AN INTERNATIONAL ORGANIZATION DEDICATED TO PROTECTING THE RIGHTS OF ALL ANIMALS

PETA FOUNDATION

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December 17, 2018

Kevin Shea
Administrator
U.S. Department of Agriculture
Animals and Plant Health Inspection Service

Tonya G. Woods
Director, Freedom of Information & Privacy Act
U.S. Department of Agriculture
Animal and Plant Health Inspection Service

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 for Request No. 2018-APHIS-00087-F

Dear Mr. Shea and Ms. Woods,

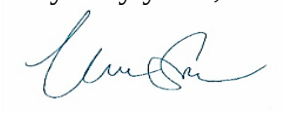
On behalf of People for the Ethical Treatment of Animals, Inc. ("PETA"), I hereby appeal the United States Department of Agriculture's ("USDA") unlawful withholding of information contained in agency records that are subject to PETA's Freedom of Information Act ("FOIA") request no. 2018-APHIS-00087-F, specifically, documents related to Barry R. Kirshner Wildlife Foundation, a USDA licensed exhibitor (license no. 93-C-0504). As detailed in the attached appeal:

- the USDA has arbitrarily and capriciously failed to explain its decision to withhold information that it previously disclosed, subjecting the responsible agency officer, Ms. Woods, to potential disciplinary proceedings;
- the withheld information at issue does not meet the threshold requirements of Exemptions 6 or 7(C);
- disclosure is required because the significant public interest outweighs the at-most *de minimis* privacy interests;
- the USDA failed to meet its burden of demonstrating that it disclosed all "reasonably segregable" portions of the requested records; and
- the *Glomar* responses are unlawful because the requested records are not exempt under FOIA, and as a result, the records do not meet threshold requirements for a *Glomar* response.

[1] The USDA has informed PETA that it does not require a hard copy of FOIA appeals. Ex. A, Email from Andrea McNally, USDA, 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 information at issue here 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,



Michelle Sinnott
Counsel, Captive Animal Law Enforcement
[redacted]

Attachments

FREEDOM OF INFORMATION ACT APPEAL FOR REQUEST NO. 2018-APHIS-00087-F

FACTUAL BACKGROUND

Barry R. Kirshner Wildlife Foundation ("Kirshner") is a California nonprofit association[2] and an unaccredited zoo in Oroville, California that exhibits a variety of animals to the public and is regulated under the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2159.[3] For many years the U.S. Department of Agriculture ("USDA") routinely released the types of information at issue in this appeal—and some of the exact same information it is now withholding—but the agency has recently reversed course without explanation. For example, pursuant to the Freedom of Information Act's ("FOIA") affirmative disclosure mandate, the USDA routinely posted the reports of its AWA inspections for Kirshner and other exhibitors regulated under the AWA on its website with only minimal redactions for signatures.[4] However, on February 3, 2017, the USDA removed all of these records from its website. It subsequently began reposting inspection reports, but with all identifying information redacted from the majority of the reports and without any ability to look up reports for most entities—including for Kirshner and many other regulated exhibitors. The USDA has also routinely released, with only minimal redactions, other types of information regarding AWA regulated facilities that are at issue in this appeal, including inspection report photographs, license renewal applications, and correspondence between AWA licensees and the USDA.[5]

Kirshner has a history of violating the AWA. A female lion cub named Lucie is the subject of several of these AWA violations. Lucie arrived at Kirshner in January 2017 at thirteen weeks

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[2] *See* Ex. 1, Articles of Association, Barry R. Kirshner Wildlife Foundation, Oct. 2, 1997, http://rct.doj.ca.gov/Verification/Web/Details.aspx?result=6046f3f8-18e1-44c0-8909-0fe5b6c76ff2.

[3] *See* Ex. 2, USDA, Excerpt: Listing of Certificate Holders, https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf (updated Dec. 1, 2018) (listing Kirshner's AWA license as valid through April 10, 2019).

[4] *See* Ex. 3, Memorandum from Kenneth Cohen, Assistant General Counsel, USDA, to Chester Gipson, Deputy Administrator, Animal Care, APHIS, USDA (Mar. 12, 2004) (AWA inspection reports "qualify as records subject to multiple requests under E-FOIA and must be made available to the public via electronic means"); *see, e.g.*, Ex. 4, USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, April 16, 2015 (inspection report with only signatures redacted); USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, May 29, 2015 (same); USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, May 10, 2016 (same); USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, July 20, 2016 (same); USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, Oct. 20, 2016 (same).

[5] *See, e.g.*, Ex. 5, Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Jan. 6, 2016) (FOIA response letter including nineteen inspection report photographs of an AWA-regulated business); Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Mar. 10, 2017) (FOIA response letter including twenty-two inspection report photographs of an AWA-regulated business); Ex. 6, Letter from Katy Vagnoni on behalf of Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Dec. 15, 2014) (FOIA response letter including various correspondence between the USDA and Tri-State operator); Letter from Katy Vagnoni on behalf of Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Apr. 2, 2015) (FOIA response letter including license applications with animal inventory information).

old.[6] Several months later, in April 2017, the USDA found Lucie "was exhibiting some lameness in [her] hindquarters, and had a history of intermittent lameness in the front as well."[7] By June, Lucie was "severely lame, uncomfortable, and unwilling to stand."[8] The USDA found that while Kirshner had an appropriate feeding plan "to ensure optimal bone growth and development in growing cubs, the diet plan was not being correctly followed" for Lucie.[9] The USDA required Kirshner to consult with a veterinarian with experience in big cat nutrition and to "immediately follow the exact recommendations of the expert."[10] During the next inspection, the USDA noted that the agency had specialists review x-rays of Lucie and both specialists concluded that "the radiographs showed thinned bone cortices, which is typically seen in metabolic bone disease, which can be caused by a dietary deficiency."[11] It now appears that there are at least six (6) inspection reports covering this time period when the USDA was closely monitoring Lucie's condition that are not available on the USDA's website and from which the USDA is now withholding all substantive information.[12]

Because PETA was no longer able to obtain any substantive information from the USDA's website, and because of ongoing animal welfare concerns, on October 4, 2017, Teresa Marshall submitted a FOIA request on behalf of PETA to the USDA Animal and Plant Health Inspection Service's ("APHIS") Animal Care ("AC") program, for "all documents for the past three years related to Barry R. Kirshner Wildlife Sanctuary, 93-C-0504."[13] Ms. Marshall specified that by all documents, she was requesting:

- photographs and/or videos;
- teachable moments;
- inspection appeals;
- complaints;
- veterinary records;
- correspondence between the exhibitor and the USDA, correspondence between the USDA AC and IES [Investigative and Enforcement Service]; between USDA and local law enforcement agencies; and between USDA and the USFWS; and
- all attachments to the above.[14]

Nearly a year later, on September 18, 2018, the USDA responded to this request.[15] Tonya Woods' response to this request included, *inter alia*, refusing to even confirm or deny the existence of records—a *Glomar* response (see *infra*, Section IV)—and producing several largely blacked-out pages. Ms. Woods explained that AC and Investigation and Enforcement Services ("IES")

[6] Ex. 7, Email from Roberta Kirshner Notifying California Department of Fish and Wildlife of a Received Animal (Jan. 21, 2017) (identifying a 13-week old female lion cub that was received with microchip 981 020 005 142 737); 2017 Inventory (listing a lion cub named Lucie with microchip 981 020 005 142 737).
[7] Ex. 8, USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, June 7, 2017.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Ex. 8, USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, 2017.
[12] Ex. 9, Records (Partially Redacted and Released in Full) Released Pursuant to FOIA Request No. 2018-APHIS-00087-F, pgs. 19-35.
[13] Ex. 10, FOIA Request Letter to Tonya Woods, 2018-APHIS-00087-F (Oct. 4, 2017).
[14] *Id*.
[15] Ex. 11, Letter from USDA to Teresa Marshall, FOIA Request 2018-APHIS-00087-F (Sept. 18, 2018).

located 147 pages of responsive records.[16] Of the sixty-six pages that were produced, sixty-two were withheld in part, purportedly pursuant to FOIA Exemptions 6 and 7(C).[17] The bulk of these partially withheld documents are official USDA inspection reports with everything redacted except for the name of the licensee, the customer ID, license number, and the name of the inspector.[18] Even the month and day of the inspection was redacted from the inspection reports.[19] The redacted records also include a two-page analysis from a veterinarian who inspected Kirshner in 2017, correspondence regarding and the results of an inspection appeal, and the content of complaints from the public and the inspection results from those complaints. The remaining eighty-one pages of responsive records were withheld in full, also purportedly pursuant to FOIA Exemptions 6 and 7(C).[20]

Additionally, the USDA appears to have asserted two unclear *Glomar* responses. With regard to what appears to relate to AC's search for responsive records, Ms. Woods stated that PETA's "request appears to seek additional information and/or records whose existence [she] can neither confirm nor deny," and that "[a]ny additional responsive records, if they existed would be exempt from disclosure under Exemptions 6 and/or 7(C)" ("AC *Glomar*").[21] With regard to IES's search for responsive records, Ms. Woods further stated that she could "neither confirm nor deny that any records existed," and that, if any additional responsive records existed, they "would be exempt from disclosure under Exemptions 5, 6, and/or 7C" ("IES *Glomar*").[22]

Ms. Woods also noted—in an attempt to justify the IES *Glomar* response—that she was unable to acknowledge whether there were additional records responsive to PETA's request because to do so "would constitute a clearly unwarranted invasion of personal privacy pursuant to Exemption 6 of the FOIA."[23] No express exemption was invoked to justify the AC *Glomar* response; however, as described above, the USDA appears to have claimed that Exemptions 6 and 7(C) may apply to the AC records that may or may not exist.

PETA appeals all of these withholdings and the *Glomar* responses for the following reasons.

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[16] *Id*.
[17] Ex. 9, Records (Partially Redacted and Released in Full) Released Pursuant to FOIA Request No. 2018-APHIS-00087-F.
[18] *Id*.
[19] *Id*.
[20] Ex. 11.
[20] *Id*.
[21] *Id*.
[22] *Id.*
[23] *Id*. The USDA's *Glomar* responses are extremely unclear. However, as outlined above, the agency appears to have provided two separate *Glomar* responses: one for records in the custody of AC and a second for any records in IES's custody. It also unclear whether the USDA is relying on Exemption 6 only to justify the IES *Glomar* response.

ARGUMENT

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

As noted above, the USDA has previously released the precise type of information redacted from the records at issue pursuant to the FOIA.[24] Inspection reports, which include photographs, have routinely been provided by the USDA in response to FOIA requests as a long-established policy—regardless of whether the regulated activity is deemed to be taking place on a homestead.[25] Similarly, the USDA has routinely provided investigative records, license applications, and correspondence between similar exhibitors and the USDA, with only minimal redactions.[26]

Now, without any explanation as to why it has changed its position, the USDA asserts that this information is exempt from disclosure pursuant to Exemptions 6 and 7(C) of the FOIA, or that it cannot confirm or deny the existence of responsive records, in contravention of well-established principles of administrative law. "'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.'"[27] "'It is textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.'"[28] As the Ninth Circuit recently explained, departure from longstanding policy "without acknowledgment or explanation" is arbitrary and capricious.[29] Thus, when an agency changes a policy or legal interpretation, as the USDA has done here, 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."[30] When it fails to do so, as the USDA has done here, the agency acts

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[24] *See supra* notes 4 and 5 and accompanying text.

[25] *See, e.g.*, Ex. 4 (unredacted inspection reports of Kirshner, provided to the public by the USDA); Ex. 5, Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Jan. 6, 2016) (FOIA response letter including nineteen inspection report photographs of an AWA-regulated business located on a homestead); Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Mar. 10, 2017) (FOIA response letter including twenty-two inspection report photographs of an AWA-regulated business located on a homestead).

[26] *See, e.g.* Ex. 6, Letter from Katy Vagnoni on behalf of Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Dec. 15, 2014) (FOIA response letter including correspondence between the USDA and Tri-State operator); Letter from Katy Vagnoni on behalf of Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Apr. 2, 2015) (FOIA response letter including license applications with animal inventory information).

[27] *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, 2125-26 (2016).

[28] *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)).

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

[30] *Fed. Commc'ns. Comm'n 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).

arbitrarily and capriciously and its action must be set aside.[31] 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."[32]

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.[33]

II. The USDA Cannot Withhold Information That It Has Previously Released

Prior to PETA submitting FOIA request No. 2018-APHIS-00087-F, the USDA publicly released on its website a version of most of the inspection reports at issue in that request with only signatures redacted.[34]

Even if the USDA's new position is that portions of these records are exempt from disclosure—which, as demonstrated above, has not adequately been explained and, as discussed below, is erroneous—materials "normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."[35] 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.[36] It is beyond dispute that the USDA previously publicly released most of the inspection reports at issue in FOIA request No. 2018-APHIS-00087-F—including the portions that it is now redacting—into the public domain.[37] Accordingly, the agency cannot now withhold this information. Nor can it withhold other formats of this same information, such as the inspection photographs from the previously released June 7, 2017, inspection report, which portray the same previously released information about the condition of a thirteen-month-old lion, name Lucie who was denied adequate veterinary care, albeit in a different format.[38]

This prior release of the results of the USDA's inspections of Kirshner also undermines the USDA's argument, discussed *infra*, that disclosure of this information would give rise to a cognizable privacy interest that must be protected under FOIA because the licensed activity is purported to take place on a homestead. As discussed fully *infra*, this does not create any privacy

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[31] *See Fox Television Stations*, 556 U.S. at 513-16; *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)).

[32] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) (additional citation and quotation marks omitted)).

[33] *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. 11 (signed on behalf of Tonya Woods).

[34] Ex. 4.

[35] *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

[36] *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).

[37] Ex. 4.

[38] *See* Ex. 4; Ex. 12, USDA, Animal Welfare Inspection Guide (2018), Required Inspection Procedures, Inspection Photographs, 2-14 – 2-15 (noting that photographs or videos must be taken of the type of violation described on this inspection report).

interest, much less one that justifies an exemption under the FOIA—but even if it did, any potential for a privacy interest being violated simply because these records reveal information about the business activities of this AWA-regulated facility, although likely nonexistent, has already been set afoot by the USDA—and apparently without any actual ramifications.

III. The Withheld Information Is Not Exempt from Disclosure

The USDA claims that Exemptions 6 and 7(C) authorize redacting the licensee's address, the dates and types of inspections conducted by the USDA, inspection report numbers, the number and types of animals inspected, the results of the inspections, inspection-related correspondence, eighty-one pages of related records, acquisition/disposition/transport information, and licensee application information. It further claims that some responsive records are subject to a *Glomar* response, and that even if that were not the case the information would still be exempt from disclosure under Exemptions 5, 6 and/or 7(C). The USDA claims the records responsive to this request are exempt from disclosure because, allegedly, "the licensed activity has been determined to be taking place on a homestead, and the licensee has a substantial privacy interest in activities taking place on their homestead" that "far outweighs any public interest in disclosing . . . this personal information."[39] The USDA also claims that the licensee has a "privacy interest in their financial information, including . . . the number of animals they own as part of the licensed business."[40] As explained below, the USDA did not—and could not—justify these withholdings.

"[D]isclosure, not secrecy, is the dominant objective of the" FOIA.[41] 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.[42]

"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."[43] These "exemptions are to be 'construed narrowly' in favor of disclosure."[44] Accordingly, there is "'a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions,"[45] and "'conclusory and generalized allegations of exemptions are

[39] Ex. 11.
[40] *Id.*
[41] *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
[42] *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citing 5 U.S.C. § 552(a)(4)(B)) (additional internal citations omitted).
[43] *Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015) (citation omitted).
[44] *Id.* at 297 (citation omitted).
[45] *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)).

unacceptable.'"[46] "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'"[47]— indeed, it is "at its zenith."[48]

To carry this burden, an agency cannot merely recite the language of an exemption. Rather, the FOIA requires that an agency notify a requestor of "the *reasons*" for any withholdings.[49] Here, the USDA cursorily recited Exemptions 6 and 7(C) and merely made a general, unsubstantiated assertion of a personal privacy interest in information related solely to the activities of a business, Kirshner, that would in some unspecified way be compromised should the information be released.[50] 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.'"[51] 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."[52] The information requested about Kirshner does not contain any personal, intimate information and thus does not constitute personnel, medical, or similar files.

As a preliminary matter, the information is unlikely to identify any individuals and therefore the application of Exemption 6 is unwarranted. For example, the photographs taken during the inspections at issue in this request would depict animals, facilities, and possibly records that do not comply with the AWA's recordkeeping requirements—but would not likely include images of people.[53] Notably, the USDA expressly prohibits including personally identifiable

[46] *Id.* (quoting *Founding Church of Scientology of Wash.., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C.Cir.1979)) (internal quotation marks and additional citation omitted)).
[47] *Multi Ag Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations omitted).
[48] *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (citation omitted).
[49] 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added); *accord* 7 C.F.R. § 1.7(a)(1).
[50] The USDA also claims that if the request at issue was not subject to a *Glomar* response, the information may also be exempt from disclosure under Exemptions 5. *See* Ex. 11. The impropriety of this response is discussed in Part IV.A *infra*.
[51] *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.)).
[52] *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980).
[53] Ex. 12, 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; Ex. 13, USDA, Retail Pet Store Rule and Importation of Live Dogs Rule – Guidance for Breeders, Brokers and Importers, pg. 25 ("Question. Will Inspectors photograph my home and its interior and make those pictures available to anyone on the Internet? Answer. We take photographs as a visual way to document noncompliant items (NCI's) during routine inspections of already licensed facilities. We also may take overview photographs to place the NCI into perspective. Our Inspectors are aware of the sensitive nature of taking photographs at a licensed facility. They will take only the minimum number necessary in the specific situation. Our information is accessible to the public and any other person through the Freedom of Information Act.").

information in the narrative section of inspection reports.[54] Further, the information at issue in this appeal relates exclusively to an entity engaged in business activity that is regulated under the AWA, and therefore does not have any bearing on the intimate details of any individual's personal life. On the off chance that any photograph did include a person's face, personally-identifiable information, or information of a highly personal nature, 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 historically done.[55]

The AWA specifically regulates activities, including exhibiting 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."[56] Because all the information at issue pertains to Kirshner as a *business*, and because "[i]t is well-established . . . that neither corporations nor business associations possess protectible privacy interests" under Exemption 6,[57] the exemption is wholly inapplicable.[58]

For these same reasons, Exemption 7(C) is also inapplicable. Similar to Exemption 6, Exemption 7(C) protects against "an unwarranted invasion of personal privacy."[59] Thus, a personal privacy interest must be at stake for Exemption 7(C) to come into play. Because all the records at

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[54] Ex. 12, USDA, Animal Welfare Inspection Guide (2018), Required Inspection Procedures, Inspection Findings, 2-4 ("Do not type any personal identifiable information (PII) or confidential or proprietary business information in the narrative of any Inspection Report, including addresses and phone numbers."). As the USDA has explained, personally identifiable information includes data such as bank account numbers, credit card numbers, dates of birth, social security numbers, criminal history, biometric record, and medical history information, when this data is combined with an individual's name. *See id.* at Appendix A – Personally Identifiable Information (PII) Examples, A-43; *see also id.* at E-2. These types of data, all of which can be used to uniquely identify an individual, are very different from the information withheld by the USDA in the instant appeal. For example, photographs of an unidentifiable lion or generic building cannot be used to identify a person.

[55] *See infra* at Part III.D.

[56] 7 U.S.C. § 2131.

[57] *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).

[58] Even to the extent a portion of a business may be individually or closely held, none of the information at issue would reveal anything at all about Kirshner's owner's personal finances. *Cf. Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). The withheld information is comprised of business addresses of the licensee, inspection numbers, inspection dates, type of inspections, actual results of the inspections, inspection photographs, signatures of AC inspectors, and the number and types of animals held. "[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 to release the information in all of the other cases. 5 U.S.C. § 552(a)(8)(A)(ii)(II), (b); *see* Part III.D, *infra*.

[59] 5 U.S.C. § 552(b)(7)(C).

issue here pertain to a business, which by definition does 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.'"[60] 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."[61]

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"[62]—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.[63] 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."[64] The information at issue here, including the eighty-one pages of related records, was generated during routine inspections by the USDA, and not as part of any investigation or enforcement action.[65] Indeed, most of the inspection reports at issue state that they are "ROUTINE INSPECTION[s]."[66] The USDA's Office of Inspector General ("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.[67]

Moreover, the U.S. District Court for the District of Columbia held in *Goldschmidt v. USDA* that reports prepared by the USDA inspectors that identify conditions that the inspector believes to violate applicable laws and regulations "are not 'investigatory' records compiled as

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[60] 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)).
[61] *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, 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).
[62] 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).
[63] *Jefferson*, 284 F.3d at 176-77.
[64] *Goldschmidt v. U.S. Dep't of Agric.*, 557 F. Supp. 274, 277 (D.D.C. 1983).
[65] Ex. 12, USDA, Animal Welfare Inspection Guide (2018), Required Inspection Procedures, https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.
[66] Ex. 4 (all labeled as routine).
[67] USDA, OIG, APHIS Oversight of Research Facilities 1, Audit No. 33601-0001-41 (Dec. 2014), https://www.usda.gov/oig/webdocs/33601-0001-41.

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.'"[68] Like the reports at issue in *Goldschmidt*, the records related to the USDA's inspections of Kirshner "are compiled from information gathered during independent plant inspections" by the USDA staff.[69] "At that point, there is no enforcement proceeding or investigation focusing on specific alleged illegal acts in existence."[70]

Like the USDA staff that prepared the reports at issue in *Goldschmidt*, the inspectors for Kirshner have "no enforcement functions."[71] The mere fact that information collected during a routine inspection might *subsequently* be referred to a different entity for formal investigation is irrelevant. Nor, for the same reasons, would it matter if, at the time of the inspection, IES was investigating Kirshner for other prior violations of the AWA.

B. 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(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"[72] and Exemption 7(C) authorizes withholding information only where it "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[73] 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.[74] The D.C. Circuit has observed that "[t]he privacy inquiries under Exemptions 6 and 7(C) are 'essentially the same.'"[75] Under both Exemptions 6 and 7(C), the third party must have more than a *de minimis* privacy interest that release of the requested information would compromise.[76] Here, any privacy interest is *de minimis* at most.

As discussed above, at issue is basic information related to the regulation of a business entity, which is not the type of information that Exemptions 6 and 7(C) were intended to protect.[77] Again, the information being withheld is broad and includes, inter alia, information resulting from AWA-mandated, routine inspections as well as AWA license renewal application information, including the number and types of animals at the facility. Notably, in a reverse-FOIA case, *Jurewicz v. U.S. Dep't of Agriculture,* the USDA itself adopted and defended the position that certain business-related information contained in AWA license renewal applications (i.e., APHIS

[68] *Goldschmidt*, 557 F. Supp. at 276 (citations omitted).
[69] *Id.*
[70] *Id.*
[71] *Id.* (quoting *Ctr. for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C.Cir.1974)).
[72] 5 U.S.C. § 552(b)(6).
[73] *Id.* § 552(b)(7)(C).
[74] *Morley v. C.I.A.*, 508 F.3d 1108, 1127-28 (D.C. Cir. 2007).
[75] *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004) (citations omitted).
[76] *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).
[77] *See supra* Part III.A; *Cohen v. E.P.A.*, 575 F. Supp. 425, 429 (D.D.C. 1983); *Wash. Post Co. v. U.S. Dep't of Agric.*, 943 F. Supp. 31, 36 (D.D.C. 1996) ("release must be measured in light of the effect on [the individuals] as businesspeople").

Form 7003) does *not* implicate the privacy concerns protected by Exemption 6.[78] Specifically, in deciding to disclose certain business information from APHIS Form 7003—including the total number of animals purchased and sold, the gross revenue from regulated activities, and for licensed dealers, the difference between the purchase price and sale price of the animals sold—pursuant to a FOIA request, the USDA found that "licensees have a 'limited privacy interest' in their personal financial information (gross dollars earned through regulated activities)" but that a "much weaker, negligible privacy interest existed . . . in the number of animals bought and sold in a given year."[79] Because of the minimal privacy interest in the information at issue, and the significant public interest in the release of the information, the USDA concluded that the "release of [Form 7003 information] would not constitute a clearly unwarranted invasion of personal privacy,"[80] and the D.C. Circuit agreed with this determination.[81] Here, without any explanation, the USDA has reversed course and withheld this precise type of information.

In addition to the USDA's conclusory assertion that Kirshner has a privacy interest in the withheld information—which, as described above, contradicts its previous position with respect to similar business information—the *only* substantive basis the USDA has proffered for withholding this information is that the licensed activity was taking place on a homestead.[82] Disclosure of addresses where an 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,[83] and is even further limited when the individual is calling upon the public to visit the purported homestead. The question "must be measured in light of the effect on [the individuals] as businesspeople."[84] The *only* information at issue here about the licensee is in her capacity as a *businessperson* at her business address. Indeed, the licensee's business is the exhibition of animals and, as such, she opens her facility on a regular basis—and thus the purported "homestead"—to the public who pay to enter and observe the animals.[85] There is clearly no privacy interest in the activities of a business that is open to the public, regardless of its location.

Even if the USDA were to speculate—which it did not in the instant matter, but has elsewhere—that the release of the requested information might cause embarrassment, harassment, or stigma, this "does not amount to a serious invasion of privacy," especially when related to

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[78] 741 F.3d 1326 (D.C. Cir. 2014). *See* Brief of Appellee, *Carolyn Jurewicz, et al., Appellants, v. U.S. Dep't of Agric., Appellee, and Humane Soc'y of U.S., Intervenor Appellee,* C.A. Nos. 10-1683 and 11-0707, 2013 WL 3804849 at 11 (D.C. Cir. July 22, 2013) (APHIS noting that "disclosure of the Licensees' business information here [as contained in AWA license renewal applications] weighs less heavily on the privacy side of the balance").

[79] *Jurewicz*, 741 F.3d at 1332.

[80] *Id.* at 1333.

[81] *Id*. at 1334.

[82] Ex. 11. With regard to the release of withheld license application information, including the number and types of animals held at Kirshner, the USDA simply asserted that the "licensee has a substantial privacy interest in their financial information," without offering any support for this conclusory assertion, despite the fact that it contradicts its previously upheld position. *Id*.

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

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

[85] *See, e.g.*, Ex. 14, Barry R. Kirshner Wildlife Foundation Website, *Visit,* http://kirshner.org/visit-the-foundation/ (last accessed Dec. 13, 2018) (listing business hours, address, and admission fees for the facility).

business activities in a regulated industry.[86] Indeed, even if Kirshner is likely to be "embarrassed" by disclosure of its 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.[87] 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."[88]

Moreover, 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."[89] Specifically, the USDA merely baldly asserts that the licensee has privacy interests in licensed activity because the business is purportedly located on a homestead, without even attempting to identify any harm or harms to the alleged interest that are reasonably foreseeable. The FOIA authorizes withholding only where "the agency *reasonably foresees* that disclosure would harm an interest protected by an exemption."[90] Here there is no reasonably foreseeable harm to a protected interest.

Finally, as discussed above, the USDA has already previously disclosed much of the information as issue here.[91] This prior release greatly diminishes any supposed privacy interest.

For these reasons, any privacy interest in the information at issue is at most *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.

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[86] *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))).

[87] *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.").

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

[89] 309 F.3d 26, 37 (D.C. Cir. 2002) (holding that Exemption 6 does not protect from disclosure site-specific information about the location of an endangered species—the pygmy owl—where disclosure might identify individuals' private property); *see also* Pub. L. 114-185, § 2. The FOIA Improvement Act of 2016 codified a "presumption of openness" by "mandate[ing] that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law." S. Rep. 114-4, at 4. The goal of this provision is to guarantee that "information may not be withheld merely . . . because of speculative or abstract fears." S. Rep. 114-4, at 8 (internal quotation marks omitted). Congress specifically instructed that "[a]gencies should note that mere speculative or abstract fears, or fear of embarrassment, are an insufficient basis for withholding information." *Id*. at 10.

[90] 5 U.S.C. § 552(a)(8)(A)(i)(I) (emphasis added).

[91] *See supra* at Part II; *see also* Ex. 4.

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."[92] 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.[93]

In conducting this analysis in the past, the USDA has specifically found a "significant public interest in release" of information because it would allow the public to "gauge the effectiveness of inspections" conducted by the USDA under the AWA by "comparing data on [license renewal applications] with publicly available inspection reports," and the D.C. Circuit has upheld that finding.[94] For example, the court concluded that "comparisons between the number of dogs reported on licensing applications and counted during inspections could assist the public in determining whether the [USDA] is properly pursuing any significant discrepancies. . ."[95]

In the instant case the USDA concedes that "there is public interest in the request for this information," but cursorily asserts that it is "minimal."[96] In reality, there can be no legitimate question that there is a very strong public interest in the information at issue here. As the en banc 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."[97]

The public's interest in this information is especially strong in cases involving facilities that are found to be non-compliant with the AWA, such as Kirshner. Kirshner has been cited for at least sixteen violations of the AWA in the past eight years.[98] Specifically, Kirshner has been cited, *inter alia*, for failing to: provide adequate veterinary care; maintain an environmental enrichment plan for primates; provide measures to prevent animals from overheating; ensure that housing facilities are structurally sound and maintained; and provide an appropriate diet to meet the nutritional needs of the animals.[99] In 2015, Kirshner paid a $5,464 penalty—discounted from a possible $60,000 fine—for alleged violations that included the unsafe handling of an adult tiger, lions, and a juvenile bear, all of whom were allowed to come into direct contact with the public.[100] This penalty also addressed alleged violations for failing to provide adequate veterinary care to

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

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

[94] *Id.* at 1333.

[95] *Id.* at 1334.

[96] Ex. 11.

[97] *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (en banc); *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))).

[98] Ex. 15, Sept. 3, 2013 – June 7, 2017 Non-Compliant USDA Inspection Reports.

[99] *Id.*

[100] Ex. 16, USDA Citation and Penalty to Roberta Kirshner (Nov. 17, 2015).

Dana, a tiger whose "left eye appeared painful with a protruding third eyelid, redness, and staining on the face from discharge," and Nasha, a lynx who "moved cautiously as if there was pain in [her] limbs."[101]

A female lion cub named Lucie is the subject of at least three of Kirshner's AWA violations. In April 2017, the USDA found that the lion cub Lucie "was exhibiting some lameness in [her] hindquarters, and had a history of intermittent lameness in the front as well."[102] By June, Lucie was "severely lame, uncomfortable, and unwilling to stand at the time of inspection."[103] The USDA cited Kirshner for not following an appropriate feeding plan "to ensure optimal bone growth and development."[104] The USDA required Kirshner to consult with a veterinarian with experience in big cat nutrition and to "immediately follow the exact recommendations of the expert."[105] The USDA had specialists review x-rays of Lucie and both specialists concluded that "the radiographs showed thinned bone cortices, which is typically seen in metabolic bone disease, which can be caused by a dietary deficiency."[106]

With regard to the inspection report information at issue, the USDA inspectors were required to take photographs or videos of the animals at the inspections outlined above to properly document these violations and identify the animals harmed by those violations.[107] Indeed, in response to PETA's FOIA request, the USDA stated that it located eighty-one pages of related records, which should include inspection photographs and may include the radiographs conducted for Lucie.[108] Access to this information is critical for the public to gauge the effectiveness of the USDA's inspections, especially in light of the inspection documentation concerns raised by the USDA's own Office of Inspector General ("OIG").

The USDA's refusal to release the requested information raises the question of whether the agency is motivated by a desire to protect itself from criticism and embarrassment for its role in continuing to license Kirshner despite its documented history of serious violations of the AWA, and for in effect punting enforcement responsibilities to a nonprofit organization that was then forced to expend its resources on other means available to stop Kirshner's cruel business practices.

The USDA's failure to take meaningful action against a facility that violates the AWA is the same sort of inaction about which the USDA's own OIG has repeatedly raised concerns.[109]

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[101] *Id*.
[102] Ex. 8, USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, June 7, 2017.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] Ex. 8, USDA Inspection Report of Barry R. Kirshner Wildlife Foundation, 2017.
[107] Ex. 12, 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;.
[108] Ex. 11.
[109] *See, e.g.*, Ex. 17, 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

The OIG has also identified as problematic the policy of automatically renewing AWA licenses despite chronic violations.[110] The OIG has further raised concerns about inspection consistency.[111] Just last year the OIG "found that inspections are not always performed consistently. . . . Uniformity in the inspection process across the country is not assured."[112] The OIG further noted the importance of inspection documentation to "assure adequate inspections are occurring.[113]

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.[114] 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."[115]

The OIG has previously found that some inspectors "did not always adequately . . . support violations with photos,"[116] which placed animals at "higher risk for neglect or ill-treatment"—in

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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))).

[110] *See* Ex. 17, 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).

[111] Ex. 18, 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.

[112] *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).

[113] *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").

[114] Ex. 17, 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.

[115] *Id.* at 6.

[116] Ex. 17, 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.").

contravention of the purposes of the AWA—and weakened enforcement actions.[117] The OIG further noted that inadequate photographs made identification of animals in need of care on re-inspection (and thus determining whether the facility has come into compliance) difficult.[118] In response, APHIS management acknowledged a potential need for additional training in collecting evidence.[119] 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, it will enable the public to:

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

The public's interest in ensuring the USDA's proper implementation of the AWA is substantial and clearly outweighs any *de minimis* privacy interests that may be identified.[120] Accordingly, the requested information documented during these animal welfare inspections, including photographs taken by the USDA in the course of inspections of Kirshner, and related information regarding the licensee's business operations, are not exempt from disclosure pursuant to Exemptions 6 or 7(C), and must 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.[121] 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."[122] "In addition to establishing that information is properly withheld under the claimed FOIA exemption, an agency seeking to withhold information bears the burden of

[117] *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).
[118] *Id.* at 19.
[119] *Id.* at 17.
[120] *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 the USDA in administration of its massive subsidy program).
[121] 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 . . . .").
[122] *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)).

establishing that all reasonably segregable non-exempt portions of records are disclosed."[123] Claims of non-segregability must be made with the same degree of detail as required for claims of exemption.[124]

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.'"[125] 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.'"[126]

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.[127] 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. This applies equally to photographs, such that if the requested photos contain some images of personal information that implicate a substantial privacy interest that warrants withholding, those images must be blurred and the photos release in redacted form, as required by the FOIA.[128] Indeed, the USDA has been

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[123] *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).

[124] *See, e.g.*, *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261–62 (D.C. Cir. 1997); *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)).

[125] 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).

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

[127] *See, e.g.*, *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 230-31 (1st Cir. 1994) (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).

[128] 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 . . . .").

and is capable of making appropriate redactions to inspection photos in order to protect individuals' personal privacy, which further demonstrates that the USDA's withholding in full of eighty-one pages of additional records that undoubtedly include photographs is wholly inappropriate.[129]

IV. The USDA's *Glomar* Responses Were Unlawful

In rare and limited circumstances where the government has found that its mere acknowledgement of the existence of records responsive to a FOIA request 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.[130] This response to a FOIA request is known as a *Glomar* response.[131] In such cases, the government must first treat the fact of the *existence* of the documents as the request, and proceed with the FOIA's exemption procedures.[132]

As discussed further below, the *Glomar* responses to the FOIA request at issue in this appeal were improper for two independent reasons: (1) the responsive records are not exempt under the sections of FOIA the USDA appears to have relied on; and (2) the records do not meet the threshold requirements for issuance of a *Glomar* response. Accordingly, the USDA cannot withhold these records, and they must be disclosed in full.

A. The *Glomar* Responses Were Improper and Unlawful Because the Requested Records Are Not Exempt Under FOIA

A *Glomar* response is valid only "if the fact of the existence or nonexistence of agency records falls within a FOIA exemption."[133] "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.'"[134] "In determining whether the existence of agency records

[129] *See, e.g.*, Ex. 19, Photograph from USDA Inspection Report of Hugo Liebel, Inspection No. 142101608550414 (May 22, 2010) (depicting elephant's rear and redacting the likeness of an individual appearing in the foreground pursuant to Exemptions 6 and 7(C)); Ex. 20, Photograph from USDA Inspection Report of Hugo Liebel, Inspection No. 315101549490012 (Nov. 10, 2010) (depicting elephant at a performance in Greenville, MS, with the likenesses of three individuals appearing in the photo redacted pursuant to Exemptions 6 and 7(C)); Ex. 21, Photographs from USDA Inspection Report of Ringling Bros. Red Unit, Inspection No. 12101324490956 (Jan. 12, 2010) (depicting elephant's left side view and redacting the likeness of an individual appearing in the background pursuant to Exemption 6); Ex. 22, Photograph from USDA Inspection Report of Summer Wind Farms, Inspection No. 174131008434910 (Aug. 5, 2013) (depicting tiger drinking out of a hose with likeness of individual appearing in the foreground marked for redaction pursuant to Exemptions 6 and 7(C)).

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

[131] See *id*.

[132] *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.").

[133] *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007).

[134] *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013); *see also Bartko v. U.S. Dep't of Justice*, 898 F. 3d 51, 63 (D.C. Cir. 2018) (quoting *Roth v. U.S. Dep't of Justice*, 642 F. 3d 1161, 1178 (D.C. Cir. 2011) ("A *Glomar* response to a FOIA request is permitted in that rare situation when either confirming or denying the very existence of records responsive to a request would 'cause harm cognizable under an FOIA exemption.'").

vel non fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases."[135]

Although its denial letter is unclear, the USDA appears to have refused to acknowledge the existence of records responsive to FOIA request No. 2018-APHIS-00087-F in the custody of both AC and IES.[136] In refusing to acknowledge the existence of responsive records in IES's custody, 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."[137] The USDA did not clearly articulate what FOIA exemption(s) it relied on to justify the AC *Glomar* response, asserting only that Exemptions 6 and/or 7(C) would apply to the records at issue. However, as discussed in full above, the release of information related to an AWA-regulated business entity would not invade personal privacy. Therefore, neither Exemption 6 or 7(C) can be used to justify the *Glomar* responses.[138]

With regard to the existence of responsive records in the custody of AC, the USDA simply asserted that "[c]onfirmation of the existence, or nonexistence, of any additional records may itself reveal exempt information," without specifying any specific potential harm.[139] Moreover, the USDA did not provide any substantive argument for any purported exemptions under the FOIA, instead baldly asserting that "[r]esponsive records [in the possession of AC], if they existed would be exempt from disclosure under Exemptions 6 and/or 7(C)," and that any existing records in the

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[135] *Wolf*, 473 F.3d at 374.
[136] Ex. 11.
[137] *Id*.
[138] Although the USDA cursorily asserts that Exemption 5 may also apply to records that may be in the custody of IES, this exemption cannot be used to justify its *Glomar* response. In its denial letter, the USDA does not specify which, if any, Exemption 5 privilege(s) would apply to responsive records regarding Kirshner. However, the deliberative process privilege—the general purpose of which is to "prevent injury to the quality of agency decisions," *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)—is arguably the most applicable. However, a D.C. District Court recently held that this

> privilege protects documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. To warrant protection, a communication must reflect[] the give-and-take of the consultative process. The existence of a responsive record . . . would show only that [the government] engaged in some deliberation, full stop. It would not necessarily reveal the *content* [of] any deliberations—any details about the agency's 'give-and-take'—surrounding [an agency's] decision . . . The nonexistence of a responsive record would be similarly uninformative.

W. Values Project v. U.S. Dep't of Justice, No. 17-CV-1671 (CRC), 2018 WL 3459921, at *5 (D.D.C. July 18, 2018) (internal citations and quotation marks omitted). Moreover, even if the records sought fell within one of the privileges protected by Exemption 5, the USDA has not offered a single justification supporting its possible contention that the mere acknowledgement of the *existence* of records may be privileged so as to fall within Exemption 5. Tellingly, an extensive search of relevant FOIA case law reveals that there is only one case that rules on—but does not approve—a *Glomar* response relying on Exemption 5. *See id.* at *3 ("The Court notes upfront that the Department's assertion of a *Glomar* response here is unusual. There is no case ruling on—let alone approving—a *Glomar* response relying on Exemption 5. Indeed, the government cites only one case in which the government even *asserted* such a response." (citation omitted)). This is because the common purpose of the privileges most frequently invoked under Exemption 5, "encouraging free and frank communication within the government," is "a mismatch with the justification for allowing *Glomar* responses: that disclosing the *existence* of certain information is harmful." *Id*. at *5.
[139] Ex. 11.

custody of IES would be exempt from disclosure under "Exemptions 5, 6, and/or 7C."[140] In fact, the USDA did not identify *any* tangible harm from identifying or releasing these records.[141]

As demonstrated in Part III *supra*, the responsive records cannot lawfully be withheld pursuant to Exemptions 6 or 7(C). Likewise, the USDA cannot rely on Exemption 5 to justify withholding the bulk of the types of records that are at issue in this appeal.[142] Exemption 5 insulates from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,"[143] and was intended to incorporate the government's common law privilege from discovery in litigation.[144] This exemption is "most commonly invoked to protect the deliberative-process privilege, the attorney work-product privilege, and the attorney-client privilege."[145] Other privileges recognized under Exemption 5 are: confidential commercial information,[146] statements from air crash investigations,[147] and reports of expert witnesses.[148] None of these even arguably apply here.

As stated above, the USDA simply cited Exemption 5 once in its response letter without offering any explanation or discussion regarding its possible application to responsive records regarding Kirshner that may or may not exist.[149] Not only does the USDA's failure either to provide the requested information or to adequately explain why it is not being disclosed violate the FOIA, but, because of this failure, PETA is at a stark disadvantage in preparing this appeal as it lacks any substantive discussion for the agency's proposed application of the FOIA's exemptions to the records—a threshold requirement to providing a *Glomar* response—and consequently, the information necessary to craft its arguments.

In line with the USDA's failure to provide *any* explanation regarding the possible applicability of Exemption 5, the USDA also does not specify which, if any, Exemption 5 privilege(s) would apply to responsive records regarding Kirshner that may or may not exist. Despite this, the deliberative process privilege—the general purpose of which is to "prevent injury to the quality of agency decisions"[150]—is arguably the most applicable. However, even if some of the records in question could be withheld pursuant to the deliberative process privilege—which protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated"[151]—it cannot be used to justify withholding the majority of the records at issue in this appeal.

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[140] *Id*.
[141] *Id*.
[142] *Id.* (The USDA cursorily asserted, with no explanation whatsoever, that "[r]esponsive records, if they existed, would be exempt from disclosure under Exemptions 5, 6, and/or 7C.").
[143] 5 U.S.C. § 552(b)(5).
[144] H.R. Rep. No. 89-1497, at 10 (1966); S. Rep. No 89-813, at 29 (1965); S. Rep. No. 88-1219, at 6-7, 13-14 (1964).
[145] *Bartko*, 898 F. 3d at 70.
[146] *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) ("[E]xemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract.")
[147] *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984).
[148] *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1138-42 (5th Cir. 1980).
[149] *Id*.
[150] *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).
[151] *Id.* at 150 (citation and quotation marks omitted); *see also supra* note 130.

Because the records at issue cannot lawfully be withheld pursuant to Exemptions 6 or 7(C), any responsive records must be provided in full. Moreover, any responsive records that do not "reflect[ ] the give-and-take of the [USDA's] consultative process,"[152] or otherwise fall outside the narrow privileges recognized under Exemption 5, 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 implies that the agency considers whether the confirmation of the existence of certain records would reveal exempt information, without considering the existence of other threshold circumstances when issuing a *Glomar* response. The four threshold circumstances that the USDA typically considers to justify the issuance of a *Glomar* response are whether: (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.[153]

PETA did not request information about a person identified by name; it requested information about Barry. R. Kirshner Wildlife Foundation, a business.[154] The plain language of the threshold requirements states that these circumstances were designed to protect *individuals* and their privacy interests, and not business entities.[155] Regulated businesses, such as Kirshner, 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."[156] Consequently, because the records requested pertain to a corporate business, they clearly fail to meet the threshold requirements the USDA typically provides when determining whether information ought to be subjected to a *Glomar* response.

CONCLUSION

Because the USDA failed to explain its decision to withhold categories of information—and even some of the exact same information—related to Kirshner that it previously released, such withholdings are arbitrary and capricious. Moreover, the threshold requirements for Exemptions 6 and 7(C) are not met, there is little to no privacy interest in the information at issue, and there is a very strong public interest in disclosure. Moreover, the USDA failed to demonstrate it released all reasonably segregable portions of the requested records. Thus, 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. Thus, the *Glomar* responses to PETA's FOIA request were improper and unlawful.

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[152] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).
[153] Ex. 11; *see also Pugh v. F.B.I.*, 793 F. Supp. 2d 226, 232 (D.D.C. 2011).
[154] *See* Ex. 10; *see also supra* Part III.A.
[155] *See also Pugh*, 793 F. Supp. 2d at 232.
[156] *See, e.g., id.; Fed. Commc'ns. Comm'n 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.'").

I look forward to your response within twenty business days of receipt of this timely filed administrative appeal.[157]

[157] *See* 5 U.S.C. § 552(6)(A)(ii); 7 C.F.R. § 1.14(c).