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June 7, 2018

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Via certified mail (return receipt requested) and e-mail (kevin.a.shea@aphis.usda.gov; tonya.g.woods@aphis.usda.gov; foia.officer@aphis.usda.gov)

Re: Freedom of Information Act Appeal – Request No. 2016-APHIS-04262-F

Dear Mr. Shea and Ms. Woods,

On behalf of PETA, I hereby appeal the United States Department of Agriculture's ("USDA") unlawful withholding of information contained in agency records that are subject to PETA's Freedom of Information Act ("FOIA") request number 2016-APHIS-04262-F. As detailed in the attached appeal:

- the USDA has arbitrarily and capriciously failed to explain its decision to withhold information that it previously disclosed, thereby subjecting the responsible agency officer, Ms. Woods, to potential disciplinary proceedings;
- the USDA previously publicly released some the same information that is at issue here, thereby precluding its withholding;
- the information at issue does not meet the threshold requirements of Exemptions 6 or 7(C);
- even if these threshold requirements were met, disclosure is required because of the significant public interest in the information at issue when balanced against the at-best *de minimis* privacy interests;
- the USDA failed to meet its burden of demonstrating that it disclosed all "reasonably segregable" portions of the requested records;

PETA FOUNDATION IS AN OPERATING NAME OF FOUNDATION TO SUPPORT ANIMAL PROTECTION.

AFFILIATES:
- PETA U.S.
- PETA Asia
- PETA India
- PETA France
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- PETA Germany
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- PETA Foundation (U.K.)

- a Glomar response was improper and unlawful because the requested records are not exempt under FOIA;
- the records do not meet the threshold requirements for a Glomar response; and
- the USDA may not give an "across-the-board" Glomar response.

For these reasons, the USDA must release the information at issue here—which PETA requested nearly two years 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. 2016-APHIS-04262-F

I. Background

The Pocono Snake & Animal Farm is a roadside zoo regulated as an exhibitor under the Animal Welfare Act ("AWA").[1] It is incorporated as Pocono Snake Country, Inc.[2] On April 4, 2016, on behalf of PETA, Lewis Crary sent a letter to the USDA's Animal and Plant Health Inspection Service ("APHIS") Animal Care ("AC") program, requesting that it inspect an apparently injured bear and a distressed monkey at Pocono Snake & Animal Farm.[3] The request included detailed information regarding the animals' conditions, photos of the animals, and the AWA regulations that appeared to be violated.[4] Mr. Crary received a complaint response form letter, dated April 5, 2016, advising that his request was assigned concern number AC16-347, he must submit a FOIA request to find out the results, and he should allow 30-60 days for the USDA to look into the matter.[5]

On June 10, 2016, Teresa Marshall submitted a FOIA request on behalf of PETA for all records related to the USDA's response to the report concerning the Pocono Snake & Animal Farm, and two other complaints—AC16-368, regarding Lancelot Kollman Ramos, and AC16-353, regarding Carson & Barnes Circus.[6] Ms. Marshall requested all agency records regarding the reports, including citations, warnings, inter-office memos and mails, inspector notes, and other agency enforcement actions. She further requested that the request be forwarded to other USDA offices with related records.[7]

Nearly two years later, on March 9, 2018, the USDA responded to the FOIA request. Tonya Woods explained that AC had located twenty-six pages of responsive records related to all three of the complaints, combined.[8] All twenty-six pages were produced. However, some of the records were withheld in part pursuant to FOIA Exemptions 6 and 7(C), including nine pages related to Pocono Snake & Animal Farm.[9] PETA hereby appeals the redactions from these records.[10] Attached as Exhibit 6 are the nine pages of responsive records, regarding the Pocono Snake & Animal Farm,

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[1] 7 U.S.C. §§ 2131-2159.

[2] Ex. 1. Pennsylvania Department of State, Pocono Snake Country, Inc.

[3] Ex. 2. Request for Investigation of Apparently Injured Bear and Distressed Monkey at Pocono Snake & Animal Farm, Apr. 4, 2016.

[4] *Id.*

[5] Ex. 3. USDA Complaint response form letter to Lewis Crary, AC16-347, Apr. 5, 2016.

[6] Ex. 4. FOIA Request Letter to Tonya Woods, AC16-347, June 10, 2016.

[7] *Id.*

[8] Ex. 5. Letter from the USDA to Teresa Marshall, FOIA Request 2016-APHIS-04262-F, Mar. 9, 2018.

[9] Ex. 6, Records regarding Pocono Snake & Animal Farm disclosed by the USDA in response to FOIA Request 2016-APHIS-04262-F.

[10] Although PETA is not appealing the partial withholdings from the pages pertaining to Lancelot Kollman Ramos (Complaint AC16-368), and Carson & Barnes Circus (Complaint AC16-353) at this time, PETA is appealing the *Glomar* response as to records regarding those complaints from IES. Moreover, PETA reserves its right to challenge similar withholdings and redactions with regard to those exhibitors, and others, in the future.

produced by the USDA. These records include Mr. Crary's three-page complaint, one page of email correspondence, the one-page response form letter Mr. Crary received from the USDA immediately following his complaint, a two-page inspection report for Pocono Snake & Animal Farm, and a two-page USDA Animal Welfare Complaint form.[11] The two pages of the Animal Welfare Complaint form, which would yield the substantive information regarding the agency's response to the initial allegations, are almost entirely redacted, pursuant to Exemptions 6 and 7(C).[12] The two pages of the inspection report were almost entirely redacted.[13]

Ms. Woods also explained that in 2017, the request was forwarded to Investigative Enforcement Services ("IES"), which searched for related records, but could neither confirm nor deny the existence of such records (a Glomar response).[14]

This appeal challenges the USDA's use of Exemptions 6 and 7(C) to redact the records it produced regarding the Pocono Snake & Animal Farm (AC16-347), as well as the Glomar responses to the Pocono Snake & Animal Farm (AC16-347), Lancelot Kollman Ramos (AC16-368), and Carson & Barnes Circus (AC16-353).

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

The precise type of information redacted from the records at issue has previously been released with only minimal redactions in response to FOIA requests.[15] Now, without any explanation as to why it has changed its position, the USDA is asserting that this information is exempt from disclosure pursuant to Exemptions 6 and 7(C) of the FOIA. "'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.'"[16] "'It is textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.'"[17] As the Ninth Circuit recently explained, departure from longstanding policy "without acknowledgment or explanation" is arbitrary and capricious.[18] 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

[11] Ex. 6.
[12] *See id.*
[13] *See id.*
[14] *Id.*
[15] *See, e.g.*, Ex. 7, USDA Complaint Responses for Timothy Stark and The Mobile Zoo.
[16] *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).
[17] *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)).
[18] *Cal. Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 977 (9th Cir. 2018).

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."[19] 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.[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]

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

Moreover, such arbitrary and capricious withholding could subject Tonya Woods, as the primary responsible agency officer, to disciplinary proceedings.[22]

III. The USDA Previously Released a Minimally Redacted Version of the Same Inspection Report

In 2016, the USDA publicly released on its website a version of the inspection report at issue here with only signatures redacted.[23] In that report, the agency cited the Pocono Snake & Animal Farm for one of the issues raised in PETA's complaint at issue, shortly after the complaint was made.[24] Notably, the USDA did not deem it necessary to apply any exemption to protect the identity of the exhibitor in the narrative set forth in the Animal Welfare Complaint.

Even if the USDA's new position is that portions of the records 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."[25] 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.[26] It is beyond dispute that the USDA previously publicly released a copy of the inspection report—including the portions that it is now redacting—into the

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[19] *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).
[20] *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)).
[21] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987)).
[22] *See* 5 USC § 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. 5 (signed on behalf of Tonya Woods).
[23] Ex. 8, Pocono Snake & Animal Farm Inspection Report, Apr. 13, 2016.
[24] *Id.*
[25] *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).
[26] *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).

public domain. Accordingly, the agency cannot now withhold this information. Moreover, to the extent the USDA's withholdings from the Animal Welfare Complaint pertain to information that was already released in the publicly posted, that information cannot be withheld.

This prior release of the results of the USDA's inspection of the Pocono Snake & Animal Farm also undermines the USDA's argument, discussed *infra*, that disclosure of this information could "embarrass or lead to harassment" of the exhibitor. Any 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 the information at issue, including inspection findings and complaint results, asserting that Exemptions 6 and 7(C) authorize its withholding because disclosure "could cause embarrassment, harassment, or other stigma to the licensee."[27] As explained below, the USDA did not—and could not—justify these withholdings.

"[D]isclosure, not secrecy, is the dominant objective of the" FOIA.[28] 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.[29]

"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."[30] These "exemptions are to be 'construed narrowly' in favor of disclosure."[31] Accordingly, there is "'a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions,"[32]

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[27] Ex. 5.
[28] *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
[29] *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).
[30] *Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015) (citation omitted).
[31] *Id.* at 297 (citation omitted).
[32] *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)).

and "'conclusory and generalized allegations of exemptions are unacceptable.'"[33] "And there is nothing about invoking 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'"[34]—indeed, it is "at its zenith."[35]

To carry this burden, an agency cannot merely conclusorily recite the language of an exemption. Rather, the FOIA requires that an agency notify a requestor of "the *reasons*" for any withholdings.[36] Here, the USDA cursorily recited Exemptions 6 and 7(C). As explained below, the agency fell short in meeting its burden under the FOIA—and cannot meet that burden.

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

"'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.'"[37] 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."[38] The USDA's records regarding the Pocono Snake & Animal Farm complaint do not contain any personal, intimate information and thus do not constitute personnel, medical, or similar files. To the contrary, the information relates exclusively to a corporate business engaged in commercial activity that is regulated under the Animal Welfare Act. The AWA specifically regulates activities, including Pocono'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."[39] Because all the information pertains to Pocono's *business*, and because "[i]t is well-established . . . that neither corporations nor business associations possess protectible privacy

[33] *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)).
[34] *Multi Ag Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations omitted).
[35] *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (citation omitted).
[36] 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added); *accord* 7 C.F.R. § 1.7(a)(1).
[37] *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.)).
[38] *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980).
[39] 7 U.S.C. § 2131.

interests" under Exemption 6,[40] the exemption is wholly inapplicable.[41] Likewise, any records pertaining to the Carson & Barnes Circus and Lancelot Kollman Ramos pertain to corporate businesses involved in the regulated commercial exhibition of animals and are therefore not subject to Exemption 6.[42]

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."[43] Thus, a personal privacy interest must be at stake for Exemption 7(C) to come into play. Because all the records at issue here pertain to businesses, which by definition do not have personal privacy interests, the USDA's application of Exemption 7(C) was unlawful. 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.'"[44] Accordingly, Exemption 7's "privacy exemption does not apply to information regarding professional or business activities. This information must be disclosed even if a professional reputation may be tarnished."[45]

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[40] *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).

[41] Even to the extent a portion of these businesses 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 is comprised solely of certificate numbers, customer numbers, legal names, addresses, inspection dates, and inspection numbers. "[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).

[42] *See, e.g.*, Ex. 9, Oklahoma Secretary of State, Carson & Barnes Circus Company, Domestic For Profit Business Corporation; Ex. 10, Florida Division of Corporations, Circo Espectacular, Inc., Lancelot Kollman.

[43] 5 U.S.C. § 552(b)(7)(C).

[44] 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)).

[45] *Cohen v. E.P.A.*, 575 F. Supp. 425, 429 (D.D.C. 1983) (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,

Nor is the threshold requirement for Exemption 7(C)—that the USDA establish that the information at issue was specifically "compiled for law enforcement purposes"[46]—met here for the redactions made to the records that were released regarding the USDA's inspection of Pocono in response to PETA's complaint. 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.[47] 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."[48] Documents following complaints are generated during routine inspections by USDA and not as part of any investigation or enforcement actions. The USDA OIG has explained the USDA's bifurcated inspection and investigation/enforcement process under the AWA:

> 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.[49]

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.'"[50] Like the reports at issue in *Goldschmidt*, the records related to the USDA's inspection of Pocono Snake & Animal Farm "are compiled from information gathered during independent plant inspections" by USDA staff.[51] "At that point, there is no enforcement proceeding or investigation focusing on specific alleged illegal acts in existence."[52]

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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).

[46] 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).

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

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

[49] USDA, OIG, APHIS Oversight of Research Facilities 1, Audit No. 33601-0001-41 (Dec. 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.

[50] *Goldschmidt*, 557 F. Supp. 274, 276 (D.D.C. 1983) (citations omitted).

[51] *Id.*

[52] *Id.*

Like the USDA staff that prepared the reports at issue in *Goldschmidt*, the inspectors documenting the Pocono Snake & Animal Farm inspection reports have "no enforcement functions."[53] The court in *Goldschmidt* noted that it was only "*after*" the inspection reports were forwarded to a different entity might any investigation "be said to have started."[54] The same is true for AWA inspections generally, regardless of whether they are conducted in response to a complaint from the public.

B. At Best 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(C)—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"[55] and Exemption 7(C) authorizes withholding information only where it "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[56] 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.[57] The D.C. Circuit has observed that "[t]he privacy inquiries under Exemptions 6 and 7(C) are 'essentially the same.'"[58] 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 material.[59] Here, if any privacy interest in the information exists at all, it is *de minimis* at best.

As discussed above, the information at issue is basic information related to business entities, and is not the type of information that Exemptions 6 and 7(C) were intended to protect.[60] Again, the information being withheld is includes inspection findings and complaint results, and the sole basis the USDA has proffered for withholding this information is its speculation that its release might "cause embarrassment, harassment, or other stigma to the licensees."[61] Even the disclosure of information such as addresses, where individuals' business and home addresses are the same alone does not constitute an unwarranted invasion of personal privacy when the information relates to the licensee's business capacities.[62] Rather, the issue "must be measured in light of the effect on [the individuals] as businesspeople."[63] The *only* information at issue here about any individuals is

[53] *Goldschmidt*, 557 F. Supp. at 276 (quoting *Center for National Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C.Cir.1974)).
[54] *Id.*
[55] 5 U.S.C. § 552(b)(6).
[56] *Id.* § 552(b)(7)(C).
[57] *Morley v. C.I.A.*, 508 F.3d 1108, 1127-28 (D.C. Cir. 2007).
[58] *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004) (citations omitted).
[59] *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).
[60] *See supra* Part II.A; *Cohen v. E.P.A.*, 575 F. Supp. 425, 429 (D.D.C. 1983).
[61] Ex. 5.
[62] *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 depends on the individual characteristics that the disclosure reveals and the consequences that are likely to ensue." (citation omitted)).
[63] *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. at 36.

in their capacity as *businesspeople* at their business address. Indeed, Pocono routinely opens up its facility to the public to come on site and observe animals[64]—that is how PETA learned about the conditions that it reported. There is clearly no privacy interest in the activities of a business that is open to the public. 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.[65]

Moreover, potential embarrassment, harassment, or stigma—especially when related to business activities in a regulated industry—"does not amount to a serious invasion of privacy."[66] Indeed, even if the regulated entities at issue are likely to be "embarrassed" by disclosure of their responsibility for violating the AWA, 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.[67] 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."[68]

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."[69]

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

C. There Is a Very Strong Public Interest in the Information at Issue

Even if there were a significant privacy interest in the information at issue, that interest would need to be weighed against the public interest in disclosure, which is very high in this case, notwithstanding the USDA's self-serving, bald assertion that the "public interest that may be

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[64] *See* Ex. 11, Pocono Snake & Animal Farm, http://poconoanimals.com/ ("Open All Year! Open Daily").
[65] *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014).
[66] *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))).
[67] *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.").
[68] *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (citations omitted).
[69] 309 F.3d 26, 37 (D.C. Cir. 2002).

served by disclosure" is "minimal."[70] 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."[71] 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.[72]

In conducting this analysis, the USDA has specifically found a "significant public interest in release" of information 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.[73]

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."[74] This monitoring is only possible through access to the information at issue, especially in light of the USDA's refusal to publicly post inspection reports for most exhibitors.

Since at least 1999, the USDA has repeatedly cited the Pocono Snake & Animal Farm for violating the AWA. Specifically, the Pocono Snake & Animal Farm has been cited for failing to provide animals adequate veterinary care, keep proper records, properly sanitize enclosures, ensure the housing facilities are structurally sound and maintained, provide adequate food, and provide environment enhancement for the psychological well-being of primates.[75] Despite all of these citations, the USDA has continued to renew Pocono's license to exhibit animals year after year, and has failed to take any enforcement action against the facility. Additionally, the concerns raised in the animal welfare complaint give rise to a greater public interest in receiving the records—as the USDA has failed to take meaningful action pursuant to the complaint. The public interest here is especially high in light of the fact that the USDA's own Office of Inspector General has repeatedly raised concerns about the agency's failure to meaningfully enforce the AWA,[76] its

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[70] Ex. 5.

[71] *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1970).

[72] *Jurewicz*, 741 F.3d 1326, 1333–34 (D.C. Cir. 2014) (citations omitted).

[73] *Id.* at 1333.

[74] *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))).

[75] Ex. 12, USDA Inspection Reports for Pocono.

[76] *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

policy of automatically renewing AWA licenses despite chronic violations,[77] and, most recently, inconsistencies in conducting AWA inspections.[78] 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 at issue will enable the public to:

- assess whether the USDA is following its own policies in conducting inspections;
- 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.[79] Accordingly, records

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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))).

[77] *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).

[78] 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.

[79] *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).

related to the animal welfare complaint inspection report are not exempt from disclosure pursuant to Exemptions 6 or 7(C), and thus should be provided in full.

D. The USDA Failed to Meet its Burden of Demonstrating that it Disclosed All "Reasonably Segregable" Portions of the Requested Records

Even if portions of the responsive records are found to be protected from disclosure by an exemption, the FOIA requires agencies to take "reasonable steps necessary" to segregate and release non-exempt information.[80] 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."[81] "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."[82] Claims of non-segregability must be made with the same degree of detail as required for claims of exemption.[83]

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.'"[84] And yet, through its extensive redactions, withholding entire documents is effectively what the USDA did in this case, in total contravention of the law. 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.'"[85]

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[80] 5 U.S.C. § 552(a)(8)(A)(ii)(II); *see also* 5 U.S.C. § 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 . . . .").

[81] *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)).

[82] *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).

[83] *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)).

[84] 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).

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

Courts have specifically held that in applying both 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.[86] With the USDA providing no substantive basis for its application of the FOIA exemptions beyond general and conclusory language, it is impossible to conclude that the records have been properly redacted. However, as discussed above, since the redacted information poses no risk of yielding an unwarranted invasion of privacy, these sweeping redactions appear to be completely misapplied. Even if portions of the requested documents may be withheld, the reasonably segregable portions of these records must still be provided and any remaining redactions fully justified.

V. <u>The USDA's Glomar Response Was Unlawful</u>

In rare and limited circumstances, in response to a FOIA request, when the government has found that its mere acknowledgement of the existence of responsive records would, itself, reveal information exempt under the FOIA, it may look to the process of refusing to confirm or deny the existence of the records responsive to the request.[87] This response to a FOIA request is known as a Glomar response.[88] In these cases, to properly provide a Glomar response to a request, the government must first treat the fact of the existence of the documents as the request, and proceed with the FOIA's exemption procedures.[89]

As discussed further below, the USDA's use of the Glomar response to the request regarding the Pocono Snake & Animal Farm, Lancelot Kollman Ramos, and Carson & Barnes Circus were improper, for three (3) independent reasons: (1) the responsive records are not exempt under FOIA, (2) the records do not meet the threshold requirements for issuance of a Glomar response, and (3) the USDA may not give an "across-the-board" Glomar response. Accordingly, the USDA cannot withhold these records, and they must be disclosed in full.

A. <u>A Glomar Response Was Improper and Unlawful Because the Requested Records Are Not Exempt Under FOIA</u>

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[86] *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 (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); *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).

[87] *Phillippi v. CIA*, 546 F.2d 1009, 1012–13 (D.C. Cir. 1976).

[88] See *id.*

[89] *Id.* ("The Agency [must] provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records.").

A Glomar response is valid only "if the fact of the existence or nonexistence of agency records falls within a FOIA exemption."[90] "Because Glomar responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information, they are permitted only when confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exception.'"[91] "In determining whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-Glomar cases."[92]

In refusing to acknowledge the existence of responsive records pertaining to the Pocono Snake & Animal Farm, Lancelot Kollman Ramos, and Carson & Barnes Circus, the USDA stated that "[t]o acknowledge the existence of records would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA."[93] However, as discussed in full above, the release of these records would not invade personal privacy. Moreover, the USDA did not provide any substantive argument for any exemptions under the FOIA, instead conclusorily asserting that "[r]esponsive records, if they existed, would be exempt from disclosure under Exemptions 6 and/or 7C."[94] As demonstrated *supra*, moreover, the responsive records cannot lawfully be withheld pursuant to any of these exemptions. Accordingly, they must be provided in full.

B. The Records Do Not Meet the Threshold Requirements for Issuance of a Glomar Response

The USDA's denial letter states that the agency considers whether the confirmation of the existence of certain records would reveal exempt information, and the following four (4) threshold circumstances exists when issuing a Glomar response: (1) the request is made by a third party; (2) the request is for information about a person identified by name; (3) the named individual is not deceased; and (4) the individual has not given the requester a waiver of his privacy rights.[95]

However, as noted above,[96] the records regarding the Pocono Snake & Animal Farm, Lancelot Kollman Ramos, and Carson & Barnes Circus are records about corporate business activities. The plain language of the above-referenced threshold requirements states that these circumstances were designed to protect individuals and their privacy interests, and not corporations.[97] Corporations, such as these, do not have personal privacy interests protected under the FOIA, nor do they meet Glomar's threshold requirement that they would be a "person identified by name."[98] Consequently,

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[90] *Wolf v. CIA,* 473 F.3d 370, 374 (D.C. Cir. 2007).
[91] *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013).
[92] *Wolf,* 473 F.3d at 374.
[93] Ex. 5.
[94] *Id.*
[95] Ex. 5; *see also*, *Pugh v. F.B.I.*, 793 F. Supp. 2d 226, 232 (D.D.C. 2011).
[96] *See supra* notes 2 & 42 and accompanying text.
[97] *See also, Pugh,* 793 F. Supp. 2d at 232.
[98] *See, e.g., id.; 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.'").

because the records requested pertain to corporate businesses, they clearly fail to meet the threshold requirements the USDA provided of being subjected to a Glomar response.

C. The USDA May Not Give an "Across-the-Board" Glomar Response

Even if portions of the requested records contained information for which a Glomar response was proper, the agency must still provide those records that are not protected by one of FOIA exemptions. "Across-the-board" Glomar responses are unjustified where there are records that fall outside of FOIA's exemptions.[99] Consequently, even if it were determined that portions of the responsive records could be protected from disclosure due to an exemption of the FOIA—and acknowledgement of the existence of these records would itself cause harm cognizable under the exemption—the reasonably segregable portions of the records that would not be protected by a privacy exemption must be provided.

VI. Conclusion

Because the USDA failed to explain its decision to withhold categories of information related to the Pocono Snake & Animal Farm that it previously released, the threshold requirements for Exemptions 6 and 7(C) are not met here, there is little to no privacy interest in the information at issue, and there is a very strong public interest in disclosure, this information must be disclosed in full. Further, because the records are not exempt under the FOIA, the records do not meet the threshold requirements for a Glomar response, and the USDA may not give an "across-the-board" Glomar response, a Glomar response to the Pocono Snake & Animal Farm, Lancelot Kollman Ramos, and Carson & Barnes Circus was improper and unlawful.

I look forward to your response within twenty business days of receipt of this timely filed administrative appeal.[100]

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[99] *PETA v. Nat'I Inst. Health*, 745 F.3d 535, 541 (D.C. Cir. 2014).
[100] *See* 5 U.S.C. § 552(6)(A)(ii); 7 C.F.R. § 1.14(c).