AN INTERNATIONAL ORGANIZATION DEDICATED TO PROTECTING THE RIGHTS OF ALL ANIMALS

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June 29, 2018

Kevin Shea
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Tonya G. Woods
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Via e-mail (kevin.a.shea@aphis.usda.gov; tonya.g.woods@aphis.usda.gov; foia.officer@aphis.usda.gov)[1]

Re: Freedom of Information Act Appeal – Request No. 2018-APHIS-05109-F

Dear Mr. Shea and Ms. Woods,

On behalf of PETA, and pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, I hereby appeal the United States Department of Agriculture's ("USDA") unlawful withholding of information contained pertaining to an inspection report of Waccatee Zoological Farm on May 9, 2017, that is responsive to PETA's FOIA request number 2017-APHIS-05109-F. As detailed in the attached appeal:

- the USDA has arbitrarily and capriciously failed to explain its decision to withhold categories of information that it previously disclosed, thereby subjecting the responsible agency officer, Ms. Woods, to potential disciplinary proceedings;
- the USDA diminished any privacy interest held by publishing the narrative portion of the inspection report on its website;
- the information does not meet the threshold requirements of Exemptions 6 or 7;
- disclosure is required because of the significant public interest in the information far outweighs the at-most *de minimis* privacy interests;
- the complaint information is not exempt from disclosure pursuant to exemption 7(D); and
- the USDA failed to meet its burden of demonstrating that it disclosed all "reasonably segregable" portions of the requested records.

[1] The USDA has informed PETA that it does not require a hard copy of FOIA appeals. Ex. 1, Email from Andrea McNally, U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Legislative and Public Affairs, to Storm Estep, PETA Foundation (June 14, 2018).

For these reasons, the USDA must release the unlawfully withheld information—which PETA requested over nine months ago—without further delay. I look forward to hearing within twenty business days that you will comply with the law and release this information so that we can avoid litigation and a request for disciplinary proceedings.

Very truly yours,

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Freedom of Information Act Appeal – Request No. 2017-APHIS-05109-F.

I. Background

Kathleen Futrell operates Waccatee Zoological Farm ("Waccatee"),[1] a roadside zoo located at 8500 Enterprise Rd., Myrtle Beach, SC, that is routinely open to the public[2] and is regulated as an exhibitor under the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2159.[3]

According to an inspection report that is posted on the USDA's website with minimal redactions, on May 9, 2017, the U.S. Department of Agriculture ("USDA") inspected and cited Waccatee for a host of AWA violations, including failing to provide adequate veterinary care to animals and failing to properly maintain its facilities.[4] Several of the animals at Waccatee were displaying abnormal behaviors such as repetitive pacing or swaying, which can be indicative of psychological distress.[5] Others showed signs of physical discomfort, such as itching, hair loss, and overgrown hooves.[6] Many of the enclosures were in need of repair or replacement as a result of issues such as rotting, erosion, chewed boards, insufficient coverage, or being insufficient for the animals to make normal postural adjustments.[7]

Waccatee is in chronic noncompliance with the AWA, and has been cited consistently for violations over the past twenty-six years. Despite indisputable evidence of neglect and mismanagement that causes harm to animals, Waccatee continues to possess and display them in continuous contravention of the AWA.

On June 21, 2017, after seeing the inspection report on the USDA's website, PETA submitted a Freedom of Information Act ("FOIA") request for "all records, including color photos, related to the May 9, 2017 inspection of Waccatee Zoo, 56-C-0230."[8]

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[1] *See* Ex. 1, Dun & Bradstreet, Waccatee Zoological Farm (June 28, 2018) (noting that Waccatee was incorporated in 1988).

[2] *See* Ex. 2, Waccatee Zoological Farm Contact Page, http://www.waccateezoo.com/contact.html (inviting the public to visit the roadside zoo and noting that it is open 365 days a year, weather permitting).

[3] Ex. 3, USDA, APHIS, Listing of Certificate Holders, https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf (last visited June 19, 2018) (listing Kathleen Futrell's AWA license as valid through Sep. 12, 2018).

[4] Ex. 4, USDA Inspection Report; *see also* USDA Inspection Reports for Exhibitors in South Carolina at 92-95, https://www.aphis.usda.gov/animal_welfare/downloads/awa/Inspection_Reports/E/AWA_IR_C-SC_secure.pdf (posting of inspection report at issue on USDA's website).

[5] Ex. 4.

[6] *Id.*

[7] *Id.*

[8] Ex. 5, Letter from Teresa Marshall, Information Officer, PETA Foundation to Tonya G. Woods, Director for Freedom of Information, USDA (Jun. 21, 2017).

More than nine months later, on April 2, 2018, the USDA responded to PETA's FOIA request.[9] The USDA stated that it located seven pages of inspection reports, four pages of a complaint, nine photographs, and three videos.[10] Despite having already been released on the USDA website almost completely unredacted, the narrative pages of the inspection report were almost entirely redacted pursuant to FOIA Exemptions 6 and 7(C).[11] The four pages pertaining to the complaint, which would yield the substantive information regarding the agency's response to the initial allegations, are almost entirely redacted pursuant to Exemptions 6, 7(C), and 7(D).[12] And the nine photographs and three videos from the inspection report were withheld in full pursuant to FOIA Exemptions 6 and 7(C).[13] This appeal challenges the USDA's improper and illegal use of Exemptions 6, 7(C), and 7(D) to withhold these public records.

II. The USDA Has Failed to Adequately Explain Its Decision to Withhold Categories of Information That It Has Previously Released

The USDA claims that "[t]he withholding of the photographs and videos are [*sic*] appropriate because the individual has a privacy interest as the facilities are located on the homestead."[14] However, photographs and videos taken as part of inspections of AWA exhibitors have routinely been provided by the USDA, in response to FOIA requests, as a long-established policy—regardless of whether the regulated facility is located on the exhibitor's homestead.[15] The USDA further claims that it has withheld the bulk of the information pertaining to the complaint it received because a "confidential source voluntarily provided . . . information that could be used in an administrative law enforcement investigation with the understanding that their identity would remain confidential."[16] However, in the past the agency routinely released AWA complaints and complaint results with only minimal—or no—redactions.[17]

Now, without any explanation as to why it has changed its position, the USDA asserts that the precise types of information it has previously released is exempt from disclosure pursuant to Exemptions 6, 7(C), and 7(D) of the FOIA, in contravention of well-established principles of administrative law.

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[9] Ex. 6, Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA, to Teresa Marshall, Information Officer, PETA Foundation (April 2, 2018).
[10] *Id*.
[11] Ex. 7, Redacted Inspection Report and Complaint Regarding Waccatee Zoological Farm, Ex. 3 at 1.
[12] *Id*.
[13] Ex. 6.
[14] *Id* at 2.
[15] *See, e.g.*, Ex. 8A (example of USDA responses to previous FOIA requests including inspection photographs and videos).
[16] Ex. 6.
[17] *See, e.g.*, Ex. 8B (records released with no redactions regarding AWA complaint pertaining to Waccatee).

"'Unexplained inconsistency' between agency actions"—like that between the USDA's prior releases and current withholdings—"is 'a reason for holding an interpretation to be an arbitrary and capricious change.'"[18] "'It is textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.'"[19] As the Ninth Circuit recently explained, departure from longstanding policy "without acknowledgment or explanation" is arbitrary and capricious.[20] Further, an agency's interpretation of a relevant provision that conflicts with its earlier interpretation is "entitled to considerably less deference" than a consistently held agency view.[21]

Thus, when, as here, an agency changes a policy or legal interpretation, it must provide a "reasoned explanation" for doing so, which requires "that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy."[22] When it fails to do so, as the USDA has done here, the agency acts arbitrarily and capriciously and its action must be set aside.[23]

For this reason alone, the information at issue was improperly withheld and must be released.[24]

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[18] *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *accord Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

[19] *New England Power Generators Ass'n, Inc. v. Fed. Energy Regulatory Comm'n*, 881 F.3d 202, 210 (D.C. Cir. 2018) (quoting W. *Deptford Energy, LLC v. Fed. Energy Regulatory Comm'n*, 766 F.3d 10, 20 (D.C. Cir. 2014) (alteration in original)).

[20] *Cal. Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 977 (9th Cir. 2018).

[21] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987)).

[22] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)); *accord Encino Motorcars*, 136 S. Ct. at 2126; *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

[23] *See Fox Television Stations*, 556 U.S. at 514-16; *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923; *Organized Vill. of Kake*, 795 F.3d at 966; *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 297-99 (4th Cir. 2018); *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1242 (D.C. Cir. 2017) (In a FOIA case "a plaintiff may challenge an agency's 'policy or practice' where it 'will impair the party's lawful access to information in the future.'" (citation omitted)).

[24] Moreover, such arbitrary and capricious withholding could subject Tonya Woods, as the primary responsible agency officer, to disciplinary proceedings. *See* 5 U.S.C. § 552(a)(4)(F); *see also* 7 C.F.R. § 1.7 (FOIA response letter must provide "[t]he name and title or position of each person responsible for denial of the request"); Ex. 6 (signed on behalf of Tonya Woods).

III. The USDA Cannot Withhold Information That It Has Posted on Its Website.

Prior to PETA submitting the FOIA request, the USDA publicly released on its website a version of the narrative portion of the inspection report at issue here with only signatures redacted, and that record remains on the USDA's website with minimal redactions.[25] Notably, consistent with longstanding agency policy, the USDA did not deem it necessary to apply any exemption to protect the identity of the exhibitor in the records. Because the USDA has publicly posted information about Waccatee's violations, it cannot now withhold that information.

Even if the USDA's new position is that portions of the records at issue are exempt from disclosure—which, as explained above, has not adequately been explained, and, as explained below, is erroneous—materials "normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."[26] For the purposes of disclosure under the FOIA, a "permanent public record" exists when the agency has released a "hard copy" of the information into the public domain.[27] It is beyond dispute that the USDA previously publicly released a copy of the narrative portion of inspection report—including the portions that it is now redacting—into the public domain.[28] Accordingly, the agency cannot now withhold this information. Moreover, to the extent the USDA's withholdings from the Animal Welfare Complaint and the photographic and video portions of the inspection report pertain to information that was already released in the publicly posted inspection report narrative, that information cannot now be withheld.

The prior release of the results of the narrative portion of the USDA's inspection report also undermines the any argument, discussed *infra*, that disclosure of this information could might infringe on privacy or lead to embarrass or harassment of the exhibitor. Any privacy infringement or potential for embarrassment or harassment, although likely nonexistent, has already been set afoot by the USDA—and apparently without any actual ramifications.

IV. The Withheld Information Is Not Exempt from Disclosure

The USDA redacted almost the entire narrative portion of the inspection report and withheld the photographic and video portions of the inspection report in full, asserting that Exemptions 6 and 7(C) authorize the withholdings because "the individual has a privacy interest as the facilities are located on the homestead" that "far outweighs any public interest in disclosing this personal information."[29] In addition, the only reason proffered to justify withholdings in the redacted complaint pursuant to exemption 7(D) was the speculative assertion that that a confidential source voluntarily provided "information that could be used in an administrative law enforcement

[25] *See supra* note 6.
[26] *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).
[27] *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).
[28] *See supra* note 6.
[29] Ex. 6.

investigation with the understanding that their identity would remain confidential."[30] As explained below, the USDA did not—and could not—justify these withholdings.

"[D]isclosure, not secrecy, is the dominant objective of the" FOIA.[31] As the Supreme Court has explained:

> The Freedom of Information Act was enacted to facilitate public access to Government documents. The statute was designed "'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" Consistently with this purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document.[32]

"Because FOIA establishes a strong presumption in favor of disclosure . . . requested material must be disclosed unless it falls squarely within one of the nine exemptions carved out in the Act."[33] These "exemptions are to be 'construed narrowly' in favor of disclosure."[34] Accordingly, there is "'a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions,"[35] and "'conclusory and generalized allegations of exemptions are unacceptable.'"[36] "And there is nothing unique in the application of Exemption 6 that lightens the agency's burden. In fact, 'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act'"[37]— indeed, it is "at its zenith."[38]

To carry this burden, an agency cannot merely recite the language of an exemption in a conclusory manner. Rather, the FOIA requires that an agency notify a requestor of "the *reasons*" for any withholdings.[39] Here, the USDA cursorily recited Exemptions 6, 7(C), and 7(D). As explained below, the agency fell far short of meeting its burden under the FOIA—and cannot meet that burden.

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[30] *Id.* at 3.
[31] *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
[32] *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citing 5 U.S.C. § 552(a)(4)(B)) (additional citations omitted).
[33] *Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015) (citation omitted).
[34] *Id.* at 297 (citation omitted).
[35] *Morley v. C.I.A.*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C.Cir.1973)).
[36] *Id.* at 1115 (D.C. Cir. 2007) (quoting *Founding Church of Scientology of Wash., D. C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C.Cir.1979)) (additional quotation marks and citation omitted)).
[37] *Multi Ag Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations omitted).
[38] *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (citation omitted).
[39] 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added); *accord* 7 C.F.R. § 1.7(a)(1).

A. The Information Does Not Meet the Threshold Requirements of Exemptions 6 and 7

"'Congress' primary purpose in enacting Exemption 6 was to protect *individuals* from the injury and embarrassment that can result from the unnecessary disclosure of *personal* information.'"[40] As the D.C. Circuit has explained, "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships."[41] The USDA's documentation of Waccatee's AWA violations do not contain any personal or intimate information, and thus do not constitute personnel, medical, or similar files. To the contrary, the photographs and videos taken during these inspections would be of animals and facilities—but would not include people.[42] This information relates exclusively to a business engaged in activity that is regulated under the AWA. Moreover, on the off chance that any photograph or video did include a person's face or personally-identifiable information, this information could easily be blurred or blacked out by the agency and released in accordance with the FOIA. Indeed, this is what it must do pursuant to its duty to segregate and has done historically as a matter of longstanding policy.[43]

The AWA specifically regulates activities, including Waccatee's exhibition of animals, that Congress has found "are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof" and whose regulation "is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce."[44] Because all the information pertains to Futrell's *business*, and because "[i]t is well-established . . . that neither corporations nor business associations possess protectable privacy interests" under Exemption 6,[45] the exemption is wholly inapplicable.[46]

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[40] *Multi Ag Media LLC*, 515 F.3d at 1228 (quoting *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599, (1982) (emphases added by D.C. Cir.)).

[41] *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980).

[42] Ex. 9, USDA, Animal Welfare Inspection Guide (2018), Required Inspection Procedures, Inspection Photographs, 2-14 – 2-15 (establishing the permissible scope of photographs and videos taken during inspections), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

[43] *See infra* at Part IV.D.

[44] 7 U.S.C. § 2131.

[45] *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985) (citations omitted); *accord Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 686 (D.C. Cir. 1976) (citation omitted); K. Davis, Administrative Law Treatise s 3A.19, at 163-64 (1970 Supp.); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 118 (D.D.C. 2005); *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. 31, 37 n.6 (D.D.C. 1996) ("corporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6"); *see also id.* at 37 n.4 ("The address of a business itself receives no protection at all under Exemption 6 because a business entity has no 'personal privacy' interest."); *Viacom Int'l, Inc. v. EPA*, No. 95-2243, 1995 U.S. Dist. LEXIS 17469 (E.D. Pa. Nov. 17, 1995) (records of EPA soil testing, including names and addresses of persons residing where samples were collected, were not "similar files" because they were not detailed records about individuals).

[46] Even to the extent the business may be individually or closely held, none of the information at issue would reveal anything at all about a business owner's personal finances. *Cf. Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). As noted, the withheld information

For these same reasons, Exemption 7(C) is also inapplicable. Similar to Exemption 6, Exemption 7(C) protects against "a clearly unwarranted invasion of personal privacy."[47] Thus, a personal privacy interest must be at stake for Exemption 7(C) to come into play. Exemptions 6 and 7(C) "cover related privacy interests, including those 'regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights [and] reputation.'"[48] Accordingly, Exemption 7's "privacy exemption does not apply to information regarding professional or business activities. And this information must be disclosed even if a professional reputation may be tarnished."[49] Because all the records at issue here pertain to a business, which by definition does not have a personal privacy interest, the USDA's application of Exemption 7(C) is unlawful.

Nor is the threshold requirement for Exemption 7—that the USDA establish that the information at issue was specifically "compiled for law enforcement purposes"[50]—met here. The D.C. Circuit focuses on whether the files relate to an actual "enforcement proceeding," as opposed to, for example, the agency engaging in its administrative inspection duties.[51] As the U.S. District Court for the District of Columbia has underscored, "[i]t was never intended that 'investigatory records' be interpreted so broadly as to encompass all information resulting from routine inspections."[52] Inspection photographs and videos are part of what must be included in the inspection reports, and are generated during routine inspections by the USDA, and not as part of any investigation or enforcement action.[53] Indeed, the narrative portion of the inspection report at issue states that it is a "ROUTINE INSPECTION."[54] In fact, the USDA uses a bifurcated inspection and investigation/enforcement process under the AWA, as explained by the USDA OIG:

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is comprised solely of photographs and videos taken during an inspection. "[T]here is a clear distinction between one's business dealings, which obviously have an *affect* on one's personal finances, and financial information that is *inherently* personal in nature." *Aguirre v. S.E.C.*, 551 F. Supp. 2d 33, 57 (D.D.C. 2008). Moreover, even if the information at issue might somehow reveal personal information in certain limited cases, the USDA has a duty to properly segregate and release the information in all of the other cases. 5 U.S.C. § 552(a)(8)(A)(ii)(II), (b); *infra* Part IV.D.

[47] 5 U.S.C. § 552(b)(7)(C).

[48] *Cohen v. E.P.A.*, 575 F. Supp. 425, 429 (D.D.C. 1983) (quoting *Rural Housing Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 77 (D.C.Cir.1974)).

[49] *Id.* (citing *Kurzon v. Dep't of Health & Human Servs.*, 649 F.2d 65, 69 (1st Cir.1981); *Sims v. Central Intelligence Agency*, 642 F.2d 562, 574 (D.C.Cir.1980)); *accord Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (citation omitted); *FCC v. AT&T, Inc.*, 562 U.S. 397, 409-10 (2011) ("The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.")

[50] 5 U.S.C. § 552(b)(7)(C); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615 (1982); *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 178 (D.C. Cir. 2002).

[51] *Jefferson*, 284 F.3d at 176-77.

[52] *Goldschmidt v. U.S. Dep't of Agric.*, 557 F. Supp. 274, 277 (D.D.C. 1983).

[53] *See* Ex. 9.

[54] Ex. 4.

> If an inspection discovers violations of AWA standards, AC requires the facility to correct the problems within a given timeframe. Moderate repeat violations (e.g., incomplete records) may be settled with an official warning, while more serious violations (e.g., animal deaths due to negligence and lack of veterinary care) are referred to APHIS' Investigative and Enforcement Services (IES) unit for a formal investigation, which includes gathering documentary evidence, interviewing witnesses, and other actions.
>
> After the completion of an investigation, IES national office staff review the evidence and determine, with the concurrence of AC, whether to take an enforcement action against the violator.[55]

The U.S. District Court for the District of Columbia held in *Goldschmidt v. USDA* that reports prepared by USDA inspectors that identify conditions that the inspector believes to violate applicable laws and regulations "are not 'investigatory' records compiled as part of an inquiry into specific suspected violations of the law. Rather, they are more accurately described as records generated pursuant to 'routine administration, surveillance or oversight of Federal programs.'"[56] Like the reports at issue in *Goldschmidt*, the photographs and videos that are part of the inspection record created by the USDA as a result of the agency's inspections of Waccatee facility "are compiled from information gathered during independent plant inspections" by USDA staff.[57] These photographs and videos were taken as part of a routine inspection when violations were discovered, and not as part of an enforcement action. Accordingly, they are the same as the records in *Goldschmidt*, where the Court concluded, "At that point, there is no enforcement proceeding or investigation focusing on specific alleged illegal acts in existence."[58]

Like the USDA employees that prepared the reports at issue in *Goldschmidt*, the inspectors documenting the inspections of Waccatee's facility have "no enforcement functions."[59] The court in *Goldschmidt* noted that it was only "*after*" the inspection reports were forwarded to a different entity that any investigation might "be said to have started."[60]

The same analysis pertains to the substance of the Animal Welfare Complaint form. The mere speculation that the complaint ultimately "could be used in an administrative law enforcement investigation"[61] does not render the information at issue "compiled for law enforcement

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[55] USDA, OIG, APHIS Oversight of Research Facilities 1, Audit No. 33601-0001-41 (Dec. 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.
[56] *Goldschmidt*, 557 F. Supp. 274, 276 (D.D.C. 1983) (citations omitted).
[57] *Id.*
[58] *Goldschmidt*, 557 F. Supp. 274, 276 (D.D.C. 1983) (citations omitted).
[59] *Id.* (quoting *Center for National Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C.Cir.1974)).
[60] *Id.*
[61] Ex. 6.

purposes." The USDA routinely takes AWA complaints from the public[62] and the vast majority of these complaints never lead to law enforcement investigations.

B. The Strong Public Interest in the Information Outweighs Any *De Minimis* Privacy Interest

1. At Most There Is Only a *De Minimis* Privacy Interest in the Information at Issue

Even if the USDA could somehow meet its threshold burdens under Exemptions 6 and 7—which, again, it cannot—disclosure of the information at issue would not constitute an unwarranted invasion of personal privacy. Again, Exemption 6 exempts disclosure only where it "would constitute a clearly unwarranted invasion of personal privacy"[63] and Exemption 7(C) authorizes withholding information only where it "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[64] Exemption 6's "clearly unwarranted" standard places a heavy burden on the government and, as a result, the presumption in favor of disclosure is strong.[65] The D.C. Circuit has observed that "[t]he privacy inquiries under Exemptions 6 and 7(C) are 'essentially the same.'"[66] Under both Exemptions 6 and 7(C), the third party must have more than a *de minimis* privacy interest that would be compromised by the release of the requested records.[67] Here, if any privacy interest in the information exists at all, it is *de minimis* at best.

As discussed above, the records at issue contain basic information related solely to a business entity, which is not the type of information that Exemptions 6 and 7(C) were intended to protect.[68] Again, the information being withheld includes photographs and videos taken during AWA-mandated inspections, and the sole basis the USDA has proffered for withholding this information is that the information was collected on the licensee's homestead[69]–because Futrell has voluntarily opted to locate her USDA-regulated business at the place of her residence. Disclosure of addresses where individuals' business and home addresses are the same does not alone constitute an unwarranted invasion of personal privacy when the information relates to the licensee's business activities,[70] and is even further limited when the individual is calling upon the public to visit his

[62] *See* Ex. 10, USDA, Animal Welfare Complaint form, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/complaint-form; Ex. 11, USDA, Animal Welfare Act Inspections, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_inspections (last modified Nov. 13, 2017) ("personnel also perform inspections in response to legitimate concerns and complaints received from the public"); Ex. 9 at A-25 (complaint worksheet form);
[63] 5 U.S.C. § 552(b)(6).
[64] *Id.* § 552(b)(7)(C).
[65] *Morley v. C.I.A.*, 508 F.3d 1108, 1127-28 (D.C. Cir. 2007).
[66] *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004) (citations omitted).
[67] *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice,* No. 11-754(GK), 2012 WL 45499 at *4 (D.D.C. Jan. 10, 2012).
[68] *See supra* at Part V.A; *Cohen v. E.P.A.*, 575 F. Supp. 425, 429 (D.D.C. 1983).
[69] Ex. 6.
[70] *See Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. 31, 36 (D.D.C. 1996); *see also Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 36 (D.C. Cir. 2002) ("[D]isclosure of site specific information is not 'inherently and always a significant threat' to privacy. Rather, the privacy threat

homestead. The question "must be measured in light of the effect on [the individuals] as businesspeople."[71] The *only* information at issue here about Futrell (or any other individual) is in her capacity as a *businessperson* at her business address. Indeed, Futrell's business is the exhibition of wild and exotic animals and, as such, she regularly opens her facility—and thus her "homestead"—to the public who pay to enter and observe the animals.[72] There is clearly no privacy interest in the activities of a business that is open to the public, regardless of its location.[73]

Additionally, even if the USDA were to speculate—which it did not in the instant matter, but has elsewhere—that the release of the photographs and videos might cause embarrassment, harassment, or stigma, this "does not amount to a serious invasion of privacy," especially when related to business activities in a regulated industry.[74] Indeed, even if Futrell were likely to be "embarrassed," by disclosure of additional evidence of Waccatee's numerous AWA violations, Exemptions 6 and 7(C) cannot be invoked, just as they cannot be invoked to "protect the concerns of a contractor who would be embarrassed by disclosure of his responsibility for shoddy work" or "those embarrassed by the nature of contract work they have undertaken.[75] As the D.C. Circuit has explained, "[i]nformation relating to business judgments and relationships does not qualify for exemption. This is so even if disclosure might tarnish someone's professional reputation."[76]

Furthermore, here, as in *Nat'l Ass'n of Home Builders v. Norton*, at best the USDA "has established only the speculative potential of a privacy invasion without any degree of likelihood."[77] Under the FOIA, an agency can withhold information only if it *reasonably foresees* that disclosure would harm an interest protected by an exemption under the FOIA, or if disclosure is prohibited by law.[78]

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depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue." (citation omitted)).

[71] *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. at 36.

[72] *See supra* note 2.

[73] *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (even in the context of information with more privacy implications than that at issue here—specific financial information related to entities regulated under the AWA—the USDA has found only a "limited privacy interest" and that holding has been upheld by the D.C. Circuit).

[74] *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 262 (D.C. Cir. 1982); *see also Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) ("Exemption [6] does not apply to an invasion of privacy produced as a secondary effect of the release. . . . According to the statute, it is the very 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy.'" (quoting 5 U.S.C. § 552(b)(6))).

[75] *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980) (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 376(1976)); *see also Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 939 (6th Cir. 1988) ("[T]he disclosure of a document will not constitute a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate.").

[76] *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (citations omitted).

[77] *Nat'l Ass'n of Home Builders*, 309 F.3d at 37.

[78] 5 U.S.C. § 552(a)(8)(A).

Finally, as discussed above, the USDA has already disclosed a minimally redacted version of the narrative of the inspection report at issue.[79] Accordingly, the information released to the public by the USDA greatly diminishes any supposed privacy interest and undermines any contention that releasing that information could cause potential embarrassment or harassment. If there were any potential embarrassment or harassment, it likely would have been prompted by the information already made available by the USDA by its online posting of the minimally redacted report.

For these reasons, any privacy interest in the information at issue is at most *de minimis*—and more likely wholly non-existent.

2. There Is a Very Strong Public Interest in Disclosure of the Information at Issue

The public interest in disclosure is so strong here that it easily trumps any alleged privacy interest, notwithstanding the USDA's brazen, self-serving, and bald assertion that the "public interest served in disclosure of the information" is "non-existent."[80]

Exemptions 6 and 7(C) require the agency or court to "balance the right of privacy of affected individuals against the right of the public to be informed."[81] As the D.C. Circuit has explained,

> The proper inquiry is whether the information "sheds light" on government activities, and whether it would "appreciably further" public understanding of the government's actions, A public interest exists where the public "can more easily determine" whether an agency is in compliance with a statutory mandate, even if "the data will not be perfect" with respect to the value of the information that might be derived from that requested.[82]

In conducting this analysis, the USDA has specifically found a "significant public interest in release" of information that would allow the public to "gauge the effectiveness of inspections" conducted by the USDA under the AWA, and the D.C. Circuit has upheld that finding.[83]

There can be no question that there is a very strong public interest in the information at issue here. As the D.C. Circuit recognized nearly two decades ago, "[T]he AWA anticipated the continued monitoring of concerned animal lovers to ensure the purposes of the Act were honored."[84] This monitoring is only possible through access to the information about AWA-mandated inspections,

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[79] *See supra* note 6 and accompanying text.
[80] Ex. 6.
[81] *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1970).
[82] *Jurewicz*, 741 F.3d 1326, 1333–34 (D.C. Cir. 2014) (citations omitted).
[83] *Id.* at 1333.
[84] *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998); *see also id.* ("[T]he Congressmen responsible for including animal exhibitions within the AWA encouraged the continued monitoring of humane societies and their members. They spoke, for instance, of how America had long depended on humane societies to bring the mistreatment of animals to light." (citing 116 Cong. Rec. 40,305 (1970) (statement of Rep. Whitehurst))).

especially in light of the USDA's refusal to publicly post inspection reports and the supporting materials, such as photographs, for most exhibitors.

The public's interest in this information is made stronger in cases involving facilities that are found to be persistently non-compliant with the AWA, such as Waccatee.[85] Waccatee has been cited, *inter alia*, for failing to: provide animals adequate veterinary care; ensure housing facilities are structurally sound and maintained; provide adequate space for animals; provide an effective dietary plan for the animals; and provide environment enhancement for the psychological well-being of primates.[86] Many of these voluminous violations are repeat and/or ongoing violations.[87] Despite Futrell's unwillingness to abide by even the most minimal legal requirements pertaining to animal welfare, the USDA has continued to renew her license to exhibit animals year after year.[88]

On May 9, 2017, USDA inspectors cited Futrell for multiple violations of the AWA, including a goat and several aoudads with overgrown hooves, which caused one aoudad's claws to grow in different directions; two squirrel monkeys with severe hair loss and redness all over their rear legs and most of their tails; a lion with incoordination in his rear legs potentially caused by malnutrition; abnormal repetitive behavior observed in several animals; several enclosures with items needing repair or replacement; and insufficient space for animals.[89]

Overgrown hooves can lead to abnormalities in the bones of the feet as they can cause the toes to turn improperly, which can lead to lameness and be potentially painful.[90] The hooves of one aoudad were so long that that they appeared slipper like, with the front claw in the air and one appearing to grow sideways.[91]

The two abnormally thin squirrel monkeys observed with severe hair loss and redness were seen scratching excessively.[92] Despite their problematic appearance, neither monkey had been evaluated by a veterinarian to try to ascertain the reason for their fur and weight loss.[93]

Futrell was also cited for multiple issues concerning the maintenance of Waccatee's facilities.[94] The inspection report noted that several animal enclosures had items in need of repair or replacement, including rotting boards with exposed nails, eroded boards, rotting boards, loose boards hanging from the roof an enclosure, an inadequately covered cap in a bison enclosure, and exposed sharp edges in some enclosures.[95]

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[85] *See* Ex. 12.
[86] *Id*.
[87] *See id.*
[88] *See* Ex. 3.
[89] *See* Ex. 4.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.

Three black bears and two cougar had insufficient room to make normal postural and social adjustments.[96] These animals normally have large ranges in the wild, and require exercise, including walking and climbing.[97] The two black bears had only enough space to take about five to six steps in each direction and little to no space for climbing.[98] The bears were observed exhibiting repetitive behaviors, which can be indicative of psychological distress.[99]

Earlier this year, Waccatee was cited yet again for many of the violations documented in May 2017. In addition to failing to provide sufficient space to animals, Waccatee was once again cited for inadequate veterinary care, including for a monkey who was licking the tip of his tail, which had no skin and had red tissue showing, possibly from frostbite. Like the squirrel monkeys cited in May 2017, this monkey showed clear hair loss and skin irritation that was not properly addressed or treated with veterinary care. The bears cited in May 2017 also continued to display stereotypical behaviors, and the USDA noted:

> This abnormal behavior was cited on 5-9-17 as behavior needing veterinary evaluation, and habitat and husbandry modifications. At this point the proposed new enclosure for the bears has not been started. The enclosures have not been modified nor any husbandry changes made to provide for normal activities and normal postural adjustments like foraging, climbing, and clawing. The physical needs of the bears needs [sic] to be addressed by the veterinarian and caretakers, and changes made to address these needs.

Waccatee's chronic noncompliance with the AWA and the USDA's failure to act on these numerous violations present a clear danger to animals continuously being harmed by Waccatte's ongoing AWA violations.

USDA inspectors were required to take photographs or video of the animals to document these violations in order to properly document the violation and identify the animals.[100] Indeed, in response to PETA's FOIA request, the USDA stated that it located seven pages of inspection reports, four pages of a complaint, nine photographs, and three videos responsive to PETA's request.[101] This information is critical for the public to gauge the effectiveness of the USDA's inspections, and in particular to determine why the USDA has consistently failed so miserably in its mandate to ensure that Futrell complies with the minimal requirements set forth in the AWA.

The USDA's unwillingness to use all tools available to the agency in order to force Futrell to comply with the AWA—including refusing to renew Futrell's AWA license—further supports the public's strong interest in the information at issue in this appeal. And the USDA's refusal to release the information raises the question of whether the agency is motivated by a desire to protect itself

[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *See* Ex. 9.
[101] Ex. 6.

from criticism and embarrassment for its role in continuing to license Futrell despite her documented history of repeated serious violations of the AWA.

The USDA's failure to take meaningful action against Waccatee, a habitually non-AWA compliant facility, is precisely the sort of inaction the USDA's own Office of Inspector General ("OIG") has repeatedly raised concerns about.[102] The OIG has also identified as problematic the policy of automatically renewing AWA licenses despite chronic violations.[103]

In addition, the OIG has also raised concerns about inspection consistency.[104] Just last year the OIG "found that inspections are not always performed consistently. . . . Uniformity in the

[102] *See, e.g.*, USDA, OIG, APHIS Oversight of Research Facilities, Audit No. 33601-0001-41, page 2 of pdf (Dec. 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.pdf (finding that APHIS "did not make the best use of its limited resources," "did not follow its own criteria in closing at least 59 cases that involved grave (e.g., animal deaths) or repeat welfare violations," "issued penalties that were reduced by an average of 86 percent from Animal Welfare Act's (AWA) authorized maximum penalty per violation," and "under-assessed penalties . . . by granting good faith reductions without merit or using a smaller number of violations than the actual number"); *id.* at 3 ("In 2010, an OIG audit . . . found that APHIS' enforcement process was ineffective, and the agency was misusing its own guidelines to lower penalties for AWA violators. The agency . . . did not implement an appropriate level of enforcement. At a time when Congress tripled the authorized maximum penalty to strengthen fines for violations, actual penalties were 20 percent less than previous calculations." (citing USDA, OIG, APHIS Animal Care Program Inspections of Problematic Dealers, Audit 33002-4-SF (May 2010), https://www.usda.gov /oig/webdocs/33002-4-SF.pdf)); *id.* ("In 2005, OIG performed an audit on animals in research facilities and found that APHIS was not aggressively pursuing enforcement actions against violators of AWA and was assessing minimal monetary penalties. Inspectors believed the lack of enforcement action undermined their credibility and authority to enforce AWA. In addition to reducing the penalty by 75 percent, APHIS offered other concessions—making penalties basically meaningless. Violators continued to consider the monetary stipulation as a normal cost of business, rather than a deterrent for violating the law." (citing USDA, OIG, APHIS Animal Care Program Inspection and Enforcement Activities, Audit. No. 33002-3-SF, (Sept. 2005), https://www.usda.gov/oig/webdocs/33002-03-SF.pdf)); *id.* ("In 1995, an Office of Inspector General (OIG) audit of APHIS' enforcement policies found that APHIS did not fully address problems disclosed in a prior report, and that APHIS needed to take stronger enforcement actions to correct serious or repeat violations of AWA. Dealers and other facilities had little incentive to comply with AWA because monetary penalties were, in some cases, arbitrarily reduced and often so low that violators regarded them as a cost of doing business." (citing USDA, OIG, APHIS Enforcement of the Animal Welfare Act, Audit No. 33600-1-Ch (Jan. 1995))).

[103] *See* USDA, OIG, Animal and Plant Health Inspection Service Implementation of the Animal Welfare Act, Audit No. 33002- 0001-Ch, (1992); USDA, OIG, Enforcement of the Animal Welfare Act, Audit No. 33600- 1-Ch (1995).

[104] OIG, APHIS: Animal Welfare Act – Marine Mammals (Cetaceans), Audit Report 33601-0001-31 (May 2017), https://www.usda.gov/oig/webdocs/33601-0001-31.pdf.

inspection process across the country is not assured."[105] The OIG further noted the importance of inspection documentation to "assure adequate inspections are occurring.[106]

Nor was this the first time the OIG flagged problems with the USDA's AWA inspections. In 2010, the OIG similarly found "that Animal Care inspectors . . . were not consistently identifying safety-related deficiencies during their facility inspections," which "could result in escapes by dangerous animals that would endanger" the public.[107] The OIG found that this "lack of consistency in the safety determinations made by APHIS Animal Care inspectors from one facility to another, and in some cases between different Animal Care inspectors at a single facility" meant that "APHIS cannot adequately ensure the safety of the animals, or of the public."[108]

Of particular relevance here, the OIG has previously found that some inspectors "did not always adequately . . . support violations with photos,"[109] which placed animals at "higher risk for neglect or ill-treatment"—in contravention of the purposes of the AWA—and weakened enforcement actions.[110] The OIG further noted that lack of photographs made identification of animals in need of care on re-inspection (and thus whether the facility has come into compliance) difficult.[111] In response, APHIS management acknowledged a potential need for additional training in collecting evidence.[112] These additional concerns make the public interest in this matter especially high.

Access to the information at issue will undoubtedly shed light on the USDA's compliance with its statutory mandates under the AWA. Among other things, access to the information will enable the public to:

- assess whether the USDA is following its own policies in conducting inspections;
- determine whether the USDA has adequately addressed issues raised by the OIG about the adequacy of its inspection photos;

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[105] *Id.* at 10; *see also id.* at 18-19 (noting that certain AWA regulations "are not consistently enforced by APHIS inspectors," resulting in "inconsistent inspection standards" and potential health consequences).

[106] *Id.*; *see also id.* at 12 (recommending that the agency "develop a uniform method of documentation to assure adequate inspections are occurring" and noting that APHIS had agreed to "establish a uniform method of documentation to promote consistent inspections and compliance").

[107] USDA, OIG, Controls Over APHIS Licensing of Animal Exhibitors 2, Audit Report 33601-10-Ch (June 2010), https://www.usda.gov/oig/webdocs/33601-10-CH.pdf.

[108] *Id.* at 6.

[109] USDA, OIG, Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers, Audit No. 33002-4-SF, at 2, https://www.usda.gov/oig/webdocs/33002-4-SF.pdf; *accord id.* at 17; *see also id.* at 22 ("We found that photos were not always taken when necessary, even though APHIS issues digital cameras to the inspectors as part of their field equipment.").

[110] *Id.* at 17; *see also id.* at 22 (finding that in 7 of 16 enforcement decision reviewed, violations had been dismissed for lack of insufficient evidence, including photographs).

[111] *Id.* at 19.

[112] *Id.* at 17.

- monitor inconsistencies in inspections; and
- monitor the USDA's enforcement of the AWA.

The public's interest in ensuring the USDA's proper implementation of the AWA is substantial and clearly outweighs any minimal privacy interests that may be identified.[113] Accordingly, photographs and videos taken by the USDA as part of an inspection documenting violations are not exempt from disclosure pursuant to Exemptions 6 or 7(C), and must be provided in full.

C. The Complaint Information Is Not Exempt from Disclosure Pursuant to Exemption 7(D)

The USDA incorrectly withheld all of the substantive information pertaining to complaint filed against Waccatee under Exemption 7(D).[114] Under this exemption, information can be withheld that "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."[115] Under this exemption, there cannot be a presumption of confidentiality, but rather, the government bears the burden of "establishing that the withheld documents reasonably could have been expected to disclose the identity of, or information provided by, a confidential source."[116] Here, the USDA made no attempt to meet this burden, but merely cursorily stated that it "withheld the identity of the confidential source and any information that would reveal the source's identity."[117] While this may authorize the redaction of the name, address, and other truly personal information of the complainant contained in the document, there is no explanation regarding the extensive information redacted by the USDA.[118]

The agency also bears the burden of proving that there was an actual expectation of confidentiality. Confidentiality cannot be presumed, but rather the agency must prove that 1) the source in question spoke with the understanding that the communication would remain confidential, or 2) the source provided information under an express assurance of confidentially or in circumstances from which such an assurance could be inferred.[119] When one files an AWA complaint with the USDA, there is an option to remain anonymous, but not an option for confidentiality.[120] Clearly in this case the source did not opt for anonymity, as the USDA knew their identity and personal information.[121] The USDA failed to meet its burden to show any express or implied confidentiality.

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[113] *See, e.g.*, *Wash. Post Co. v. U.S. Dep't of Agric*., 943 F. Supp. at 36 (finding disclosure of information regarding recipients of federal subsidies under cotton subsidy program would further significant public interest in shedding light on the workings of USDA in administration of its massive subsidy program).
[114] *See* Ex. 6, Ex. 7.
[115] 5 U.S.C. § 552(b)(7)(D).
[116] *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 169 (1993).
[117] Ex. 6.
[118] *See* Ex. 7.
[119] *Landano*, 508 U.S. at 172.
[120] *See* Ex. 10.
[121] *See* Ex. 7.

Nor is the portion of Exemption 7(D) that pertains to "a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation" of any relevance here, despite the USDA's recitation of this language in its response letter.[122] By its terms, that provision pertains only to information gathered as part of a criminal or national security investigation, and the USDA does not claim—nor could it colorably claim—any such investigation here. The USDA speculatively asserts that the information might someday "be used in an *administrative* law enforcement investigation"[123] but says nothing about any potential criminal law enforcement investigations. This is consistent with the agency's enforcement practices under the AWA—the only AWA enforcement actions routinely taken by the USDA are warnings, settlements, stipulations, and administrative complaints.[124] Although criminal penalties are theoretically available for AWA violations, they are virtually unheard of in practice and have only been brought in recent years in cases of dogfighting, never in cases involving exhibitors like Waccatee.[125]

D. The USDA Failed to Disclose All "Reasonably Segregable" Portions of the Requested Records

Even if portions of the items requested are found to be protected from disclosure by Exemptions 6, 7(C), or 7(D), the FOIA requires agencies to take "reasonable steps necessary" to segregate and release non-exempt information.[126] Since the FOIA's focus is "information, not documents," an agency "cannot justify withholding an entire document simply by showing that it contains some exempt material."[127] "In addition to establishing that information is properly withheld under the claimed FOIA exemption, an agency seeking to withhold information bears the burden of establishing that all reasonably segregable non-exempt portions of records are disclosed."[128]

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[122] *See* Ex. 6.

[123] *Id.* (emphasis added).

[124] *See* Ex. 13, USDA, Animal Care Enforcement Summary (AWA and HPA), https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-ac_enforcement_summary (last modified Apr. 18, 2018).

[125] *See* Ex. 14, U.S. Dep't of Justice, Animal Welfare, https://www.justice.gov/enrd/animal-welfare.

[126] 5 U.S.C. § 552(a)(8)(A)(ii)(II); *see also id.* § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ."); 7 C.F.R. § 1.15(b) ("In the event a requested record contains some portions that are exempt from mandatory disclosure and others that are not, the official responding to the request shall ensure that all reasonably segregable nonexempt portions are disclosed . . . .").

[127] *Clemente v. F.B.I.*, 64 F. Supp. 3d 110, 116 (D.D.C. 2014) (quoting *Krikorian v. U.S. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993)).

[128] *In Def. of Animals v. U.S. Dep't of Agric.*, 656 F. Supp. 2d 68, 73, 82 (D.D.C. 2009) (holding that the USDA failed to meet its burden of demonstrating that all reasonably segregable nonexempt information from 1017 withheld pages had been disclosed).

Claims of non-segregability must be made with the same degree of detail as required for claims of exemption.[129]

As the Department of Justice has long recognized, the "clear purpose of this statutory requirement . . . is to 'prevent the withholding of entire [documents] merely because portions of them are exempt, and to require the release of nonexempt portions.'"[130] As the Department of Justice's Office of Information Policy has emphasized, "[i]n administering the [FOIA] . . . agencies must not overlook their obligation to focus on individual record portions that require disclosure. This focus is essential in order to meet the Act's primary objective of 'maximum responsible disclosure of government information.'"[131]

Courts have specifically held that in applying Exemptions 6 and 7(C) agencies are required to release all remaining information after limiting any redactions to only those that must be made to protect individual privacy interests.[132]

Agencies also have a duty to take reasonable steps to segregate and release non-exempt information as it pertains to Exemption 7(D).[133] Because 7(D) is designed to prevent revealing the identity of a confidential source,[134] this information should be segregable from the pure contents

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[129] *See, e.g., Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261–62; *Sciacca v. F.B.I.*, 23 F. Supp. 3d 17, 26 (D.D.C. 2014) (agency "must provide a detailed justification and not just conclusory statements to demonstrate that all reasonably segregable information has been released" (internal quotation marks and citations omitted)).

[130] Department of Justice, Office of Information Policy, FOIA Update Vol. XIV, No. 3, OIP Guidance: The 'Reasonable Segregation' Obligation (Jan. 1, 1993) (quoting Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 14 (Feb. 1975)) (alteration in original).

[131] *Id.* (citation omitted).

[132] *See, e.g., Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 230-31 (1st Cir. 1994) (deciding that Vaughn Index must explain why documents entirely withheld under Exemption 7(C) could not have been released with identifying information redacted); *Canning v. DOJ*, No. 01-2215, slip op. at 19-20 (D.D.C. Mar. 9, 2004) (finding application of Exemption 7(C) to entire documents rather than to personally identifying information within documents to be overly broad); *Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000) (any non-exempt information must be segregated and released, unless the "exempt and nonexempt information are 'inextricably intertwined,' such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value"); *Maydak v. DOJ*, 254 F. Supp. 2d 23, 43 (D.D.C. 2003) (where the FBI failed to explain "why it could not excise the third-party identifying information and release any non-exempt information" the court "[could not] conclude that the FBI properly withheld third-party documents in their entirety under exemption 7(C)"); *Lawyer's Comm. for Civil Rights v. U.S. Dep't of the Treasury*, No. 07-2590, 2008 WL 4482855, at *21 (N.D. Cal. Sept. 30, 2008) (requiring parties to meet and confer regarding scope of Exemption 6 and 7(C) redactions to ensure only private information is withheld and alleviate need for Vaughn Index).

[133] *Billington v. U.S. Dep't of Justice*, 245 F. Supp. 2d 79, 86 (D.C. Cir. 2000).

[134] 5 U.S.C. § 552(b)(7)(D).

detailing the nature of the complaint. A large paragraph contained in the requested complaint was redacted under Exemptions 6, 7(C), and 7(D).[135] The USDA offered no explanation regarding how or why the contents of the complaint were covered these exemptions, nor did it make any attempt segregate any supposed personal information or information that could potentially reveal the identity of a confidential source from the substantive content of the complaint,[136] which would be invaluable in assessing whether the USDA had adequately fulfilled its duty to address the contents of the complaint during its inspection. The agency cannot lawfully invoke these three exemptions to withhold the entire paragraph with no explanation or justification.[137]

As discussed above, because the information at issue in this appeal is not the type of information protected by Exemptions 6 and 7, and, even if it were, poses no risk of yielding an unwarranted invasion of privacy, the USDA's withholding of almost all of the requested information unquestionably violates the FOIA. However, in the unlikely event that it is determined that portions of the requested information are exempt from disclosure and thus can be redacted, this determination must be fully justified by the USDA and the, the remaining information must be released without further undue delay.[138]

V. Conclusion

Because the USDA failed to explain its decision to withhold categories of information that it has routinely provided in the past, because the USDA diluted any privacy interest by releasing a minimally redacted version of the narrative portion of the inspection report prior to PETA's request, because the threshold requirements for Exemptions 6 and 7 are not met here, because the very strong public interest in disclosure of the information at issue far outweighs any de minimis privacy interest, and because Exemption 7(D) is inapplicable, the information at issue must be disclosed in full.

I look forward to your response within twenty business days of receipt of this timely filed administrative appeal.[139]

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[135] *See* Ex. 7.
[136] *See* Ex. 6.
[137] *See Billington*, 245 F. Supp. 2d at 91.
[138] *See ACLU v. DOD*, 389 F. Supp. 2d 547, 571 (S.D.N.Y. 2005) ("publication of redacted photographs will not constitute an 'unwarranted invasion of personal privacy,' since all identifying characteristics of the persons in the photographs have been redacted").
[139] *See* 5 U.S.C. § 552(6)(A)(ii); 7 C.F.R. § 1.14(c).