

July 16, 2018

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Administrator  
Animal & Plant Health Inspection Service  
U.S. Department of Agriculture

Bernadette Juarez  
Deputy Administrator  
Animal Care  
Animal & Plant Health Inspection Service  
U.S. Department of Agriculture

Tonya Woods  
FOIA Director  
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**Re: Request for Access to Full Animal Welfare Act Annual Reports,  
Including Explanation Pages, Pursuant to 5 U.S.C. § 552(a)(2)**

Dear Mr. Shea and Mses. Juarez and Woods,

I am writing on behalf of myself in my individual capacity as well as in my capacity as Vice President and Deputy General Counsel for the PETA Foundation, and on behalf of PETA, Physicians Committee for Responsible Medicine, Massachusetts Society for the Prevention of Cruelty to Animals, and Rescue and Freedom Project to request, pursuant to 5 U.S.C. § 552(a)(2), that the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) affirmatively disclose full research facility annual reports (annual reports), including the explanation pages of those reports, for fiscal years 2015-2017.

Currently, these annual reports are posted without Column E explanation pages—the critical portion of the report that purports to explain the bases for subjecting animals to painful or distressful procedures without medication or other treatments to minimize their suffering. *See* 7 U.S.C. § 2143(a)(7); 9 C.F.R. § 2.36(b)(7). Most pages explaining departures from other minimum animal welfare requirements are also missing from these reports. *See* 7 U.S.C. § 2143(a)(7); 9 C.F.R. § 2.36(b)(3). Failure to include these pages with the online postings violates the Freedom of Information Act's (FOIA) affirmative disclosure mandate.

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

AFFILIATES:

- PETA U.S.
- PETA Asia
- PETA India
- PETA France
- PETA Australia
- PETA Germany
- PETA Netherlands
- PETA Foundation (U.K.)

The E-FOIA’s affirmative disclosure mandate was intended to “tackle the mother of all complaints lodged against the Freedom of Information Act: that is, the often ludicrous amount of time it takes some agencies to respond, if they respond at all, to freedom of information requests.” 142 CongRec. H10447, H10451. APHIS’s failure to comply with the mandate flies in the face of both the letter and the purpose of the 1996 amendments to the FOIA.

The mandate provides that “by computer telecommunications”—i.e., online<sup>1</sup>—“[e]ach agency . . . shall make available”:

- . . . copies of all records, regardless of form or format—(i) that have been released to any person under paragraph (3); and
- (ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
- (II) that have been requested 3 or more times . . . .

5 U.S.C. § 552(a)(2)(D).

USDA regulations promulgated pursuant to this mandate further provide that “each agency within the Department shall make . . . available” “by computer telecommunications”:

Copies of all records, regardless of form or format, which have been released pursuant to a FOIA request under 5 U.S.C. 552(a)(3), and which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. Agencies shall decide on a case by case basis whether records fall into this category, based on the following factors:

- (i) Previous experience with similar records;
- (ii) The particular characteristics of the records involved, including their nature and the type of information contained in them; and
- (iii) The identity and number of requesters and whether there is widespread media, historical, academic, or commercial interest in the records . . . .

7 C.F.R. § 1.4(a)(4).

“To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it” makes affirmative disclosures. 5 U.S.C. § 552(a)(2)(E). “*However*, in each case the justification for the deletion shall be *explained fully in writing*, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption . . . under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.” *Id.* (emphases added).

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<sup>1</sup> See U.S. Dep’t of Justice, Office of Information Policy, OIP Guidance, Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request, <https://www.justice.gov/oip/oip-guidance/proactive-disclosure-of-non-exempt-information> (updated Jan. 11, 2017) (“Congress intended the term ‘computer telecommunications’ to mean online access —i.e., that agencies would make proactive disclosures by posting the information on the internet.” (citing S. Rep. No. 104-272, at 11 (1996); H.R. Rep. No. 104-795, at 20-21 (1996); 142 Cong. Rec. S10893, S10894 (statement of Sen. Leahy); 142 Cong. Rec. H10447, H10451 (statement of Rep. Maloney))).

It is beyond cavil that AWA annual reports qualify as frequently requested records. In April 2003, Chester Gipson, then Deputy Administrator of Animal Care for APHIS, acknowledged that annual reports qualified as “reading room” records “because of the high interest from animal interest groups as well as the general public,” Memorandum from Chester Gipson to Kenneth Cohen (April 18, 2003), and APHIS’s then Assistant General Counsel agreed with this conclusion, stating unequivocally that annual reports “*qualify as records subject to multiple requests under E-FOIA and must be made available to the public via electronic means,*” Memorandum from Kenneth E. Cohen, Assistant General Counsel, General Law Division, Office of General Counsel, USDA, to Chester A. Gipson, Deputy Administrator, Animal Care, APHIS, & Michael S. Marquis, Assistant Director for Freedom of Information, Legislative and Public Affairs, APHIS (Mar. 12, 2004) (emphasis added). Furthermore, APHIS’s FOIA logs show that even just over the past year and a half it has received *dozens* of requests for access to annual reports, *see* USDA, APHIS, FOIA Logs, [https://www.aphis.usda.gov/aphis/resources/foia/ct\\_foia\\_logs](https://www.aphis.usda.gov/aphis/resources/foia/ct_foia_logs)—and pursuant to FOIA’s statutory deadlines has by now certainly released such records to requesters.<sup>2</sup>

Yet, although the FOIA clearly requires these reports to be posted online, with any redactions properly indicated and explained, the USDA appears to be withholding virtually *all* Column E explanation pages from the annual reports posted for the years 2015-2017, as well as the vast majority of other explanation pages, without so much as acknowledging that it is doing so, let alone proffering any basis for that decision. *See, e.g.*, Intervet Inc. (Merck Animal Health) 2017 Annual Report (reporting that 1 cat, 574 guinea pigs, 1382 hamsters, and 459 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Merck Sharp & Dohme Corp. 2017 Annual Report (reporting that 4 guinea pigs, 3 rabbits, and 4 primates were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); University of Massachusetts Medical School 2017 Annual Report (reporting that 25 primates and 430 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); U.S. Army Medical Research Institute of Infectious Diseases 2017 Annual Report (reporting that 190 primates, 18 ferrets, 454 guinea pigs, and 256 hamsters were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Walter Reed Army Institute of Research 2017 Annual Report (reporting that 170 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Charles River Laboratories Inc. 2016 Annual Report (reporting that 3 hamsters and 12 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Intervet Inc. (Merck Animal Health) 2016 Annual Report (reporting that 823 guinea pigs, 1157 hamsters, and 541 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Merck Sharp & Dohme Corp. 2016 Annual Report (reporting that 8 dogs, 47 hamsters, and 6 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); University of Massachusetts Medical School 2016 Annual Report (reporting that 712 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); U.S. Army Medical Research Institute of Infectious Diseases 2016 Annual Report (reporting that 137 primates, 535

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<sup>2</sup> Indeed, the 2015 Annual Reports were also previously released in that they were posted on APHIS’s website pursuant to the FOIA’s affirmative disclosure mandates prior to the February 3, 2017, removal of records. As Mr. Shea, who was responsible for making the agency’s February 2017 decision to remove information from the FOIA Electronic Reading Room, explained in a sworn declaration to a federal court, “*APHIS generally referred requesters to the website, rather than processing and releasing records already available on the agency website.*” Decl. of Kevin Shea ¶ 17 (Apr. 26, 2017), filed in Support of Defs’ Opp’n to Preliminary Injunction, *Animal Legal Defense Fund v. U.S. Dep’t of Agric.*, Civ. No. 3:17-00949 (N.D. Cal.), Docket No. 22-1 (emphasis added). The information to which he specifically refers includes “inspection reports and research facility annual reports.” *Id.* ¶¶ 14-17.

guinea pigs, and 238 hamsters were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Walter Reed Army Institute of Research 2016 Annual Report (reporting that 274 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Charles River Laboratories Inc. 2015 Annual Report (reporting that 1 guinea pig and 25 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Intervet Inc. (Merck Animal Health) 2015 Annual Report (reporting that 853 guinea pigs, 1,194 hamsters, and 646 rabbits were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Merck Sharp & Dohme Corp. 2015 Annual Report (reporting that 1 dog, 1 guinea pig, 297 hamsters, 30 rabbits, and 3 primates were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); University of Massachusetts Medical School 2015 Annual Report (reporting that 609 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); U.S. Army Medical Research Institute of Infectious Diseases 2015 Annual Report (reporting that 171 primates, 28 rabbits, 684 guinea pigs, and 440 hamsters were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so); Walter Reed Army Institute of Research 2015 Annual Report (reporting that 378 guinea pigs were subjected to unmitigated pain or distress but failing to disclose the reasons for doing so). There is no lawful basis for withholding this information, especially in light of the fact that the USDA has routinely posted these pages online for many years and, indeed, continues to maintain them on its website for past years' reports. *See, e.g.*, Charles River Laboratories Inc. 2014 Annual Report; Merck Sharp & Dohme Corp. 2014 Annual Report Charles River Laboratories Inc. 2013 Annual Report; Merck Sharp & Dohme Corp. 2013 Annual Report.

Because the explanation pages clearly comprise part of the reports themselves, *see, e.g.*, 7 U.S.C. § 2143(a)(7) (requiring “each research facility . . . to report at least annually, that the provisions of this chapter are being followed and that professionally acceptable standards governing the care, treatment, and use of animals are being followed by the research facility during actual research or experimentation,” and requiring the report to include “information on procedures likely to produce pain or distress in any animal” and “an explanation for any deviation from the [regulatory] standards”); 9 C.F.R. § 2.36(b)(7) (“An explanation of the procedures producing pain or distress in these animals and the reasons such drugs were not used shall be attached to the annual report . . . .”); APHIS Form 7023 (“(An explanation of the procedures producing pain or distress on these animals and the reasons such drugs were not used must be attached to this report.”), the USDA must disclose them on its website with the rest of the report. Indeed, the agency seems aware of as much, given that it provides columns for these pages of the reports on its website where the annual reports are posted, and indeed provides these pages of the reports for prior years—it simply is failing to post the pages for the reports from the years 2015 to 2017.

In light of the foregoing, I request that APHIS come into compliance with its affirmative disclosure duties by immediately disclosing all annual report explanation pages. Please let me know by the end of the day August 13 if, and by when, you intend to comply with this request. If I have not heard back from you by then, I will assume that you are denying my request. If you have any questions I can be reached at [DelciannaW@petaf.org](mailto:DelciannaW@petaf.org) or at 202-309-4697.

Sincerely,



Delcianna J. Winders

Enclosures

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