Building Expansion Project due to violations of the Information Quality Act.
4. Undertake a new externally peer-reviewed NEPA environmental analysis for the Commercial Building Expansion Project that constitutes a full and open environmental review which affords interested agencies, stakeholders, and the public the opportunity to

learn about, comment, and influence decision making.

5. Satisfy all requirements of the Information Quality Act to the fullest extent in all future NEPA environmental analyses, with underlying data and methodologies presented in a way that is transparent and reproducible, in accordance with OMB and GSA Guidelines.

Based on PEER's May 21, 2014 Complaint, PEER respectfully requests that the GSA rescind and correct false and unfounded claims contained in its CATEX for the Commercial Building Expansion Project, dated Nov. 15, 2012. Pursuant to OMB and GSA Guidelines, I look forward to your response to this Administrative Appeal within 90 days. Thank you in advance for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'JR', with a long horizontal flourish extending to the right.

Jeff Ruch
Executive Director