

May 3, 2019

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** [REDACTED]  
[foia.officer@aphis.usda.gov](mailto:foia.officer@aphis.usda.gov)<sup>1</sup>

**Re: Freedom of Information Act Appeal for Request Nos. 2018-APHIS-01818-F and 2015-APHIS-02988-F**

Dear Mr. Shea and Ms. Woods,

On behalf of PETA, and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I hereby appeal the United States Department of Agriculture's (USDA) unlawful withholding of information contained in agency records that are subject to PETA's FOIA request Nos. 2018-APHIS-01818-F and 2015-APHIS-02988-F, specifically, documents from three inspections of Lazy 5 Ranch—a USDA licensed dealer and exhibitor (license no. 55-B-0069). 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 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; and
- the USDA failed to meet its burden of demonstrating that it disclosed all “reasonably segregable” portions of the requested records.

For these reasons, the USDA must release the information at issue here—some of which PETA requested more than four years ago—without further delay. I look forward to hearing within twenty business days that you will comply with the law and release this information so that we can avoid litigation and a request for disciplinary proceedings.

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

PEOPLE FOR  
 THE ETHICAL  
 TREATMENT  
 OF ANIMALS  
 FOUNDATION

Washington, D.C.  
 1536 16th St. N.W.  
 Washington, DC 20036  
 202-483-PETA

Los Angeles  
 2154 W. Sunset Blvd.  
 Los Angeles, CA 90026  
 323-644-PETA

Norfolk  
 501 Front St.  
 Norfolk, VA 23510  
 757-622-PETA

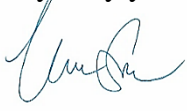
Berkeley  
 2855 Telegraph Ave.  
 Ste. 301  
 Berkeley, CA 94705  
 510-763-PETA

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.)

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michelle Sinnott', written in a cursive style.

Michelle Sinnott  
Counsel, Captive Animal Law Enforcement



**Freedom of Information Act Appeal for  
Request Nos. 2018-APHIS-01818-F and 2015-APHIS-02988-F**

**Factual Background**

Lazy 5 Ranch, a North Carolina business corporation,<sup>2</sup> is a roadside zoo in Mooresville, North Carolina that deals in and exhibits animals to the public and is regulated under the Animal Welfare Act (AWA).<sup>3</sup> For many years the U.S. Department of Agriculture (USDA) routinely posted the reports of its AWA inspections for Lazy 5 Ranch and other exhibitors regulated under the AWA on its website with only minimal redactions for signatures pursuant to the Freedom of Information Act's (FOIA) affirmative disclosure mandate.<sup>4</sup> 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 reports and without any ability to look up reports for most entities—including for nearly all regulated exhibitors, including Lazy 5 Ranch.

Lazy 5 Ranch has been repeatedly cited for violating the AWA for years.<sup>5</sup> On September 10, 2018, the USDA filed an administrative complaint against Henry Hampton for more than 70 alleged AWA violations at both of his facilities, including Lazy 5 Ranch.<sup>6</sup> These violations spanned approximately a four-year period from October 2013 through December 2017, including the violations documented during the March 17, 2015 and August 23, 2017 inspections at issue in this appeal.<sup>7</sup> For example, in its complaint, the USDA documented the following violations at Lazy 5 Ranch:

- Failure to provide veterinary care to a pregnant camel who had difficulty breathing.<sup>8</sup> The USDA inspector noted that “[h]er breathing was highly audible and labored. She kept her neck and head fully extended during the inspection. Severe swelling was noted in her facial/head area along with swelling in her lower limb especially her feet.”<sup>9</sup> The last time a veterinarian had seen this camel was three months prior, and at which time she was noted as “doing well.”<sup>10</sup>

---

<sup>2</sup> Ex. 2, North Carolina Secretary of State, Business Corporations listing for Lazy 5 Ranch, Inc.

<sup>3</sup> 7 U.S.C. §§ 2131-2159; *see* Ex. 3, USDA, Excerpt: Listing of Certificate Holders, [https://www.aphis.usda.gov/animal\\_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf) (Report updated April 8, 2019) (listing Henry Hampton, dba Lazy 5 Ranch, AWA license as valid through August 13, 2019).

<sup>4</sup> *See, e.g.*, Ex. 22, 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 Reports, Lazy 5 Ranch (2010-2017).

<sup>5</sup> Ex. 4.

<sup>6</sup> Ex. 5, USDA Complaint, In re: Henry Hampton, AWA Docket No. 18-0076, 18-0077, 18-0078 (September 10, 2018).

<sup>7</sup> Ex. 5.

<sup>8</sup> Ex. 5; Ex. 4 at 47 (March 17, 2015 Inspection).

<sup>9</sup> Ex. 4 at 47 (March 17, 2015 Inspection).

<sup>10</sup> *Id.*

- Failure to provide veterinary care to a sheep in the drive-thru area of the facility who was seen limping.<sup>11</sup> The USDA inspector noted that she had a “slower and irregular gait compare to the other [sheep] and had a head bob.”<sup>12</sup> It also appeared that she had a “6 in long and 2 in wide” wound on her side.<sup>13</sup>
- Deficiencies in Lazy 5 Ranch’s written Program of Veterinary Care (PVC), specifically authorizing the use of succinylcholine as the primary drug for tranquilization.<sup>14</sup> The USDA explained that “[s]uccinylcholine is a paralytic agent” with no pain relieving or tranquilizing properties.<sup>15</sup> Since the drug does not “alter conscious awareness,” the USDA considers its use for “routine non-painful procedures” to be “distressful to the animals” and thus it “is not considered to be adequate veterinary care.”<sup>16</sup> Moreover, since the “drug can also paralyze respiratory muscles” and cause animals to stop breathing, its use creates a risk that animals “can die of suffocation while they remain conscious.”<sup>17</sup> Hampton had been cited repeatedly for authorizing the use of this drug between April 2015 and August 2017.<sup>18</sup>
- Failing to maintain adequate acquisition and disposition records for animals.<sup>19</sup>
- Allowing dangerous and unsupervised public contact between animals and guests, specifically in the drive-through portion of the facility.<sup>20</sup>

In addition to the violations identified in the USDA’s complaint, Lazy 5 Ranch was also cited for failing to provide adequate shelter to five waterbuck who died during a cold snap, which according to the USDA “contribut[ed] to their deaths.”<sup>21</sup> In March 2019, Hampton agreed to pay a \$20,000 penalty to settle the USDA’s lawsuit over these violations—and other violations at Hampton’s Sugarcreek, Ohio facility, The Farm at Walnut Creek.<sup>22</sup>

### **The FOIA Requests at Issue**

Because of the serious public safety and animal welfare concerns evident in the above, on April 10, 2015, Teresa Marshall submitted FOIA request No 2015-APHIS-02988-F to the USDA Animal and Plant Health Inspection Service’s (APHIS) Animal Care (AC) program, requesting “all records related to the March 17, 2015 inspection of Lazy 5 Ranch 55-B-0069, including but

---

<sup>11</sup> Ex. 5; Ex. 4 at 47 (March 17, 2015 Inspection)

<sup>12</sup> Ex 4 at 47 (March 17, 2015 Inspection).

<sup>13</sup> *Id.*

<sup>14</sup> Ex. 5.

<sup>15</sup> Ex. 4 at 52 (May 25, 2016 Inspection).

<sup>16</sup> Ex. 6, USDA Routine Inspection Report of The Farm at Walnut Creek (April 20, 2015).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; Ex. 4 at 56 (March 21, 2017 Inspection Report); *id.* at 58 (May 23, 2017 Inspection Report); *id.* at 63 (Aug. 23, 2017 Inspection Report).

<sup>19</sup> Ex. 5; Ex. 4 at 63 (Aug. 23, 2017 Inspection Report).

<sup>20</sup> *Id.*

<sup>21</sup> Ex. 4 at 66 (Dec. 5, 2017 Inspection Report).

<sup>22</sup> Ex. 7, Consent Order, In re; Henry Hampton (March 4, 2019).

not limited to color photos.”<sup>23</sup> On the same day, Tonya Woods acknowledged this request and identified a target response date of May 8, 2015.<sup>24</sup> Over four years later, Ms. Marshall received a response from Ms. Woods explaining that AC located 30 pages of responsive records.<sup>25</sup> While the USDA produced all 30 pages of records, these documents were almost entirely redacted purportedly pursuant to FOIA Exemptions 6 and 7(C).<sup>26</sup> The USDA’s justification for withholding these records was because the licensee has a substantial privacy interest “because the facilities are located on the homestead.”<sup>27</sup>

In addition to the above request, on January 11, 2018, Teresa Marshall submitted FOIA request No. 2018-APHIS-01818-F on behalf of PETA to the USDA APHI AC program, requesting “any photos, videos, documents, related to the August 23, 2017 and December 5, 2017 inspections of Lazy 5 Ranch, 55-B-0069.”<sup>28</sup> On January 12, 2018, Ms. Woods acknowledged this request and identified a target response date of February 9, 2018.<sup>29</sup> A year later, on February 4, 2019, Ms. Marshall received a response from Ms. Woods explaining that AC located 26 pages of photographs responsive to the request.<sup>30</sup> The USDA withheld all 26 pages of responsive photographs in full, purportedly pursuant to FOIA Exemptions 6 and 7(C).<sup>31</sup> The USDA’s justification for withholding these records was because the licensee had “more than a de minimis privacy interest because the facility is located on their homestead.”<sup>32</sup>

PETA appeals all of the withholdings in FOIA requests Nos. 2018-APHIS-01818-F and 2015-APHIS-02988-F for the following reasons.

### **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 precise type of information redacted from the records at issue has previously been released with only minimal redactions pursuant to the FOIA. The March 17, 2015 inspection report at issue in FOIA Request No. 2015-APHIS-02988-F was previously released with only redactions for signatures.<sup>33</sup> Now, without any explanation as to why it has changed its position, the USDA asserts that this information is exempt from disclosure pursuant

---

<sup>23</sup> Ex. 23, FOIA Request Letter to Tonya Woods, 2015-APHIS-02988-F, April 10, 2015.

<sup>24</sup> Ex. 24, Letter from the USDA to Teresa Marshall, FOIA Request 2015-APHIS-02988-F, April 10, 2015.

<sup>25</sup> Ex. 25, Letter and Records from the USDA to Teresa Marshall, FOIA Request 2015-APHIS-02988-F, May 1, 2019.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Ex. 8, FOIA Request Letter to Tonya Woods, 2018-APHIS-01818-F, January 11, 2018.

<sup>29</sup> Ex. 9, Letter from the USDA to Teresa Marshall, FOIA Request 2018-APHIS-01818-F, Jan. 12, 2018.

<sup>30</sup> Ex. 10, Letter from the USDA to Teresa Marshall, FOIA Request 2018-APHIS-01818-F, Feb. 4, 2019. This letter is incorrectly dated February 4, 2018. The response was actually received on February 4, 2019, which is evident from the letter itself, which states that the USDA conducted the relevant search on November 28, 2018.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ex. 4 at 47-49 (March 17, 2015 Inspection Report).

to Exemptions 6 and 7(C) of the FOIA.<sup>34</sup> In both FOIA requests, the USDA claims that the information in the photographs is protected because the licensee has a privacy interest because the facility is located on their homestead.<sup>35</sup> However, photographs taken as part of inspections of AWA exhibitors have routinely been provided by the USDA, in response to FOIA requests, as a long-established policy—regardless of whether the regulated facility is located on the exhibitor’s homestead.<sup>36</sup> 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, 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.’”<sup>37</sup> “‘It is textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.’”<sup>38</sup> As the Ninth Circuit recently explained, departure from longstanding policy “without acknowledgment or explanation” is arbitrary and capricious.<sup>39</sup> Thus, when, as here, an agency changes a policy or legal interpretation, it must provide a “reasoned explanation” for doing so, which requires “that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.”<sup>40</sup> When it fails to do so, as the USDA has done here, the agency acts arbitrarily and capriciously and its action must be set aside.<sup>41</sup> 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.<sup>42</sup>

---

<sup>34</sup> Ex. 25.

<sup>35</sup> *Id.*; Ex. 10.

<sup>36</sup> See, e.g., Ex. 4 at 14-33 (Aug. 18, 2011 Lazy 5 Ranch Inspection Report with 18 photos); *id.* at 40-42 (Jan. 23, 2013 Lazy 5 Ranch Inspection Report with two photos); Ex. 11, Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Jan. 6, 2016) (nineteen photographs attached to letter); Letter from Tonya G. Woods, Dir. for Freedom of Information, USDA to Teresa Marshall, Information Officer, PETA Foundation (Mar. 10, 2017) (twenty-two photographs attached to letter).

<sup>37</sup> *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); accord *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

<sup>38</sup> *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)).

<sup>39</sup> *Cal. Pub. Utilities Comm’n v. Fed. Energy Regulatory Comm’n*, 879 F.3d 966, 977 (9th Cir. 2018).

<sup>40</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)); accord *Encino Motorcars*, 136 S. Ct. at 2126; *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

<sup>41</sup> See *Fox Television Stations*, 556 U.S. at 514-16; *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923; *Organized Vill. of Kake*, 795 F.3d at 966; *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 297-99 (4th Cir. 2018); see also *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1242 (D.C. Cir. 2017) (In a FOIA case “a plaintiff may challenge an agency’s ‘policy or practice’ where it ‘will impair the party’s lawful access to information in the future.’” (citation omitted)).

<sup>42</sup> *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987)).

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.<sup>43</sup>

## **II. THE USDA PREVIOUSLY RELEASED MINIMALLY REDACTED VERSIONS OF THE SAME INSPECTION REPORTS**

Prior to PETA submitting FOIA request No. 2015-APHIS-02988-F, the USDA publicly released on its website a version of the March 17, 2015 inspection report at issue in that request with only signatures redacted.<sup>44</sup> This report would have been responsive to PETA’s request, and thus is now being largely withheld.

Even if the USDA’s new position is that portions of the 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.”<sup>45</sup> 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.<sup>46</sup> It is beyond dispute that the USDA previously publicly released a copy of the inspection report at issue in FOIA request No. 2015-APHIS-002988-F—including the portions that it is now redacting—into the public domain.<sup>47</sup> In addition the redacted report in the response was dated from before February 3, 2017, meaning it was at one point released before the USDA changed their policies. Accordingly, the agency cannot now withhold this information.

This prior release of the results of the USDA’s inspection of Lazy 5 Ranch 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 since the licensed activity is purported to take place on a homestead. As discussed fully *infra*, this does not create any privacy interest, much less one that justifies an exemption under the FOIA. The USDA alleges that the public would be able to compare the publicly available inspection report found in the APHIS Animal Care Public Search database against the requested redacted inspection report, which, in this case, would reveal the identity of the licensee.<sup>48</sup> Any potential invasion of privacy, although likely non-existent has already been set afoot by the USDA.

## **III. THE WITHHELD INFORMATION IS NOT EXEMPT FROM DISCLOSURE**

The USDA claims that Exemptions 6 and 7(C) authorize withholding the 56 pages of records—51 of which are photographs—at issue in this appeal. The USDA claims the information responsive to the request is exempt from disclosure because the individuals have a privacy interest because the facilities are located on a homestead and that privacy interest “far

---

<sup>43</sup> 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. 10 (signed on behalf of Tonya Woods); Ex. 25 (signed on behalf of Tonya Woods).

<sup>44</sup> Ex. 4 at 47-49 (March 17, 2015 Inspection Report).

<sup>45</sup> *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

<sup>46</sup> *Davis v. U.S. Dep’t of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).

<sup>47</sup> Ex. 4 at 47-49 (March 17, 2015 Inspection Report).

<sup>48</sup> Ex. 25.

outweighs any public interest in revealing the personal information in these records.”<sup>49</sup> Allegedly, disclosure of the inspection photographs and inspection results constitutes an “unwarranted invasion of the privacy of the individual.”<sup>50</sup> As explained below, the USDA did not—and could not—justify these withholdings.

“[D]isclosure, not secrecy, is the dominant objective of the” FOIA.<sup>51</sup> 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.<sup>52</sup>

“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.”<sup>53</sup> These “exemptions are to be ‘construed narrowly’ in favor of disclosure.”<sup>54</sup> Accordingly, there is “‘a substantial burden on an agency seeking to avoid disclosure’ through the FOIA exemptions,”<sup>55</sup> and “‘conclusory and generalized allegations of exemptions are unacceptable.’”<sup>56</sup> “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’”<sup>57</sup>— indeed, it is “at its zenith.”<sup>58</sup>

To carry this burden, an agency cannot merely conclusory recite the language of an exemption. Rather, the FOIA requires that an agency notify a requestor of “the *reasons*” for any withholdings.<sup>59</sup> Here, the USDA cursorily recited Exemptions 6 and 7(C). As explained below, the agency fell short in meeting its burden under the FOIA—and cannot meet that burden.

---

<sup>49</sup> Ex. 10; Ex. 25 (“[T]he established privacy interest the individual has in his homestead, far outweighs any public interest in disclosing of this personal information.”)

<sup>50</sup> Ex. 10; Ex. 25 (“[T]he full release of the requested inspection report would be considered an unwarranted invasion of personal privacy.”)

<sup>51</sup> *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

<sup>52</sup> *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citing 5 U.S.C. § 552(a)(4)(B)) (additional citations omitted).

<sup>53</sup> *Chiquita Brands Int’l Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015) (citation omitted).

<sup>54</sup> *Id.* at 297 (citation omitted).

<sup>55</sup> *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)).

<sup>56</sup> *Id.* at 1115 (D.C. Cir. 2007) (quoting *Founding Church of Scientology of Wash., D. C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C.Cir.1979)) (additional quotation marks and citation omitted).

<sup>57</sup> *Multi Ag Media LLC v. U.S. Dep’t of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations omitted).

<sup>58</sup> *Jurewicz v. U.S. Dep’t of Agric.*, 741 F.3d 1326, 1332 (D.C. Cir. 2014) (citation omitted).

<sup>59</sup> 5 U.S.C. § 552(a)(6)(A)(i)(I) (emphasis added); *accord* 7 C.F.R. § 1.7(a)(1).



**A. The Information Does Not Meet the Threshold Requirements of Exemptions 6 and 7(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.”<sup>60</sup> 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.”<sup>61</sup> Reports and photographs that the USDA took as part of its inspections of Lazy 5 Ranch, that document animal welfare violations do not contain any personal, intimate information and thus do not constitute personnel, medical, or similar files. In particular, the photographs taken during the March 17, 2015 and August 23, 2017 inspections would likely include photographs of the animals that the USDA documented as needing veterinary care.<sup>62</sup> Photographs from the December 5, 2017 inspection might include records of the five waterbuck that were found dead after a cold snap, likely due to lack of adequate shelter.<sup>63</sup> These photographs will provide added documentation to the citations outlined in the USDA’s inspections reports and are not likely to include people.<sup>64</sup> This information relates exclusively to an entity engaged in business activity that is regulated under the AWA. Moreover, on the off chance that the photograph did include a person’s face or other personally-identifiable information, this information could easily be blurred or blacked out by the agency and released in accordance with the FOIA. Indeed, this is what it must do and has historically done pursuant to their duty to segregate.<sup>65</sup>

The AWA specifically regulates activities, including dealing and 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.”<sup>66</sup> Because all the information at issue pertains to Lazy 5 Ranch’s *business*, and because “[i]t is well-established . . .

---

<sup>60</sup> *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.)).

<sup>61</sup> *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980).

<sup>62</sup> Ex. 4 at 63 (Aug. 23, 2017 Inspection Report); *id.* at 47-49 (March 17, 2015 Inspection Report).

<sup>63</sup> Ex. 4 at 66 (Dec. 5, 2017 Inspection Report).

<sup>64</sup> Ex. 12, Excerpt, USDA, Animal Welfare Inspection Guide (June 23, 2017 Update and 2013 Edition), Required Inspection Procedures, Inspection Photographs, 2-15 (establishing the permissible scope of photographs taken during inspections, and requiring photographs for all critical or repeat citations); 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.”).

<sup>65</sup> See *infra* at Part III.D.

<sup>66</sup> 7 U.S.C. § 2131.

that neither corporations nor business associations possess protectable privacy interests” under Exemption 6,<sup>67</sup> the exemption is wholly inapplicable.<sup>68</sup>

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.”<sup>69</sup> Thus, a personal privacy interest must be at stake for Exemption 7(C) to come into play. Because all the records at issue here pertain to a business, which by definition does not have a personal privacy interest, 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.’”<sup>70</sup> 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.”<sup>71</sup>

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”<sup>72</sup>—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.<sup>73</sup> 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

---

<sup>67</sup> *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).

<sup>68</sup> Even to the extent a portion of Lazy 5 Ranch may be individually or closely held, none of the information at issue would reveal anything at all about Lazy 5 Ranch’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 solely of business addresses of the licensee, inspection numbers, inspection dates, type of inspections, actual results of the inspections, and signatures of AC inspectors. “[T]here is a clear distinction between one’s business dealings, which obviously have an *affect* on one’s personal finances, and financial information that is *inherently* personal in nature.” *Aguirre v. S.E.C.*, 551 F. Supp. 2d 33, 57 (D.D.C. 2008). Moreover, even if the information at issue might somehow reveal personal information in certain limited cases, the USDA has a duty to properly segregate and release the information in all of the other cases. 5 U.S.C. § 552(a)(8)(A)(ii)(II), (b).

<sup>69</sup> 5 U.S.C. § 552(b)(7)(C).

<sup>70</sup> 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)).

<sup>71</sup> *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).

<sup>72</sup> 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).

<sup>73</sup> *Jefferson*, 284 F.3d at 176-77.

from routine inspections.”<sup>74</sup> Inspection photographs are part of what must be included in the inspection reports, and are generated during routine inspections by the USDA, and not as part of any investigation or enforcement action.<sup>75</sup> All three inspection reports for the photographs at issue state that they are, indeed, “ROUTINE INSPECTION[s].”<sup>76</sup> In fact, 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.<sup>77</sup>

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 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.’”<sup>78</sup> Like the reports at issue in *Goldschmidt*, the photographs from the USDA’s March 17, 2015, August 23, 2017, and December 5, 2017 inspections of Lazy 5 Ranch “are compiled from information gathered during independent plant inspections” by the USDA staff.<sup>79</sup> “At that point, there is no enforcement proceeding or investigation focusing on specific alleged illegal acts in existence.”<sup>80</sup>

Like the USDA staff that prepared the reports at issue in *Goldschmidt*, the inspectors for Lazy 5 Ranch have “no enforcement functions.”<sup>81</sup> The mere fact that information collected during an inspection might *subsequently* be referred to a different entity for formal investigation is irrelevant. Nor would it matter if, at the time of the inspection, IES was investigating Lazy 5 Ranch for other prior violations of the AWA.

---

<sup>74</sup> *Goldschmidt v. U.S. Dep’t of Agric.*, 557 F. Supp. 274, 277 (D.D.C. 1983).

<sup>75</sup> Ex. 12.

<sup>76</sup> Ex. 4 at 47 (March 17, 2015 Inspection Report labeled as routing); *id.* at 63 (Aug. 23, 2017 Inspection Report labeled as routine); *id.* at 66 (Dec. 5, 2017 Inspection Report labeled as routine).

<sup>77</sup> Ex. 14, USDA, OIG, APHIS Oversight of Research Facilities 1, Audit No. 33601-0001-41 (Dec. 2014), <https://www.usda.gov/oig/webdocs/33601-0001-41>.

<sup>78</sup> *Goldschmidt*, 557 F. Supp. at 276 (citations omitted).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Goldschmidt*, 557 F. Supp. at 276 (quoting *Ctr. for Nat’l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C.Cir.1974)).

## 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”<sup>82</sup> and Exemption 7(C) authorizes withholding information only where it “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>83</sup> 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.<sup>84</sup> The D.C. Circuit has observed that “[t]he privacy inquiries under Exemptions 6 and 7(C) are ‘essentially the same.’”<sup>85</sup> Under both Exemptions 6 and 7(C), the third party must have more than a *de minimis* privacy interest that would be compromised by the release of the requested material.<sup>86</sup> Here, any privacy interest is *de minimis* at most.

As discussed above, the information at issue is basic information related to a business entity, and is not the type of information that Exemptions 6 and 7(C) were intended to protect.<sup>87</sup> Again, the information being withheld are photographs taken during and the result of AWA-mandated inspections, and the sole basis the USDA has proffered for withholding this information is that the information was collected on the licensees’ homestead.<sup>88</sup> The licensee, Henry Hampton, has voluntarily opted to locate his USDA-regulated business—Lazy 5 Ranch, which is open to the public<sup>89</sup>—at the place of his residence. 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 licensees’ business activities,<sup>90</sup> and is even further limited when the individuals are calling upon the public to visit their homestead.<sup>91</sup> The question “must be measured in light of the effect on [the individuals] as businesspeople.”<sup>92</sup> The *only* information at issue is the business address for this limited liability corporation, which is used by the licensees in his capacity as a *businessperson*. Indeed, a significant part of Lazy 5 Ranch’s business is the exhibition of animals and, as such, he regularly opens his facility—and thus the “homestead”—to the public who pay to enter and observe the

---

<sup>82</sup> 5 U.S.C. § 552(b)(6).

<sup>83</sup> *Id.* § 552(b)(7)(C).

<sup>84</sup> *Morley v. C.I.A.*, 508 F.3d 1108, 1127-28 (D.C. Cir. 2007).

<sup>85</sup> *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004) (citations omitted).

<sup>86</sup> *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).

<sup>87</sup> 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”).

<sup>88</sup> Ex. 10; Ex. 25.

<sup>89</sup> See, e.g., LAZY 5 RANCH, <http://lazy5ranch.com/rates-hours.html> (last accessed April 28, 2019) (listing business hours and admission fees for the facility).

<sup>90</sup> 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)).

<sup>91</sup> See Lazy 5 Ranch, *supra* note 89.

<sup>92</sup> *Wash. Post Co. v. U.S. Dep’t of Agric.*, 943 F. Supp. at 36.

animals.<sup>93</sup> There is clearly no privacy interest in the activities of a business that is open to the public, regardless of its location.

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.”<sup>94</sup> The FOIA only authorizes withholding where “the agency *reasonably foresees* that disclosure would harm an interest protected by an exemption.”<sup>95</sup>

Finally, as discussed above, the USDA has already disclosed the minimally redacted reports detailing the USDA’s findings during the March 17, 2015, August 23, 2017, and December 5, 2017 inspections at issue here, which is when the USDA took the photographs at issue in the instant matter.<sup>96</sup> The USDA has also disclosed the findings from the March 17, 2015 and August 23, 2017 inspection reports in its administrative complaint against Henry Hampton.<sup>97</sup> The USDA cannot withhold other formats of the same information, such as the photos from the previously released inspection reports. This is the same information that was previously released albeit in a different format. Accordingly, the information released to the public by the USDA greatly diminishes Lazy 5 Ranch’s 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. 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.”<sup>98</sup> 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.<sup>99</sup>

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

---

<sup>93</sup> See Lazy 5 Ranch, *supra* note 89.

<sup>94</sup> 309 F.3d 26, 37 (D.C. Cir. 2002).

<sup>95</sup> 5 U.S.C. § 552(a)(8)(A)(i)(I) (emphasis added).

<sup>96</sup> See *supra* at Part I; see also Ex. 4 at 63-67 (Aug. 23, 2017 and Dec. 5, 2017 Inspection Reports); *id.* at 47-49 (March 17, 2015 Inspection Report).

<sup>97</sup> Ex. 5.

<sup>98</sup> *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1970).

<sup>99</sup> *Jurewicz*, 741 F.3d 1326, 1333–34 (D.C. Cir. 2014) (citations omitted).

effectiveness of inspections” conducted by the USDA under the AWA, and the D.C. Circuit has upheld that finding.<sup>100</sup>

In the instant case the USDA curiously asserts that “the harm to personal privacy is greater than any minimal public interest that may be served by disclosure.”<sup>101</sup> However, in reality, there is 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.”<sup>102</sup>

The public’s interest in this information is especially strong in cases involving facilities that are found to violate the AWA repeatedly, such Lazy 5 Ranch.<sup>103</sup> During just the three inspections subject to this appeal, the USDA cited Lazy 5 Ranch for thirteen violations of the AWA, nine of which were repeat citations and one of which was a critical citation.<sup>104</sup> The December 5, 2017, inspection report documents that five waterbuck died, likely due to exposure during cold weather because they did not have access to adequate shelter.<sup>105</sup> The March 17, 2015 and August 23, 2017, inspection reports document that six animals were in need of veterinary care.<sup>106</sup> The August inspection report also has multiple citations related to the safety of animals and the public due to the lack of appropriate barriers and unattended public contact.<sup>107</sup> There is a very strong public interest in all of this information.

In response to PETA’s FOIA requests, the USDA stated that it located 56 pages of records, 51 of which were photographs.<sup>108</sup> Access to this information is critical for the public to gauge the effectiveness of the USDA’s inspections. The OIG has issued a finding stating that APHIS needs to improve their inspection process in order to safeguard the public at animal exhibitions.<sup>109</sup>

The USDA’s unwillingness to use all tools available to the agency in order to force Lazy 5 Ranch to comply with the AWA—including refusing to renew Lazy 5 Ranch’s AWA license or, in the alternative, seeking suspension or revocation of that license—further supports the public’s interest in the information at issue in this appeal. And the USDA’s refusal to release the information raises the question of whether the agency is motivated by a desire to protect itself

---

<sup>100</sup> *Id.* at 1333.

<sup>101</sup> Ex. 10; Ex. 25.

<sup>102</sup> *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))).

<sup>103</sup> Ex.5.

<sup>104</sup> Ex. 4 at 47-49 (March 17, 2015 Inspection Report); *id.* at 63-67 (Aug. 23, 2017 and Dec. 5, 2017 Inspection Reports).

<sup>105</sup> *Id.* at 66 (Dec. 5, 2017 Inspection Report).

<sup>106</sup> *Id.* at 63 (Aug. 23, 2017 Inspection Report); *id.* at 47 (March 17, 2015 Inspection Report).

<sup>107</sup> *Id.*

<sup>108</sup> Ex. 10; Ex. 25.

<sup>109</sup> Ex. 15, 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>.

from criticism and embarrassment for its role in continuing to license Lazy 5 Ranch despite its 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 Lazy 5 Ranch’s cruel business practices.

The USDA’s failure to take meaningful action against Lazy 5 Ranch is the same sort of inaction about which the USDA’s own Office of Inspector General (“OIG”) has repeatedly raised concerns.<sup>110</sup> The OIG has also identified as problematic the policy of automatically renewing AWA licenses despite chronic violations.<sup>111</sup>

The OIG has further raised concerns about inspection consistency.<sup>112</sup> In 2017 the OIG “found that inspections are not always performed consistently. . . . Uniformity in the inspection process across the country is not assured.”<sup>113</sup> The OIG further noted the importance of inspection documentation to “assure adequate inspections are occurring.”<sup>114</sup>

---

<sup>110</sup> See, e.g., Ex. 14, USDA, OIG, APHIS Oversight of Research Facilities, Audit No. 33601-0001-41, page 2 of pdf (Dec. 2014), <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf> (finding that APHIS “did not make the best use of its limited resources,” “did not follow its own criteria in closing at least 59 cases that involved grave (e.g., animal deaths) or repeat welfare violations,” “issued penalties that were reduced by an average of 86 percent from Animal Welfare Act’s (AWA) authorized maximum penalty per violation,” and “under-assessed penalties . . . by granting good faith reductions without merit or using a smaller number of violations than the actual number”); *id.* at 3 (“In 2010, an OIG audit . . . found that APHIS’ enforcement process was ineffective, and the agency was misusing its own guidelines to lower penalties for AWA violators. The agency . . . did not implement an appropriate level of enforcement. At a time when Congress tripled the authorized maximum penalty to strengthen fines for violations, actual penalties were 20 percent less than previous calculations.” (citing USDA, OIG, APHIS Animal Care Program Inspections of Problematic Dealers, Audit 33002-4-SF (May 2010), <https://www.usda.gov/oig/webdocs/33002-4-SF.pdf>)); *id.* (“In 2005, OIG performed an audit on animals in research facilities and found that APHIS was not aggressively pursuing enforcement actions against violators of AWA and was assessing minimal monetary penalties. Inspectors believed the lack of enforcement action undermined their credibility and authority to enforce AWA. In addition to reducing the penalty by 75 percent, APHIS offered other concessions—making penalties basically meaningless. Violators continued to consider the monetary stipulation as a normal cost of business, rather than a deterrent for violating the law.” (citing USDA, OIG, APHIS Animal Care Program Inspection and Enforcement Activities, Audit. No. 33002-3-SF, (Sept. 2005), <https://www.usda.gov/oig/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))).

<sup>111</sup> See Ex. 16, USDA, OIG, Animal and Plant Health Inspection Service Implementation of the Animal Welfare Act, Audit No. 33002-0001-Ch, (1992).

<sup>112</sup> Ex. 17, 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>.

<sup>113</sup> *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).

<sup>114</sup> *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”).

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.<sup>115</sup> 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."<sup>116</sup>

Of particular relevance here, the OIG has previously found that some inspectors "did not always adequately . . . support violations with photos,"<sup>117</sup> which placed animals at "higher risk for neglect or ill-treatment"—in contravention of the purposes of the AWA—and weakened enforcement actions.<sup>118</sup> The OIG further noted that lack of photographs made identification of animals in need of care on re-inspection (and thus whether the facility has come into compliance) difficult.<sup>119</sup> In response, APHIS management acknowledged a potential need for additional training in collecting evidence.<sup>120</sup> These additional concerns make the public interest in this matter especially high.

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

- assess whether the USDA is following its own policies in conducting inspections;
- determine whether the USDA has adequately addressed issues raised by the OIG about the adequacy of its inspection photos;
- monitor inconsistencies in inspections; and
- monitor the USDA's enforcement of the AWA.

The public's interest in ensuring the USDA's proper implementation of the AWA is substantial and clearly outweighs any minimal privacy interests that may be identified.<sup>121</sup> Accordingly, the photographs taken by the USDA in the course of inspections of Lazy 5 Ranch and the results of those inspections are not exempt from disclosure pursuant to Exemptions 6 or 7(C), and must be provided in full.

---

<sup>115</sup> Ex. 15, 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>.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> Ex. 18, 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.").

<sup>118</sup> *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).

<sup>119</sup> *Id.* at 19.

<sup>120</sup> *Id.* at 17.

<sup>121</sup> *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).



#### **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.<sup>122</sup> 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.”<sup>123</sup> “In addition to establishing that information is properly withheld under the claimed FOIA exemption, an agency seeking to withhold information bears the burden of establishing that all reasonably segregable non-exempt portions of records are disclosed.”<sup>124</sup> Claims of non-segregability must be made with the same degree of detail as required for claims of exemption.<sup>125</sup>

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.’”<sup>126</sup> The USDA withheld entire documents 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.’”<sup>127</sup>

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.<sup>128</sup> With the USDA providing no

---

<sup>122</sup> 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 . . . .”).

<sup>123</sup> *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)).

<sup>124</sup> *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).

<sup>125</sup> *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)).

<sup>126</sup> 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).

<sup>127</sup> *Id.* (citation omitted).

<sup>128</sup> *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).

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 photograph at issue contains 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.<sup>129</sup> Indeed, the USDA has been 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 of the photographs subject to the instant appeal is wholly inappropriate.<sup>130</sup>

### **Conclusion**

Because the USDA failed to explain its decision to withhold the 56 pages of documents, 51 of which are photographs that the USDA took during three inspections at Lazy 5 Ranch, 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.

I look forward to your response within twenty business days of receipt of this timely filed administrative appeal.<sup>131</sup>

---

<sup>129</sup> 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 . . . .”).

<sup>130</sup> *See, e.g.*, Ex. 19, Photograph from United States Department of Agriculture 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 United States Department of Agriculture Inspection Report of Hugo Liebel, Inspection No. 315101549490012 (Nov. 10, 2010) (depicting elephant at a performance in Greenville, MS, with the likenesses of two individuals appearing in the photo redacted pursuant to Exemptions 6 and 7(C)); Ex. 21, Photograph from United States Department of Agriculture Inspection Report of Ringling Brothers Circus Red Unit, (January 12, 2010) (depicting elephant and redacting the likeness of individuals appearing in the photos pursuant to Exemptions 6).

<sup>131</sup> *See* 5 U.S.C. § 552(6)(A)(ii); 7 C.F.R. § 1.14(c).