

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR FOOD SAFETY,)
660 Pennsylvania Avenue, SE, #302)
Washington, DC 20003)

Plaintiff,)

v.)

ANIMAL AND PLANT HEALTH)
INSPECTION SERVICE,)
1400 Independence Avenue, SW)
Washington, DC 20250)

Defendant.)

Case No.: 1:14-cv-398

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMPLAINT

Plaintiff Center for Food Safety alleges as follows:

I. NATURE OF ACTION

1. Plaintiff Center for Food Safety (CFS) brings this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Through a FOIA request, CFS has sought records from Defendant Animal and Plant Health Inspection Service (APHIS), a division of the United States Department of Agriculture. Defendant APHIS has violated FOIA by: (1) failing to disclose the requested documents, instead unlawfully withholding the requested information; and (2) failing to adequately respond to Plaintiff’s appeal within the statutorily prescribed time limit. CFS now asks the Court to order Defendant to respond to Plaintiff’s appeal, and to produce all responsive agency records that Defendant improperly withheld from the Plaintiff.

2. This case concerns Defendant APHIS’s duty to disclose information related to

the agency's decision to approve the unrestricted cultivation and sale of genetically engineered alfalfa (Roundup Ready alfalfa), alfalfa engineered to withstand the repeated applications of the herbicide glyphosate. APHIS's process of approving Roundup Ready alfalfa has been an issue of national interest, and a subject of litigation involving Plaintiff CFS, alfalfa farmers, consumer groups, and other national public interest groups dedicated to sustainable agriculture and the protection of our environment.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action under 28 U.S.C. § 1331 (federal question).

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

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because no real property is involved in this action and Plaintiff is incorporated and has its principal place of business in this district. Venue is also proper under 5 U.S.C. § 552(a)(4)(B).

6. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2414 and 5 U.S.C. § 552(a)(4)(E).

III. PARTIES

7. Plaintiff CFS is a national nonprofit organization incorporated in the District of Columbia with offices in the District of Columbia; Portland, Oregon; and San Francisco, California. CFS represents more than 400,000 farmer and consumer members throughout the country who support sustainable agriculture.

8. CFS is not a commercial enterprise for purposes of the fee waiver provisions of

FOIA. *See* 5 U.S.C. § 522(a)(4)(A)(iii).

9. CFS works to address the impacts of our food production system on human health, animal welfare, and the environment. CFS seeks to protect human health and the environment by advocating thorough, science-based safety testing of genetically engineered products prior to any marketing; cultivation of genetically engineered crops in a manner that minimizes any risk of contaminating conventional food supplies or the environment, and that minimizes negative impacts such as increased use of pesticides and evolution of resistant weeds; and appropriate labeling of foods that are or contain genetically engineered products. CFS also seeks to provide consumers with a means of identifying genetically engineered foods on the market and to encourage full public participation in defining the issues presented by genetically engineered crops.

10. A cornerstone of CFS's mission is to inform, educate, and counsel its members and the public on the harm done to human health, agricultural economy, and the environment by industrial agriculture, including the cultivation of genetically engineered crops that are designed to withstand the application of toxic herbicides. CFS utilizes regulatory actions, citizen engagement, legislation, and when necessary, litigation, to promote transparency and accountability in the agricultural industry.

11. Defendant APHIS is an agency of the United States, within the meaning of 5 U.S.C. § 552(f)(1), and has a duty to provide public access to documents in its possession consistent with the requirements of FOIA. It has possession of, and control over, the records that CFS seeks, and is unlawfully withholding records from Plaintiff, in contravention of federal law.

IV. STATUTORY AND REGULATORY FRAMEWORK

Statutory Deadlines Under the Freedom of Information Act

12. FOIA promotes open government by providing every person with a right to request and receive federal agency records. 5 U.S.C. § 552(a)(3)(A), (f); *see* 7 C.F.R. § 1.1.

13. In furtherance of its design to encourage open government, FOIA imposes strict deadlines on agencies to provide responsive documents to FOIA requests. 5 U.S.C. § 552(a)(6)(A); *see* 7 C.F.R. § 1.2.

14. An agency must comply with a FOIA request by issuing a determination within twenty days after receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i); *see* 7 C.F.R. § 1.7.

15. The determination “must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013).

16. An agency must immediately notify the requester of the determination and the reasons for it, and of the right of such person to appeal an adverse determination. The agency has twenty days to make a determination with respect to any appeal. 5 U.S.C. § 552(a)(6)(A)(ii); *see* 7 C.F.R. § 1.14.

17. An agency’s failure to comply with any timing requirements is deemed constructive denial and satisfies the requester’s requirement to exhaust administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i); *see* 7 C.F.R. § 1.17.

18. A FOIA requester who exhausts administrative remedies may petition the court for injunctive and declaratory relief from the agency’s continued withholding of public records. 5 U.S.C. § 552(a)(4)(B); *see* 7 C.F.R. §§ 1.14, 1.17.

Disclosure Under the Freedom of Information Act

19. In enacting FOIA, Congress intended “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S. Rep. No. 813, 89th Cong., 1st Session, 3 (1965).

20. Under FOIA, all federal agency records are presumed disclosable to the public unless specifically exempted from disclosure. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

21. FOIA maintains nine exemptions to the general presumption of mandatory disclosure. 5 U.S.C. § 552(b)(1)-(9). In keeping with the objectives of FOIA, courts have construed the scope of these exemptions narrowly. *See Dep’t of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001).

22. Exemption 5 of FOIA (FOIA Exemption 5) applies to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

23. In order for a document to be properly withheld under FOIA Exemption 5, a document must have been generated and distributed within government agencies, and it must be both (1) “predecisional,” meaning that it is “antecedent to the adoption of agency policy,” and (2) “deliberative,” meaning that “it must actually be related to the process by which policies are formulated.” *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978).

24. Even if a document falls within an exemption under FOIA, an agency has the authority to construe the exemptions as discretionary rather than mandatory when no harm would result from disclosure of the requested information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *see* 7 C.F.R. § 1.19. The U.S. Department of Justice has provided guidance:

“even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are . . . most applicable under Exemption 5.”

25. Even if a document falls within an exemption under FOIA, FOIA requires that “[a]ny reasonably segregable portion” of that document “shall be provided” to the requester by “deletion of the portions which are exempt.” 5 U.S.C. § 552(b); *see* 7 C.F.R. § 1.15(b) (“all reasonably segregable nonexempt portions [shall be] disclosed, and that all exempt portions are identified according to the specific exemption or exemptions which are applicable.”)

V. FACTUAL BACKGROUND

26. Genetically engineered crops are the subject of great public interest both in the United States and abroad. Controversial issues that continue to generate public interest and debate surrounding genetically engineered crops include the growing control of seed supply by agrochemical firms, their inability to live up to the promises made for them, transgenic contamination of non-genetically engineered crops, and the adverse environmental impacts associated with their use.

27. Alfalfa (*Medicago sativa L.*) is the fourth most widely grown crop in the United States behind corn, soybeans, and wheat; it is grown in every U.S. state. It ranks third in agricultural crops in terms of value. Both food (sprouts, dietary supplements, and herbal or homeopathic medicine) and animal feed (hay, haylage, or silage) are derived from alfalfa.

28. Roundup Ready alfalfa is genetically engineered to withstand the applications of the herbicide ingredient glyphosate, the active ingredient in Monsanto’s herbicide Roundup.

29. APHIS is responsible for regulating genetically engineered organisms pursuant to the Plant Protection Act, 7 U.S.C. § 7701 *et seq*, through which the agency has authority over both “plant pest” and “noxious weed” harms. Genetically engineered plants like Roundup

Ready alfalfa are considered “regulated articles,” whose movements in interstate commerce are restricted under the Plant Protection Act and its implementing regulations. *See* 7 U.S.C.

§ 7711(a); 7 C.F.R. § 340.0. In order to commercialize such a genetically engineered crop, the manufacturer petitions APHIS seeking a “deregulation,” a determination that an article should not be regulated. 7 C.F.R. § 340.6.

30. APHIS first deregulated Roundup Ready alfalfa in 2005, in response to a petition by its manufacturers Monsanto Company and Forage Genetics International. *See* Availability Determination of Nonregulated Status for Alfalfa Genetically Engineered for Tolerance to the Herbicide Glyphosate, 70 Fed. Reg. 36917, 36917-19 (June 27, 2005).

31. In 2006, Plaintiff CFS, along with a coalition of farmers, consumer interest groups, and environmental public interest organizations, challenged APHIS’s decision to deregulate Roundup Ready alfalfa. *Geertson Seed Farms v. Johanns (Alfalfa I)*, No. C 06-01075 CRB. (N.D. Cal. filed May 3, 2007). The district court in *Alfalfa I* granted summary judgment in favor of the plaintiffs, finding that APHIS failed to comply with the National Environmental Policy Act prior to its deregulation decision, and vacated APHIS’s decision to deregulate Roundup Ready alfalfa. *Alfalfa I*, No. C 06-01075 CRB, 2007 WL 776146, at *3 (N.D. Cal. Mar. 12, 2007) (Preliminary Injunction Order); 2007 WL 1302981, at *8-9 (N.D. Cal. May 3, 2007) (Permanent Injunction Order). The court held that APHIS was required to prepare an Environmental Impact Statement under the National Environmental Policy Act before again considering whether or not to deregulate Roundup Ready alfalfa. The court both enjoined any further planting as well as set aside the underlying approval action, which reverted Roundup Ready alfalfa back to a regulated article that could not be planted or sold commercially. *Alfalfa I*, 2007 WL 776146, at *3 (N.D. Cal. Mar. 12, 2007) (Preliminary

Injunction Order); 2007 WL 1302981, at *8-9 (N.D. Cal. May 3, 2007) (Permanent Injunction Order).

32. APHIS and Defendant-Intervenors Monsanto and Forage Genetics appealed. After the Ninth Circuit twice affirmed, *see Alfalfa I*, 541 F.3d 938 (9th Cir. 2008) (amending opinion and denying petition for rehearing and rehearing en banc), 570 F.3d 1130 (9th Cir. 2009), the Supreme Court granted *certiorari*. The Supreme Court set aside the injunction as unnecessary in light of the vacatur remedy, which it left in place, with the result that Roundup Ready alfalfa remained unlawful to sell or plant commercially pending further regulatory action. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2747, 2761-62 (2010).

33. Pursuant to the court's order in *Alfalfa I*, APHIS issued a draft Environmental Impact Statement for public comment in December 2009. 74 Fed. Reg. 67,206 (Dec. 18, 2009); 75 Fed. Reg. 1585 (Jan. 12, 2010) (explaining history). APHIS received approximately 244,000 public comments on the draft Environmental Impact Statement.¹

34. Approximately one year later, APHIS released the final Environmental Impact Statement. 75 Fed. Reg. 80,807, 80807-08 (December 23, 2010). In that document APHIS acknowledged that an approval decision would likely cause significant environmental, agronomic, and economic harm. As such, in the final Environmental Impact Statement, APHIS determined that one of its two "preferred alternatives" was a partial approval, with restrictions, such as required isolation distances and geographic limitations. These restrictions were designed to limit the likelihood of transgenic contamination. The agency concluded that this alternative would fulfill APHIS's "purpose and need" to promote "coexistence" in agriculture

¹ APHIS, USDA, Record of Decision, *Glyphosate-Tolerant Alfalfa Events J101 and J163: Request for Nonregulated Status* (Jan. 27, 2011), available at http://www.aphis.usda.gov/brs/aphisdocs/04_11001p_rod.pdf.

between production of genetically engineered, organic, and conventional crops.

35. Approximately one month later, on January 27, 2011, APHIS issued its determination and record of decision. In it, the agency reversed its position and instead announced its decision that it had no choice but to grant unrestricted approval to Roundup Ready alfalfa.² On February 2, 2011, APHIS published a notice informing the public of its Deregulation Determination in the Federal Register. 76 Fed. Reg. 5780, 5780-81 (Feb. 2, 2011).

36. On January 31, 2011, four days after APHIS's initial announcement of its decision to once again deregulate Roundup Ready alfalfa, Plaintiff CFS filed a FOIA request to Defendant APHIS. CFS's FOIA request sought the following information:

All documents, from February 2007 to present, relating to the January 27, 2011 Record of Decision of "Glyphosate-Tolerant Alfalfa Events J101 and J163: Request for Nonregulated Status" and all documents relating to the Final Environmental Impact Statement of Alfalfa Events J101 and J163 (Roundup Ready alfalfa), released December 23, 2010.

37. APHIS received CFS's FOIA request on February 8, 2011. On the same day, APHIS sent a letter acknowledging receipt of CFS's FOIA request. In its letter, APHIS assigned case number FOIA 11-244 to CFS's FOIA request and set March 9, 2011, as the deadline for responding to CFS's FOIA request.

38. APHIS subsequently sent another letter, dated March 7, 2011, requesting an extension to complete processing CFS's FOIA request. In its letter dated March 7, 2011,

² Press Release, APHIS, USDA, USDA Announces Decision to Fully Deregulate Roundup Ready Alfalfa (Jan. 27, 2011), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2011/01/0035.xml>.

APHIS stated that the agency estimated that the review for the responsive records would be completed by March 31, 2011. However, APHIS did not produce the responsive documents by that date, nor did the agency provide any further communication by mail regarding the anticipated deadline for completing the agency's response to CFS's FOIA request.

39. On March 18, 2011, CFS filed a complaint in the Northern District of California challenging APHIS's decision to deregulate Roundup Ready alfalfa. *Ctr. for Food Safety v. Vilsack (Alfalfa II)*, No. 3:11-cv-01310-SC (N.D. Cal. decided Jan. 5, 2012), *appeal filed*, No. 12-15052 (9th Cir. filed Jan. 6, 2012). On January 5, 2012, the district court in *Alfalfa II* granted summary judgment in favor of federal defendants. *Alfalfa II*, 844 F. Supp. 2d 1006 (N.D. Cal. 2012) (order denying plaintiffs' motion for summary judgment). CFS appealed. On August 6, 2013, the Court of Appeals affirmed the district court's judgment. *Alfalfa II*, 718 F.3d 829 (9th Cir. 2013).

40. While litigation was ongoing, CFS continued to follow up on the status of its FOIA request. APHIS repeatedly failed to respond to CFS's inquiries. When APHIS finally responded, the agency was unable to provide CFS with any meaningful update on the progress of its response to CFS's FOIA request.

41. APHIS finally issued a complete response to CFS's FOIA request on June 22, 2012, nearly a year and a half after CFS had filed its initial FOIA request. APHIS's June 22, 2012, final response contained 2520 electronic documents that were saved to a portable USB drive.

42. APHIS identified a total of 3699 responsive records related to CFS's FOIA request. APHIS's June 22, 2012, production included only 2520 responsive documents. APHIS withheld 1179 documents in their entirety, claiming that the information contained

therein was being withheld under FOIA Exemption 5.

43. APHIS did not redact, or partially produce, any of the withheld responsive documents. APHIS did not provide what is commonly known as a *Vaughn* index—an index that describes each of the withheld documents, specifies the reason for its withholding, and explains whether the agency had produced any reasonably segregable, non-exempt information. *See Vaughn v. Rosen*, 484 F.2d 820, 827-29 (D.C. Cir. 1973).

44. The June 22, 2012, letter accompanying APHIS's document production provided only the following explanation:

The records being withheld consist of internal staff memoranda and correspondence containing recommendations, opinions, suggestions and analyses of the Commission's technical and legal staffs. The records constitute both pre-decisional and deliberative discussion that clearly falls within the attorney client and attorney work product privileges. Any factual materials in the record not covered by some other exemption are inextricably intertwined with exempt materials or the disclosure of the factual materials would itself expose the deliberative process.

45. APHIS's June 22, 2012, response letter also stated: "You may appeal our partial denial of this information. If you choose to appeal, your appeal must be in writing and must be sent within 45 days of the date of this letter"

46. Pursuant to APHIS's June 22, 2012, response letter, CFS filed a timely FOIA appeal to APHIS on August 5, 2012. To date, APHIS has yet to issue a final response to CFS's FOIA appeal.

47. Since filing the appeal on August 5, 2012, CFS has repeatedly followed up with APHIS regarding the status of its FOIA appeal. Voicemail messages left by CFS staff at APHIS's contact number provided in APHIS's June 22, 2012, letter were unanswered.

48. APHIS finally responded to CFS's inquiries for an update on the status of CFS's FOIA appeal in March of 2013, more than six months after CFS filed its FOIA appeal. Based

on voicemail messages from, and subsequent e-mail correspondence with, APHIS FOIA Officer Ms. Katherine Vagnoni, CFS learned that APHIS was still processing CFS's FOIA appeal. APHIS was unable to supply CFS with an estimated timeline for completion of CFS's FOIA appeal. Despite further phone calls and voicemail messages asking for an update, APHIS never supplied a timeframe for completing its review of CFS's FOIA appeal.

49. Based on a telephone conversation with APHIS FOIA Officer Ms. Vagnoni on December 12, 2013, more than a year after CFS filed its FOIA appeal, CFS learned that APHIS had not reviewed a single page of the 1179 withheld documents, the withholding of which CFS challenged in its FOIA appeal.

50. By email dated January 16, 2014, APHIS FOIA Officer Ms. Vagnoni informed CFS that she has reviewed the first set of records related to APHIS's appeal, but that she had some questions regarding the reviewed subset of records for Biotechnology Regulatory Services (BRS), a subdivision of APHIS. CFS has not received any further communications or updates from APHIS regarding its FOIA appeal.

51. To date, CFS's FOIA appeal remains outstanding, and APHIS has failed to provide any estimated timeline by which the agency may complete review of CFS's FOIA appeal.

52. Plaintiff CFS has fully exhausted its administrative remedies. Administrative remedies are deemed exhausted whenever an agency fails to comply with the applicable time limits, as stated by 5 U.S.C. § 552(a)(6)(C). Plaintiff now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

FIRST CAUSE OF ACTION

Violation of the Freedom of Information Act

FAILURE TO RESPOND TO CFS'S FOIA APPEAL WITHIN STATUTORY TIMELINE

53. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1-52 in the complaint as if fully set forth herein.

54. CFS timely appealed APHIS's decision to withhold 1179 documents in their entirety in response to CFS's FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(ii); 7 C.F.R. § 1.14.

55. APHIS's failure to respond adequately to CFS's appeal within statutory timelines is a violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated thereunder.

SECOND CAUSE OF ACTION

Violation of the Freedom of Information Act

UNLAWFUL WITHHOLDING OF 1179 DOCUMENTS IN THEIR ENTIRETY UNDER FOIA EXEMPTION 5

56. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1-55 in the complaint as if fully set forth herein.

57. APHIS's failure to disclose 1179 responsive documents is a violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated thereunder.

58. APHIS's decision to withhold 1179 responsive documents in their entirety constitutes unlawful withholding of records in violation of FOIA, 5 U.S.C. § 552, and the agency's own regulations promulgated thereunder.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Declare as unlawful APHIS's failure to respond to Plaintiff's FOIA appeal;

- B. Declare as unlawful APHIS's withholding of 1179 responsive documents from Plaintiff;
- C. Order APHIS to produce all records requested by Plaintiff and challenged in Plaintiff's FOIA appeal by a date certain;
- D. Exercise close supervision over APHIS as it processes Plaintiff's appeal;
- E. Award to Plaintiff all costs and reasonable attorney fees as provided in 5 U.S.C. § 552(a)(4)(E) or any other law; and
- F. Grant other and further relief as the Court may deem just and proper.

Dated this 12th day of March, 2014.

Respectfully submitted,

/s/ Donna F. Solen

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