

entire purpose of UIPA is to ensure open government and public access to state records. CFS has requested under UIPA documents in DOA's possession regarding a matter of serious public concern, namely, open-air field tests in this state of food crops genetically engineered to produce a wide range of industrial chemicals and drugs, including contraceptives, hormones, vaccines, and other potent, biologically active substances. DOA participates in overseeing such activities, also known as "biopharming" or "biopharm," and holds information of significant public interest -- including documents received from the United States Department of Agriculture ("USDA") -- concerning the nature of the field tests, their potential impacts, and their regulation by the federal and state authorities. Nevertheless, DOA has denied CFS any access to documents under UIPA on the grounds that: (1) disclosure would "frustrate a legitimate government function" because DOA would no longer receive documents from USDA and (2) the documents are "protected from disclosure" under the federal counterpart to UIPA, the Freedom of Information Act ("FOIA").

DOA's reasoning fails on multiple levels. Most fundamentally, (1) USDA's own regulations require it to furnish DOA with documents, belying DOA's claim that disclosure will impair its ability to receive the documents in the future, and (2) FOIA expressly applies to federal agencies and has no bearing on CFS's request under state law for state records in state agency possession. DOA's denial violates the letter and spirit

of UIPA. CFS thus brings this action to enforce the statute, compel access to the requested documents, and recover the litigation costs necessary to ensure DOA's compliance.

II. JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the claims for relief in this action pursuant to Haw. Rev. Stat. § 603-21.5(a)(3) (civil actions and proceedings), Haw. Rev. Stat. § 92F-15 (actions for judicial enforcement of UIPA), and Haw. Rev. Stat. § 632-1 (actions for declaratory judgments in cases of actual controversy).

3. Venue lies properly in this judicial circuit under Haw. Rev. Stat. § 603-36(5) because the claims in this action arose in this circuit, and under Haw. Rev. Stat. § 92F-15(e) because the request for the government records at issue was made in this circuit and the requested records are maintained in this circuit.

III. PARTIES

4. Plaintiff CENTER FOR FOOD SAFETY is a national nonprofit organization incorporated in the District of Columbia, whose membership includes a number of residents in the State of Hawai'i. Since its founding in 1997, CFS's activities have focused on several areas including addressing the environmental, economic, and ethical concerns raised by the development and commercialization of agricultural technologies.

5. CFS develops and disseminates to its members, policymakers, members of local, state and federal government,

nonprofit organizations, and interested members of the general public a wide array of educational and informational materials addressing the environmental, social and public health impacts associated with use of genetically engineered foods and crops. These materials include, but are not limited to, reprints of news articles and agencies' regulatory positions, legal briefs, press releases, fact sheets, action alerts, electronic mail alerts and investigative and technical reports. CFS's materials often analyze the legal and regulatory means taken by government agencies to address the various economic, environmental, public health, and social impacts associated with agricultural biotechnology.

6. The interests of CFS are being, and will be, adversely affected by defendant's actions complained of herein. In particular, defendant's failure to release records in its possession harms CFS's goals and functions by impeding the organization's ability to gather, analyze, and disseminate information concerning specific aspects of agricultural biotechnology in Hawai'i.

7. Defendant DEPARTMENT OF AGRICULTURE, STATE OF HAWAI'I, is the state agency charged with regulating the introduction, transportation, and propagation of plants in the State of Hawai'i. See generally Haw. Rev. Stat. ch. 141. The DOA, through its Plant Quarantine Branch, is involved in overseeing field tests of genetically engineered plants in Hawai'i and

maintains documents in its possession relating to such activities.

IV. STATUTORY FRAMEWORK

8. The State of Hawai`i enacted the Uniform Information Practices Act in 1988 to “[p]romote the public interest in disclosure” and “[e]nhance governmental accountability through a general policy of access to government records.” Haw. Rev. Stat. § 92F-2(1), (3). UIPA declares that “it is the policy of this State that the formation and conduct of public policy -- the discussions, deliberations, decisions, and actions of government agencies -- shall be conducted as openly as possible.” Id. § 92F-2.

9. Consistent with its purposes, UIPA establishes a baseline presumption in favor of disclosure. Thus, “[a]ll government records are open to public inspection unless access is restricted or closed by law.” Id. § 92F-11(a).

10. Upon a request by any person, a state agency such as DOH “shall make government records available for inspection and copying during regular business hours . . . [and] assure reasonable access to facilities for duplicating [such] records.” Id. § 92F-11(b), (d).

11. UIPA specifies five narrow exemptions to its mandate of disclosure. See id. § 92F-13. While UIPA does not require the disclosure of government records falling within these limited exceptions, neither does it prohibit an agency from disclosing

such records. *Id.* Accordingly, Haw. Rev. Stat. § 92F-13 merely allows agencies limited discretion to withhold certain types of records in responding to an UIPA request.

12. "A person aggrieved by the denial of access to a government record" may bring an action to compel disclosure of such record anytime within two years after the denial. *Id.* § 92F-15(a). The circuit courts shall hear actions to compel disclosure de novo, and "[e]xcept as to cases the circuit court considers of greater importance, . . . [such cases] "shall take precedence on the docket over all cases and shall be assigned for hearing and trial or for trial at the earliest practicable date and expedited in every way." *Id.* § 92F-15(b), (f).

13. In UIPA enforcement actions, "[t]he agency has the burden of proof to establish [the] justification for nondisclosure." *Id.* § 92F-15(c). Moreover, if the complainant prevails, the Court "shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation." *Id.* § 92F-15 (d).

V. BACKGROUND FACTS

14. In recent years, Hawai'i has silently yet quickly become a leading national site for open-air field tests of genetically engineered crops. Many of the tests involve field tests of plants genetically altered to produce a wide range of chemicals or drugs, including, for example: contraceptives, blood thinners and clotters, potent growth hormones, vaccines for

animals and humans, and enzymes that are known allergens. Because such "biopharm" field tests use food crops consumed by humans and take place in the open air, they raise obvious concerns to the public regarding potential harmful exposure to humans and the environment.

15. Little or no information is available to the public concerning biopharm field tests. For example, USDA, the federal agency regulating field tests of genetically engineered plants, indicates on its website that it issued two permits for biopharm field tests in Hawai`i in 2002. USDA issued one permit, No. 01-306-01R, to Hawai`i Agriculture Research Center for a .5-acre field test of a biopharm variety of sugar cane that received a gene from a "man." USDA issued the other permit, No. 01-257-01R, to Monsanto for a 20.8-acre field test of a biopharm variety of corn, whose gene donor it conceals as "confidential business information." No other information is provided regarding, for example, the substance(s) produced by the crops, or even the location of the tests, beyond their existence somewhere in "HI."

16. USDA cooperates and consults with the state departments of agriculture regarding field tests of genetically engineered plants conducted in their respective states. Through this process, DOA produces and acquires documents relating to biopharm field tests. These documents contain important information concerning the nature of the field tests, as well as the respective roles and activities of the USDA and DOA in overseeing them.

17. The information contained in documents in the possession of DOA, including, for example, what kind of substances are being produced, how and where these substances are being released, and what the responsible authorities are doing to control them, is highly germane to the public at large, including CFS and its members. The public, including CFS and its members, has a strong interest in knowing about these activities occurring at undisclosed locations in this state that could detrimentally impact the environment and public health.

18. On May 23, 2003, CFS, through counsel, sent the Plant Quarantine Branch of the DOA a "Request to Access Government Record" via certified mail, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A." The request sought access to:

"[a]ll documents, records and files in the possession of the [DOA] relating to any and all ongoing field tests of [biopharm] varieties in the State of Hawai`i, including but not limited to field tests conducted under [USDA] Permits No. 01-306-01R, issued to Hawaii Agricultural Research Center, and No. 01-257-01R, issued to Monsanto."

19. DOA received the request on May 27, 2003. On June 6, 2003, the DOA sent CFS its response via facsimile transmission, on a standard one-page form entitled "Notice to Requester." A copy of the response is attached hereto and incorporated herein by reference as Exhibit "B."

20. DOA checked the box on the response form indicating that access to the requested documents "is denied in its entirety or will be granted only to certain part(s) of this government

record." DOA included none of the requested documents in its response, but rather only a copy of CFS's request and a two-page elaboration of its reasons for withholding the requested records. DOA thus denied CFS's request in its entirety.

21. On the response form, DOA indicated that it was withholding "Permits and Inter-Agency correspondence that are the records of the [USDA], Animal and Plant Health Inspection Service (APHIS), Biotechnology Regulatory Service." As the legal bases for its denial of access, DOA cited: (1) Haw. Rev. Stat. § 92F-13(3), relating to "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function"; and (2) Haw. Rev. Stat. § 92F-13(4), relating to "[g]overnment records which pursuant to state or federal law including an order of any state or federal court, are protected from disclosure." Under the section regarding the "method and date of disclosure," DOA stated, "We are unable to address method and date of disclosure until USDA APHIS FOIA makes a determination regarding disclosure."

22. DOA attached to the response form two additional typewritten pages in which it explained the reasons for its denial of CFS's request. Regarding the exception in Haw. Rev. Stat. § 92F-13(3) ("frustration of a legitimate government function"), DOA stated that it receives information from both USDA and permit applicants "that is confidential business information provided, in the latter instance, pursuant to express

or implied promises of confidentiality." According to DOA, it receives such information for the purpose of allowing it "to concur or not concur on federal permits, make recommendations and/or comments on federal permit applications and participate in inspection of federally permitted sites." Thus, DOA concluded, "[w]ithout receipt of this information, the [DOA] would not be able to perform these legitimate and essential [DOA] functions and [DOA] would not receive this information without the promise of confidentiality."

23. Regarding the exception in Haw. Rev. Stat. § 92F-13(4) ("protected from disclosure" by law), the DOA stated, "USDA considers the state records responsive to this request to be federal government records that contain confidential business information protected from disclosure under federal law." As the legal grounds for this claim, DOA cited two exceptions to disclosure under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), relating to "trade secrets and commercial and financial information obtained by a person and privileged or confidential," and 5 U.S.C. § 552(b)(5), relating 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," as well as a provision in USDA's FOIA regulations, 7 C.F.R. § 1.12, setting forth procedures for "[h]andling information from a private business." Based on the foregoing, DOA concluded, "only the federal government is authorized to determine whether the requested records or any

portion of those records may be disclosed. Consequently, [DOA] is prohibited from disclosing the requested records by federal law and by [§ 92F-13(4)]."

24. DOA's reasons for denying access lack merit. As to DOA's reliance on Haw. Rev. Stat. § 92F-13(3) ("frustration of a legitimate government function"), USDA's own regulations require it to provide various documents to the DOA in connection with any application for a permit to conduct field tests of genetically engineered crops in this state. Applicants submitting confidential business information ("CBI") must submit a copy of the application marked "CBI Copy" and a redacted copy of the application marked "CBI Deleted." 7 C.F.R. § 340.4(a). USDA must conduct an "initial review" within 30 days of receipt of the application and determine whether the application is complete. Id. § 340.4(b). Once the USDA deems an application is complete, it "shall submit to the State department of agriculture of the State where the release is planned, a copy of the initial review and a copy of the application marked, 'CBI Deleted', or 'No CBI' for State notification and review." (Emphasis added.) Thus, disclosure of, at minimum, the documents that USDA must provide DOA would not affect DOA's ability to obtain such documents in the future.

25. Moreover, as established above, CBI is already redacted from some or all of the documents that DOA receives from the USDA. Thus, even apart from the requirement of disclosure under USDA's regulations, disclosure of these redacted documents raise

no concerns regarding any breach of confidentiality and resultant "frustration of legitimate government function."

26. To the extent that any other protected information may still exist, the regulations promulgated under UIPA mandate that state agencies make reasonable efforts to "segregate" or redact information not required to be disclosed under UIPA, and to disclose the remainder of the requested documents. See Haw. Admin. R. § 2-71-17. Here, DOA has issued a blanket denial of CFS's request. DOA has made no attempt to segregate any additional protected information beyond that which has already been redacted, nor has it made any determination that any such additional protected information is not reasonably segregable.

27. As to DOA's reliance on Haw. Rev. Stat. § 92F-13(4) ("protected from disclosure" by law), FOIA expressly applies to federal agencies. See 5 U.S.C. § 551(1) (defining "agency" as "authority of the Government of the United States"). It does not purport to govern state agencies such as the DOA or documents in the possession of state agencies. Moreover, FOIA exceptions such as those cited by DOA, 5 U.S.C. § 552(b)(4), (5), merely specify exceptions to disclosure, rather than affirmative prohibitions against disclosure, and thus do not fall within the proper scope of the "catch-all" provision of Haw. Rev. Stat. § 92F-13(4). The USDA FOIA regulation cited by DOA, 7 C.F.R. § 1.12, merely describes procedures for USDA's handling of CBI; it does not, and cannot, add any substantive legal requirements not contained in the FOIA statute.

28. In short, DOA has specified no law that precludes a state agency such as itself from disclosing documents in its possession under UIPA. Again, to the extent that any such law exists, and to the extent that any protected information has not already been redacted, the UIPA regulations provide for the segregation of protected information, yet DOA has made no attempt to follow this procedure.

29. Finally, while the basis for DOA's reliance on 5 U.S.C. § 552(b)(5), relating to "inter-agency or intra-agency memorandums or letters," is unclear, it is well-settled that this FOIA exception applies only to correspondence between federal agencies, not to correspondence between federal and state agencies.

FIRST CLAIM FOR RELIEF

30. Plaintiff realleges and incorporates by reference the allegations in the preceding paragraphs.

31. DOA's denial of CFS's May 23, 2003 Request to Access Government Records violates UIPA, Haw. Rev. Stat. § 92F-11.

32. CFS is aggrieved by DOA's denial of access and is entitled to judicial relief compelling disclosure of the requested documents pursuant to Haw. Rev. Stat. § 92F-15.

SECOND CLAIM FOR RELIEF

33. Plaintiff realleges and incorporates by reference the allegations in the preceding paragraphs.

34. An actual controversy exists between CFS and DOA regarding the legality of DOA's denial of access to government records sought in CFS's May 23, 2003 request. CFS is entitled to judicial relief establishing its right to access, and DOA's obligation to disclose, such records.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests this Court:

1. For a declaratory judgment entered in favor of CFS and against the DOA ruling that CFS is entitled to access records covered by its May 23, 2003 request for access to government records and compelling DOA to provide such access.

2. For an award of the costs of suit herein, including an award of reasonable attorneys' fees.

3. For the Court to retain continuing jurisdiction to review DOA's compliance with all judgments and orders entered herein.

4. For such further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between CFS and DOA.

//

//

//

//

//

//

DATED: Honolulu, Hawai'i, July 23, 2003.

PAUL H. ACHITOFF
DAVID L. HENKIN
D. KAPUA'ALA SPROAT
ISAAC H. MORIWAKE
EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai'i 96813-4501

By: _____
ISAAC H. MORIWAKE
Attorney for Plaintiff
CENTER FOR FOOD SAFETY