

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

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

Plaintiff,)

v.)

CAUSE NO.

UNITED STATES DEPARTMENT OF)
AGRICULTURE, and SECRETARY)
ANN M. VENEMAN, In Her Official Capacity)
As Secretary of the United States)
Department of Agriculture,)
1400 Independence Avenue, SW)
Washington, DC 20250)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the Center for Food Safety (“CFS”), bring this Complaint for Declaratory and Injunctive Relief against the United States Department of Agriculture (“USDA”) and Ann M. Veneman, in her official capacity as the Secretary of the USDA. This action relates to the unlawful withholding of public documents and denial of a fee waiver request.

JURISDICTION AND VENUE

1. This action arises under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, and 7 C.F.R. § 6(a)(1), to enjoin the Defendants from withholding from public disclosure records of the USDA within its possession and control, and from denying a fee waiver for the requested documents.

2. This Court has jurisdiction over this action pursuant to the FOIA, 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a Defendant), and 28 U.S.C. § 1361 (mandamus).

3. The relief requested is specifically authorized pursuant to 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief).

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1392(e) as the Defendants in this action, the USDA and its Secretary, have their principle office within this district, and a substantial part of the events and omissions which gave rise to this action occurred in this district.

PARTIES

5. Plaintiff, CFS, is a non-profit public interest organization committed to the protection of human health and the environment. CFS seeks to engage in projects that address the impacts of our food production system on human health, animal welfare and the environment. CFS focuses its efforts on understanding and sharing information about harmful food technologies, and promoting organic and other forms of sustainable agriculture. CFS achieves these goals by, *inter alia*, analyzing information from, policy decisions of, and applications for organic certifying accreditation pursuant to the requirements of the National Organic Program¹ submitted to Defendant USDA. CFS is located at 660 Pennsylvania Avenue, SE, Suite 302, Washington, DC 20003.

6. Defendant, the USDA, is an agency of the United States Government established under 7 U.S.C. § 2201, *et seq.*, and charged with the duty to propose and promulgate regulations, prepare studies and reports, make determinations and findings, and take other appropriate actions concerning the protection of food, agriculture, and

¹ Final Rule, Subpart F – Accreditation of Certifying Agents.

natural resources, including issues related to the National Organic Program, 7 U.S.C. § 6501 *et seq.*

7. Defendant, Secretary Veneman, in her official capacity, (collectively with the USDA, the “Defendants”), is appointed pursuant to 7 U.S.C. § 2202, and is charged with oversight of Defendant USDA and ensuring that all rules and regulations pertaining to Defendant USDA are complied with.

8. Defendants, pursuant to the requirements of FOIA, 5 U.S.C. § 552 *et seq.*, have a duty to provide public access to all public documents in their possession, including those concerning the National Organic Program. Defendants possess records, relating to the accreditation of organic certifying agents, to which CFS seeks access.

FACTS AND CLAIMS FOR RELIEF

9. This is an action to compel Defendants to obey the law. It is an action to correct and prevent further gross and deliberate violation of federal law requiring the release of public documents and fee waiver and to compel compliance with the requirements of such law.

10. The Freedom of Information Act provides that any person has a right to obtain access to federal agency records, unless those records are protected by one of the nine enumerated exemptions within the Act. 5 U.S.C. § 552 *et seq.*

11. Section 552(a)(4)(A)(iii) of FOIA requires agencies to waive fees for the requested documents if the requester can show that “disclosure of the information is in the public interest. . .”

12. Each federal agency then publishes its own procedural regulations regarding FOIA requests and fee waivers. The Defendants' regulations require that the agency shall waive fees after considering the following six factors:

- (i) The subject of the request, i.e., whether the subject of the requested records concerns "the operations or activities of the government";
- (ii) The informative value of the information to be disclosed, i.e., whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (iii) The contribution to an understanding of the subject by the general public likely to result from the disclosure, i.e., whether disclosure of the requested information will contribute to "public understanding";
- (iv) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;
- (v) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (vi) The primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

7 C.F.R. Pt. 1, Subpt. A, App. A, § 6(a)(1).

13. FOIA provides that once a requester exhausts its administrative remedies, it may seek judicial review of denials of fee waivers. 5 U.S.C. § 552(a)(6).

14. On June 26, 2002, CFS sent Defendants a "Freedom of Information Act Request," ("request letter") pursuant to 5 U.S.C. § 552 *et seq.*, requesting documents in the possession of the Defendants pertaining to, *inter alia*, the USDA's use of applications for accreditation under the requirements of the National Organic Program, 7 U.S.C. § 6501 *et seq.*, Final Rule, Subpart F. The request letter also requested a fee waiver, and provided justification for such waiver, pursuant to 7 C.F.R. Pt. 1, Subpt. A, App. A, §

6(a)(1). A copy of the request letter is attached hereto and incorporated herein by reference as Exhibit A.

15. By letter dated August 7, 2002, Defendants denied CFS' request for documents, stating that CFS did not qualify for a "mandatory fee waiver." Defendants offered to consider a voluntary fee waiver if CFS narrowed its request to a "more manageable size." Furthermore, Defendants stated that CFS was entitled to appeal its denial of the fee waiver.² A true and accurate copy of the August 7, 2002, letter is attached hereto and incorporated herein by reference as Exhibit B.

16. On August 14, 2002, by letter, CFS administratively appealed the Defendants' denial of a fee waiver for its FOIA request.³ CFS pointed out that it met all the criteria necessary to obtain a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and 7 C.F.R. § 6(a)(1). A true and accurate copy of this appeal letter is attached hereto and incorporated herein by reference as Exhibit C.

17. By letter dated February 11, 2003, almost six months later, the Defendants responded with a final denial of CFS' fee waiver request, and informed CFS that since it was a final agency determination, CFS was entitled to judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). A true and accurate copy of this final letter is attached hereto and incorporated herein by reference as Exhibit D.

18. On May 12, 2003, in response to the Defendants' actions and after a meeting with representatives of the USDA, CFS sent a request letter to the Defendants which narrowed the scope of its original document request and once again requested a fee

² Defendants assigned this FOIA request AMS FOIA No. 130-02.

³ Defendants assigned this appeal, Appeal No. 13-02.

waiver. A true and accurate copy of this letter is attached hereto and incorporated herein by reference as Exhibit E.

19. On June 26, 2003, CFS sent a follow up letter, via email, to the Defendants, reaffirming its interest for the documents previously requested. A copy of this letter is attached hereto and incorporated herein by reference as Exhibit F.

20. On August 27, 2003, after no response from the Defendants, CFS sent another follow up email to the Defendants inquiring on the status of its FOIA request. A true and accurate copy of this email is attached hereto and incorporated herein by reference as Exhibit G.

21. On the same day, via email, Defendants' representative, Paula Collins, responded stating that the request had been prepared and submitted to the Office of the General Counsel for review. A copy of this email is attached hereto and incorporated herein by reference as Exhibit H.

22. On September 16, 2003, via email, CFS once again contacted Defendants inquiring on the status of its FOIA request. Defendants responded, on the same day, via email, stating that the draft response remained in the Office of General Counsel, and it was not known when it would be released. A true and accurate copy of these emails are attached hereto and incorporated herein by reference as Exhibits I and J, respectively.

23. On March 11, 2004, nearly 6 months with no final determination or response from the Defendants, CFS, believing the silence to be a constructive denial of its request for documents and fee waiver, sent a letter to the Defendants requesting the Defendants to provide the requested documents within twenty working days or consider

the letter a final administrative appeal of the denial. A true and accurate copy of the letter is attached hereto and incorporated herein by reference as Exhibit K.

24. On March 16, 2004, the Defendants replied by sending CFS a letter stating the fee waiver request was denied and that if CFS wanted the documents it could pay the costs associated with the search, review and copying associated with the requested documents. The letter also stated that CFS had a right to seek an administrative appeal. A true and accurate copy of the letter is attached hereto and incorporated herein by reference as Exhibit L.

25. CFS, by letter dated March 23, 2004, filed an administrative appeal of Defendants' denial of its request for fee waiver. A true and accurate copy of the letter is attached hereto and incorporated herein by reference as Exhibit M.

26. On May 4, 2004, the Defendants responded to CFS' appeal, by letter, stating that CFS did not meet all the requirements of the fee waiver provision of 7 C.F.R. § 6(a)(1), specifically the third factor requiring the requester to show that the information will contribute to "public understanding." The letter further stated that the fee waiver was denied, it was a final agency determination, and that CFS was entitled to seek judicial review of the denial. A true and accurate copy of the final denial letter is attached hereto and incorporated herein by reference as Exhibit N.⁴

27. CFS has exhausted its administrative remedies under FOIA and is entitled to judicial review of this matter pursuant to 5 U.S.C. § 552(a)(B).

28. This Court should enter injunctive relief and permanently enjoin the Defendants from denying CFS' request for a fee waiver.

⁴ Defendants refer to this appeal as, Appeal 3-04.

WHEREFORE, the Center for Food Safety respectfully requests this Court to:

- (A) Declare Defendants' actions of withholding access to the public records and denying CFS' fee waiver request a violation of law;
- (B) Direct Defendants to immediately comply with CFS' records request and fee waiver;
- (C) Retain jurisdiction of this cause of action until Defendants have complied in full;
- (D) Issue such other and further relief as it may deem necessary and proper, including awarding CFS its attorney's fees and litigations costs incurred with bringing this action pursuant to 5 U.S.C. § 552(a)(4)(E).

Dated: August 5, 2004

Respectfully submitted,

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Attorney for Plaintiff