

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT

PEOPLE FOR THE ETHICAL TREATMENT
 OF ANIMALS, INC.

Plaintiff

v.

UNIVERSITY OF MASSACHUSETTS
 AMHERST

Defendant

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action brought pursuant to Mass. Gen. Laws c. 66, § 10(A)(c) (hereafter, “G.L.”) and G.L. c. 231A, § 1 to enforce the requirements of the Massachusetts Public Records Law.

2. In an improper attempt to shield its activities from public scrutiny, Defendant, the University of Massachusetts Amherst, refuses to produce numerous public records, including video recordings of taxpayer-funded primate experiments conducted at its facilities. Over the past 15 months, Plaintiff, People for the Ethical Treatment of Animals, Inc., has requested public records pertaining to these taxpayer-funded experiments from Defendant, but Defendant continues to violate the Public Records Law by refusing to produce the records based on unsubstantiated claims that these public records are exempted from disclosure.

3. This Court’s intervention is now required to compel Defendant to comply with its obligations under the Public Records Law.

PARTIES

4. Plaintiff, People for the Ethical Treatment of Animals, Inc., is a Virginia non-stock corporation and an animal protection charity dedicated to protecting animals—including those used for experimentation, exhibition, and entertainment—from abuse, neglect, and cruelty. Plaintiff undertakes these efforts through, *inter alia*, cruelty investigations, research, animal rescue, legislation, and public education.

5. Defendant, University of Massachusetts Amherst, is a public university created pursuant to statute, G.L. c. 75, § 1, and is an agency subject to the provisions of the Public Records Law, as defined by G.L. c. 4, § 7, cl. 26 and G.L. c. 66, § 6A(a).

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to G.L. c. 66, § 10A(d)(1)(i)-(ii).

7. Venue is proper in Suffolk County pursuant to G. L. c. 66, § 10A(c), which provides that any action filed under the Public Records Law against an agency of the Commonwealth “shall be filed in Suffolk superior court.”

LEGAL BACKGROUND

The Massachusetts Public Records Law

8. The Massachusetts Public Records Law, G.L. c. 66, § 10(a), provides that records custodians “shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record” as defined in G.L. c. 4, § 7 cl. 26, “or any segregable portion of a public record, not later than 10 business days following the receipt of the request.” *See also* G.L. c. 66, § 6A(d) (“The records access officer shall provide the public records to a requestor by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form.”).

9. G.L. c. 4, § 7 cl. 26 defines “public records,” in relevant part, as all “documentary materials or data, regardless of physical form or characteristics” either “made or received by” any officer or employee of any agency.

10. In order to fully discharge its duties under the Public Records Law, an agency must either disclose the requested records, or satisfactorily rebut the presumption in favor of disclosure by identifying express exemptions in G.L. c. 4, § 7, cl. 26 that permit withholding. *See* G. L. c. 66, §§ 10(a), 10A(d)(1)(iv).

11. Where exempt information is intertwined with non-exempt information, the agency must produce any segregable, non-exempt portion of the records at issue. G.L. c. 66, § 10(a).

12. A requestor may initiate a civil action to enforce the requirements of the Public Records Law, c. 66, § 10A(c)(iv). In any such action, a “presumption shall exist that each record sought is public and the burden shall be on the defendant agency . . . to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.” G.L. c. 66, § 10A(d)(1)(iv).

13. G.L. 66, § 10A further provides that the Superior Court has available all remedies at law or in equity in an enforcement action, § 10A(c), including the authority to enter injunctive relief, § 10A(d)(1)(i), to award attorney fees and costs, § 10A(d)(2), to order the agency to waive fees, § 10A(d)(3), and, in cases where the Court finds the agency did not act in good faith, to award punitive damages, *id.* §10A(d)(4).

PUBLIC RECORDS REQUESTS AT ISSUE

Plaintiff's May 11, 2021 Public Records Request (the "First Request")

14. On May 11, 2021, Plaintiff submitted a public records request to Defendant for "[a]ll photographic and videographic records related to experiments carried out by UMass-Amherst faculty member, Dr. Agnès Lacreuse (Department of Psychological and Brain Sciences)" and "[a]ll protocol(s) for which Dr. Lacreuse is the Principal Investigator or Co-Investigator" for the period from January 1, 2017 to the present. A true and correct copy of the Request is attached as Exhibit A at 2-4.

15. On July 26, 2021, in response to the Request, Defendant provided four heavily redacted Protocols and some videos.

16. Defendant withheld descriptions of procedures and other portions of the Protocols and many videographic records (the "Videos"), such as videos of social separation experiments and thermal regulation experiments performed on marmosets, citing the following exemptions in the Public Records Act: exemption (n) pertaining to records "likely to jeopardize public safety"; exemption (u) pertaining to trade secrets or proprietary information; and exemption (c) pertaining to "materials or data," the disclosure of which may constitute an unwarranted invasion of personal privacy.

17. Defendant's response failed to identify which of the three claimed exemptions were applied to which records or portions of records that Defendant withheld. Exhibit A at 1.

18. Plaintiff does not challenge any withholdings of the location of the experiments, or the names, titles, contact information or any other personally identifiable information of persons associated with the experiments at issue.

19. Plaintiff challenges the withholding of the following records under exemptions (n), (u) or (c): the Videos; pages 46, 51-52, and 56 of Protocol 2132; pages 45-46 of Protocol 764; and pages 30-31 of Protocol 2376.

20. On September 24, 2021, pursuant to G.L. c. 66 § 10A(a) and 950 CMR 32.08(1), Plaintiff appealed Defendant's withholding of the Videos and portions of the Protocols to the Supervisor of Records, Office of the Secretary of the Commonwealth ("Supervisor of Records"). A true and correct copy of Plaintiff's appeal is attached as Exhibit B.

21. On October 8, 2021, the Supervisor of Records determined that Defendant had failed to meet its statutory burden to explain or otherwise demonstrate that the claimed exemptions (n), (u), and (c) apply to the Videos and the portions of the Protocols withheld by Defendant. Specifically, the Supervisor of Records determined that Defendant "merely cite[d] Exemptions (c), (n), and (u) without any further explanation as to the exemptions' applicability to the requested records."

22. Consequently, the Supervisor of Records ordered Defendant to provide a response with "a more in-depth explanation of what records or portions of records are being withheld and how these records are exempt under Exemptions (c), (n), and (u)" within ten (10) business days of its determination. A true and correct copy of the Supervisor of Records' determination is attached as Exhibit C.

Plaintiff's August 10, 2021 Public Records Request (the "Second Request")

23. On August 10, 2021, Plaintiff submitted a public records request to Defendant for (among other records not at issue in this litigation) "[a]ll videographic records referenced and collected for study in the published paper: Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A. (2019). Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *American journal of primatology*, 81(9), e23057." A true and correct copy of the Request is attached as Exhibit D at 2-3.

24. On October 4, 2021, in response to the Request, Defendant provided certain redacted records and withheld others that are not at issue in this litigation, but also withheld all responsive videographic records (the "Videos") purportedly under exemptions (u) and (c) of the Public Records Law. A true and correct copy of the Defendant's October 4, 2021 response is attached as Exhibit D at 1.

25. Plaintiff challenges Defendant's withholding of the Videos.

26. On October 13, 2021, pursuant to G.L. c. 66, § 10A(a) and 950 CMR 32.08(1), Plaintiff appealed Defendant's withholding of the Videos to the Supervisor of Records, Office of the Secretary of the Commonwealth ("Supervisor of Records"). A true and correct copy of Plaintiff's appeal is attached as Exhibit E.

27. On October 27, 2021, the Supervisor of Records ordered the Defendant to provide the Supervisor of Records with an un-redacted copy of the responsive records for *in camera* inspection in order to facilitate a determination.

28. Defendant failed to comply with this order. A true and correct copy of the Supervisor of Records' order is attached as Exhibit F.

Defendant's Combined Response to the Supervisor of Records Regarding the First and Second Requests

29. On January 3, 2022, Defendant provided a past-due response to the Supervisor of Record's orders and subsequent compliance inquiries. Defendant's response came nearly three months after the Supervisor of Records ordered Defendant to provide additional information in support of its withholdings with regard to the First Request, and nearly two months after the Supervisor of Records ordered Defendant to provide the Videos for *in camera* review with regard to the Second Request. A true and correct copy of the Defendant's response is attached as Exhibit G.

30. Defendant maintained that the withheld records and portions of records are exempt, and refused to produce any additional records to Plaintiff.

31. Defendant claimed that "the redacted portions of the requested protocols, procedures and preliminary results, and withheld photographs and video *are unpublished research materials*" which constitute "the trade secrets and proprietary information of the University, and, accordingly, are exempt from disclosure under the Public Records Law, pursuant to G.L. c. 4, s7(26)(a) (18 U.S.C. §1836, et seq. and G. L. c. 93, §42 to 42G) and G. L. c. 4, § 7(26)(u)" (emphasis in original). Exhibit G at 2.

32. Defendant also failed to provide records to the Supervisor of Records for *in camera* review, as ordered.

33. As stated above, Plaintiff does not challenge any withholdings of the location of the experiments, or the names, titles, contact information or any other personally identifiable information of persons associated with the experiments at issue.

Defendant's Response Regarding the First and Second Requests Fails to Support the Withholdings

34. Upon information and belief, a number of the procedures that have been redacted in full or in part by Defendant in the Protocols are procedures commonly known and used by experimenters, and these procedures have been repeatedly described or referenced in published papers.

35. For example, perfusion, one of the procedures redacted in full by Defendant, is a non-survival surgical procedure commonly used in laboratories when experimenters want the ability to analyze post-mortem animal tissues. Social reactivity procedures are also common practice.

36. Further, Lacreuse, in collaboration with her colleagues, has published multiple papers pertaining to the procedures redacted by Defendant, specifically spatial working memory tasks and emotional reactivity procedures as well as a similar thermal heat induction procedure, all used on nonhuman primates.

37. Subsequent to Defendant's responses to the Request and to the Supervisor of Records' order, Lacreuse also published a paper pertaining to the olfactory discrimination procedure.

38. The published papers include detailed descriptions of the procedures used in the experiments.

39. Consequently, a number of the procedures withheld by Defendant, as well as the clinical effects that may occur as a result of the procedures, are either previously published or fail to qualify as trade secret and propriety information in the first place.

40. Many of the Videos at issue have also been described or referenced in papers published by Lacreuse and her colleagues.

41. For example, one publication details how experimenters administered letrozole, a drug that decreases the amount of estrogen production, to marmosets for four weeks, in an attempt to replicate symptoms associated with menopause in humans. The experimenters then “video-recorded spontaneous behaviors of each marmoset in their home cage, and administered the thermal challenge,” the latter of which was also video-recorded. Gervais, N.J., Remage-Healey, L., Starrett J.R., Mong, J.A., & Lacreuse, A., “Adverse Effects of Aromatase Inhibition on the Brain and Behavior in a Nonhuman Primate,” *The Journal of Neuroscience*, 39(5), 918-925 (Jan. 2019) (summarizing experiment design and methodology, as well as videographic data collected); Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A., “Baseline Cortisol Levels and Social Behavior Differ as a Function of Handedness in Marmosets (*Callithrix jacchus*),” *American Journal of Primatology*, 81(9), e23057 (Sept. 2019) (same).

42. Consequently, the Videos fail to qualify as trade secret and propriety information.

43. Defendant also erroneously invoked exemption (n)—which only applies to records such as “blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments . . . the disclosure of which . . . is likely to jeopardize public safety”—by baselessly relying on information provided on websites of private groups that serve the interests of industries that Plaintiff opposes on ethical grounds through First Amendment-protected activities, and 2004 testimony before a Congressional committee in which Plaintiff is not even referenced.

44. As of the date of this filing, Defendant has not produced all of the information in the Protocols, or the Videos, that Plaintiff is lawfully entitled to in response to the First and Second Requests.

Plaintiff's January 25, 2022 Public Records Request (the "Third Request")

45. On January 25, 2022, Plaintiff submitted a public records request to Defendant for the names of all current members of Defendant's Institutional Animal Care and Use Committee (the "Committee"), as well as the Committee's meeting notices, agendas, and meeting minutes since January 1, 2020. A true and correct copy of the Request is attached as Exhibit H.

46. On April 1, 2022, in response to the Request, Defendant provided certain records that are not at issue in this litigation, but improperly and unjustifiably withheld the names of the Committee members by citing exemptions (c) and (n) of the Public Records Law, which pertain only to "materials and data . . . the disclosure of which may constitute an unwarranted invasion of personal privacy," or records such as "blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments . . . the disclosure of which . . . is likely to jeopardize public safety[.]" A true and correct copy of the Defendant's April 1, 2022 response is attached as Exhibit I.

47. Pursuant to the federal Animal Welfare Act and implementing regulations, the Institutional Animal Care and Use Committee is responsible for oversight of the animal care and use program at UMass-Amherst. 7 U.S.C. § 2143 (b)(1); 9 CFR § 2.31(a).

48. Further, pursuant to the National Institutes of Health, the Committee must consist of at least 5 members, and include: one veterinarian either certified by specified professional organizations or with training and experience in laboratory animal science and medicine or in the use of the species at the institution; one practicing scientist experienced in research with animals; one member, such as an “ethicist, lawyer, or member of the clergy,” whose primary concerns are in a nonscientific area and so can “represent the general community interests in the proper care and use of animals” and bring to a committee “a naïve attitude with regard to science and scientific activities”; and one member who is not affiliated with the institution, not a laboratory animal user or former user, with “no discernible” personal or spousal ties to the institution other than as a member of the Committee. NIH Guidance on Qualifications of IACUC Nonscientific and Nonaffiliated Members, Notice No. NOT-OD-15-109 (June 9, 2015), <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-109.html#:~:text=NOT%2DOD%2D15%2D109,IACUC%20Nonscientific%20and%20Nonaffiliated%20Members&text=This%20Notice%20provides%20guidance%20to,nonaffiliated%20members%20of%20the%20IACUC>; Nat’l Academies Press, “Guide for the Care and Use of Laboratory Animals: Eighth Edition,” p. 24 (2011); *see also*, 7 U.S.C. § 2143 (b)(1) and 9 CFR § 2.31(b) (also setting forth composition requirements).

49. No federal or state statute specifically or by necessary implication exempts disclosure of the names of the Committee members.

50. The names of the Committee members are necessary to allow the public to independently verify each member’s qualifications and ultimately ensure that Defendant is complying with the federal law.

51. As of the date of this filing, Defendant has not produced all information subject to disclosure contained in public records responsive to the Third Request.

CLAIMS AND PRAYER FOR RELIEF

COUNT I

Violation of G.L. c. 66, § 10 and G.L. c. 4, § 7, cl. 26

52. Plaintiff repeats the allegations of ¶¶ 1-51 above as if fully set forth herein.

53. Under G.L. c. 66, § 10, “every person having custody of any public record . . . shall, at reasonable times and without unreasonable delay, permit it . . . to be inspected and examined by any person” upon request.

54. By refusing to produce all non-exempt public information responsive to Plaintiff’s May 11, 2021, August 10, 2021, and January 25, 2022 Public Records Requests, Defendant violated the Public Records Law.

55. Plaintiff is entitled to injunctive relief pursuant to G.L. c. 66, § 10A(d)(1)(i) ordering Defendant to comply with its obligation under the Public Records Law by providing all records responsive to Plaintiff’s Requests, which were each submitted on May 11, 2021, August 10, 2021, and January 25, 2022.

COUNT II

Declaratory Judgment, G.L. c. 231A, § 1

56. Plaintiff repeats the allegations of ¶¶ 1-55 above as if fully set forth herein.

57. There exists an actual controversy between Plaintiff and Defendant concerning whether various information and records responsive to Plaintiff’s Requests are shielded from disclosure pursuant to any exemptions in the Public Records Law.

58. Plaintiff alleges that the requested records are public records under G.L. c. 4, § 7, cl. 26, that Defendant has failed to satisfactorily rebut the presumption in favor of disclosure by identifying applicable exemptions that permit withholding, and that Defendant has not acted in

good faith by continuing to withhold the various records under exemptions (a), (n), (u) and (c).

59. Declaratory relief will clarify the rights and obligations of the parties and is therefore appropriate to resolve this controversy.

WHEREFORE, Plaintiff respectfully prays that the Court:

1. Expedite the proceedings in this case pursuant to G.L. c. 66, § 10A(d)(1)(iii);
2. Enter a permanent injunction sought in Count I, above, compelling Defendant to produce forthwith all of the public records responsive to Plaintiff's Requests;
3. Enter a declaratory judgment pursuant to Count II of this Complaint, determining and declaring that the records sought in Plaintiff's Requests are public records pursuant to G.L. c. 66, § 10; that Defendant has not met its burden to show that any exemptions apply to justify their withholding; and that Defendant has acted in bad faith in refusing to provide the records;
4. Award Plaintiff its reasonable attorney fees and costs pursuant to G.L. c. 66, § 10A(d)(2);
5. Award punitive damages to Plaintiff and against Defendant for its bad faith conduct pursuant to G.L. c. 66, § 10A(d)(4); and
6. Grant such other relief as the Court deems just and proper.

Dated: September 12, 2022

Respectfully submitted,

PEOPLE FOR THE ETHICAL TREATMENT OF
ANIMALS, INC.

By its attorneys:



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Chicago, IL 60607
312-243-5900
foia@loevy.com

Exhibit A

From: [Christine Wilda](#)
To: [Kaylie Flaughner](#)
Cc: [Records Administrator - UMass Amherst](#)
Subject: FW: FW: Public Records Request
Date: Monday, July 26, 2021 10:26:53 AM
Attachments: [image001.png](#)

Kaylie,

I am in receipt of the check issued by PETA for the records requested below. You will be receiving an email with a link to a Microsoft OneDrive folder containing records responsive to your request, to the extent allowable. The University will not provide video graphic records for unpublished work and research currently being conducted which constitutes trade secrets or other proprietary information of the University of Massachusetts nor records that contain images of individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy and jeopardize public safety. In addition, we have redacted personally identifiable information and unpublished material. We are withholding those materials under exemptions (n), (u) and (c) to Section 7(26) of the Massachusetts General Laws.

Under Chapter 66 of the General Laws, you have the right to appeal our disposition of your request to the Supervisor of Public Records, Office of the Secretary of State, pre@sec.state.ma.us and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

Regards,
Christine

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Christine M. Wilda
Associate Chancellor for Compliance
UMASS Amherst
340 Whitmore Building
Amherst, MA 01003
Ph: 413-545-2148
Fax: 413-545-2114
cwilda@umass.edu

From: Christine Wilda [<cwilda@umass.edu>](mailto:cwilda@umass.edu)
Sent: Tuesday, May 25, 2021 3:20 PM
To: 'Kaylie Flaughner' [<kaylief@peta.org>](mailto:kaylief@peta.org)
Cc: Records Administrator - UMass Amherst [<recordsadmin@umass.edu>](mailto:recordsadmin@umass.edu)
Subject: RE: Public Records Request

Kaylie,

I am in receipt of your records request as detailed below.

At this time, we have made a good faith estimate of the fees necessary to produce the records you have requested.

Segregate/Redaction: 35 hours at \$25/hour =	\$875
No charge for first 4 employee hours =	<u>-\$100</u>
Total =	\$775

Once we receive your payment (check payable to the University of Massachusetts) we will begin the process to provide the records. If the total cost of production exceeds this estimate, we will advise you of the additional cost; if the total cost is less than the estimate, we will refund that amount to you. Please address all correspondence regarding your request to me at the address below.

Under Chapter 66 of the MA General Laws, you have the right to appeal our disposition of your request to the Supervisor of Public Records, Office of the Secretary of State, pre@sec.state.ma.us and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

Sincerely,
Christine

Christine M. Wilda
Associate Chancellor for Compliance
UMASS Amherst
340 Whitmore Building
Amherst, MA 01003
Ph: 413-545-2148
Fax: 413-545-2114
cwilda@umass.edu

From: Kaylie Flaughner <kaylief@peta.org>
Sent: Tuesday, May 11, 2021 3:41 PM
To: Records Administrator - UMass Amherst <recordsadmin@umass.edu>
Subject: Public Records Request

May 11, 2021

Christine Wilda
Associate Chancellor for Compliance
341 Whitmore
Administration Building
UMass Amherst

181 Presidents Drive
Amherst, MA 01003

Dear Ms. Wilda:

I am submitting this request for public information on behalf of People for the Ethical Treatment of Animals (PETA) pursuant to the Massachusetts Public Records Law (M. G. L. Chapter 66, Section 10).

For the period from January 1, 2017, to the present, PETA hereby requests the following public records from the University of Massachusetts Amherst: (UMass-Amherst):

- All photographic and videographic records related to experiments carried out by UMass-Amherst faculty member, Dr. Agnès Lacreuse (Department of Psychological and Brain Sciences); and
- All protocol(s) for which Dr. Lacreuse is the Principal Investigator or Co-Investigator.

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

PETA is a non-profit public interest animal protection organization whose federal tax-exempt number is 52-1218336. As such, we request that a non-profit fee waiver be applied to our request. PETA has no commercial interest in the records requested but seeks them strictly in an effort to ensure the public is fully informed about operations and regulations involving the use of animals in laboratories (an issue of well-established public importance). If the foregoing request for a non-profit fee waiver is denied, and fees are expected to exceed \$50.00, please notify me by telephone to this effect before this disclosure request is processed.

If you have any questions about our request, please contact me at KaylieF@peta.org. Thank you very much for your kind assistance with this matter.

Sincerely,

Kaylie Flaugher (she/her)

Executive Assistant to the Vice Presidents
Laboratory Investigations Department
People for the Ethical Treatment of Animals (PETA)
501 Front St. Norfolk, VA 23510
E-mail: KaylieF@peta.org | Web: www.PETA.org



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Agnès Lacreuse, PhD.
Professor
Psychological and Brain Sciences
University of Massachusetts
Morrill IV North, 204N
639 North Pleasant st
Amherst MA 01003

Email: lacreuse@umass.edu
<https://www.lacreuselab.com/>

Exhibit B

AN INTERNATIONAL ORGANIZATION DEDICATED TO PROTECTING THE RIGHTS OF ALL ANIMALS



PEOPLE FOR
THE ETHICAL
TREATMENT
OF ANIMALS
FOUNDATION

Washington
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

September 24, 2021

Supervisor of Records
Office of the Secretary of the Commonwealth
Public Records Division
McCormack Building, Room 1719
One Ashburton Place
Boston, MA 02108
Via e-mail to pre@sec.state.ma.us

**Appeal of University of Massachusetts-Amherst's Withholding of
Records and Information Under G.L. c. 4 § 7(26)(n), (u), and (c)**

Dear Supervisor of Records:

Pursuant to the Massachusetts Public Records Law ("PRL"), Chapter 66 § 10A of the Massachusetts General Laws, and 950 CMR 32.08(1), People for the Ethical Treatment of Animals, Inc. ("PETA") appeals the University of Massachusetts-Amherst ("University")'s withholding of records requested by PETA on May 11, 2021 ("Request"). Copies of the Request, and all written responses thereto, are attached. Exs. 1-5.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Request

The Request seeks, for the period from January 1, 2017 to the present, two categories of public records:

All photographic and videographic records related to experiments carried out by UMass-Amherst faculty member, Dr. Agnès Lacreuse (Department of Psychological and Brain Sciences) ("Videos"); and

All protocol(s) for which Dr. Lacreuse is the Principal Investigator or Co-Investigator ("Protocols").

See Ex. 1.

B. The University's response

The University acknowledged receipt of the Request via email on May 25, 2021. Ex. 2. PETA and the University corresponded on July 20 and 21, 2021, concerning confirmation of PETA's fee payment for responding to the

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

AFFILIATES:

- PETA U.S.
- PETA Asia
- PETA India
- PETA France
- PETA Australia
- PETA Germany
- PETA Netherlands
- PETA Foundation [U.K.]

Request. Exs. 3.a and 3.b. The University formally responded to the Request on July 26, 2021, stating that PETA “will be receiving an email with a link to a Microsoft OneDrive folder containing records responsive to [the Request], to the extent allowable.” Ex. 4a-c. The University also stated, in broad brush and ambiguous fashion that it:

will not provide video graphic [sic] records for unpublished work and research currently being conducted which constitutes trade secrets or other proprietary information of the University of Massachusetts nor records that contain images of individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy and jeopardize public safety. In addition, we have redacted personally identifiable information and unpublished material. We are withholding those materials under exemptions (n), (u) and (c) to Section 7(26) of the Massachusetts General Laws.

Ex. 4a-c. The University then produced some videos and four Protocols. The Protocols were extensively redacted. Exs. 5a-5d. In relevant part, the redacted information includes the names, titles, and work contact information of persons associated with the experiments at issue, and the identity of certain research collaborators. The University also redacted the details of the procedures to be carried out as part of the experiments, as well as a description of adverse effects on the animals that could occur.¹

C. The information at issue in the Request

i. Overview

In the past, public records requested by PETA have uncovered research misconduct and violations of animal welfare regulations in connection with experiments on animals carried out at the University. Ex. 6 Affidavit of Kathy Guillermo. Given the University’s track record of non-compliances with protocols and animal welfare regulations and guidelines, the Request aimed to shed light on whether Dr. Agnès Lacreuse (“Lacreuse”) and her colleagues carried out their publicly funded work at the University in a law abiding and capable manner, and in accordance with required protocols. Where, as here, “the conduct at issue occurred in the performance of the official’s professional duties or materially bears on the official’s ability to perform those duties honestly or capably,” the “public interest furthered by the public records law—transparency, accountability, and public confidence—are at their apex[.]” *Media Partners, LLC v. Dep’t of Criminal*

¹ The University also redacted the room location where procedures were conducted, which PETA does not appeal.

Justice Info. Servs., 484 Mass. 279, 293 (2020) (internal quotations and citation omitted).

Specifically, at issue here are the experiments on marmosets conducted by Lacreuse, with grants from the National Institutes of Health, funded by the taxpayers. Various public records describe how these experiments are—and were—conducted, purportedly according to strict protocols that would ensure the welfare of the animals as well as the integrity of the research. *See, e.g.*, Impact of brain estrogens on cognition and brain aging in a non-human primate; Project number 1R01CA246929-01A1 (describing experiments that involve injecting middle-aged marmosets with hormones, and monitoring sleep, cognition, and thermoregulation in the animals over time) (Ex. 7); Sleep, hot flashes and cognition: A nonhuman primate model for menopausal symptoms; Project number 5R21AG053841-02 (describing experiments involving hormone treatments in marmosets to study their impact on age-related changes in sleep, cognition, and thermoregulation) (Ex. 8); Sex differences in cognitive and brain aging: a primate model Project number 5R01AG046266-05 (describing experiments to study the effects of aging and hormones on the brains of marmosets, and how those brain changes correlate with cognitive changes) (Ex. 9); *see also* Ex. 10 <https://www.umass.edu/m2m/people/agn%C3%A8s-lacreuse> (University website, summarizing Lacreuse’s research).

Precise details and results of these experiments have been in published research articles, including, most recently, in Gervais N, Remage-Healey L, Starrett J, Pollak D, Mong J, Lacreuse A (2019), Adverse effects of aromatase inhibition on the brain and behavior in a nonhuman primate. *J Neurosci* 39:918–928. doi:10.1523/JNEUROSCI.0353-18.2018 pmid:30587540 (“Gervais, et al.”) (Ex. 11) and Vaughan E, Le A, Casey M, Workman KP, Lacreuse A. Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *Am J Primatol.* 2019 Sep;81(9):e23057. doi: 10.1002/ajp.23057. Epub 2019 Sep 30. PMID: 31566763 (“Vaughan et al.”) (Ex. 12). Contact information for the researchers involved in these studies is readily available to the public by visiting the University’s website and from other public domain sources. See e.g. <https://www.umass.edu/m2m/people/agn%C3%A8s-lacreuse> (publishing Lacreuse’s email, phone number, and address); <https://www.pbs.umass.edu/people/nicole-gervais> (publishing Gervais’ email).

ii. Gervais, et al.

The Gervais, et al. article describes, among other things, that marmosets were given a drug and the experimenters then “video-recorded spontaneous behaviors of each marmoset in their home cage...” Ex. 11 page 919. The

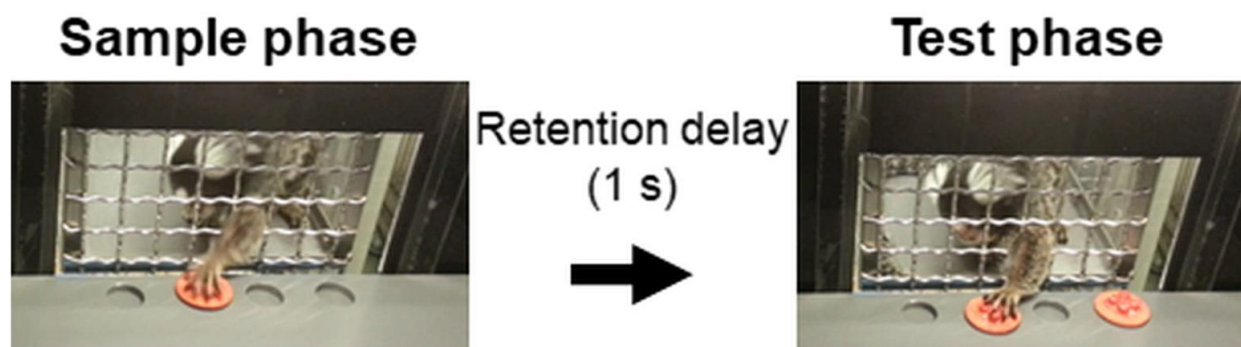
authors provide further details of how this experiment was conducted, which included an experimenter holding a marmoset in her lap for 20 minutes and overheating her with hand warmers in order to simulate hot flashes associated with (human) menopause:

One hand covering the abdomen held a hand warmer that provided the heating source ... A second experimenter, sitting ~ 20 cm from the animal's face, recorded the facial temperature of the marmoset using a thermal imaging camera ... The camera provided a video of the face along with a measurement of temperature (in degrees F) on the crosshair location. The sensitivity of the camera was 0.18 degrees F. One of every 25 frames was extracted from each video using VLC media player, resulting in ~670 frames for each animal (33/min).

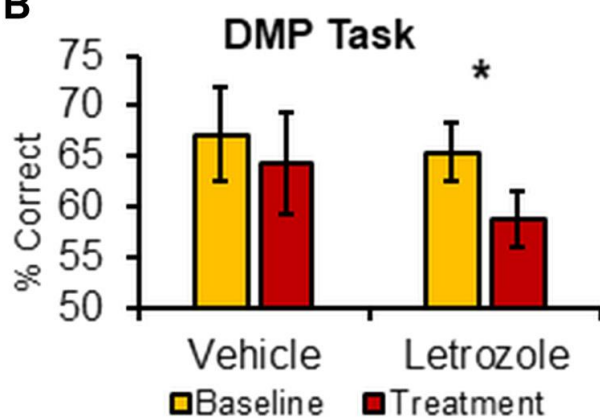
Id. at 920.

The article identifies the researchers involved in the experiments by name and also depicts photographs of some of the described experiments.

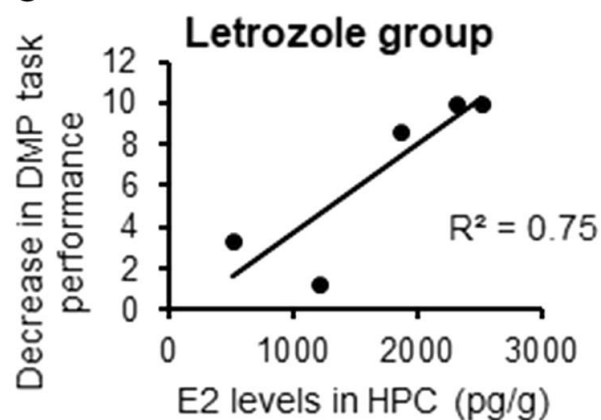
A



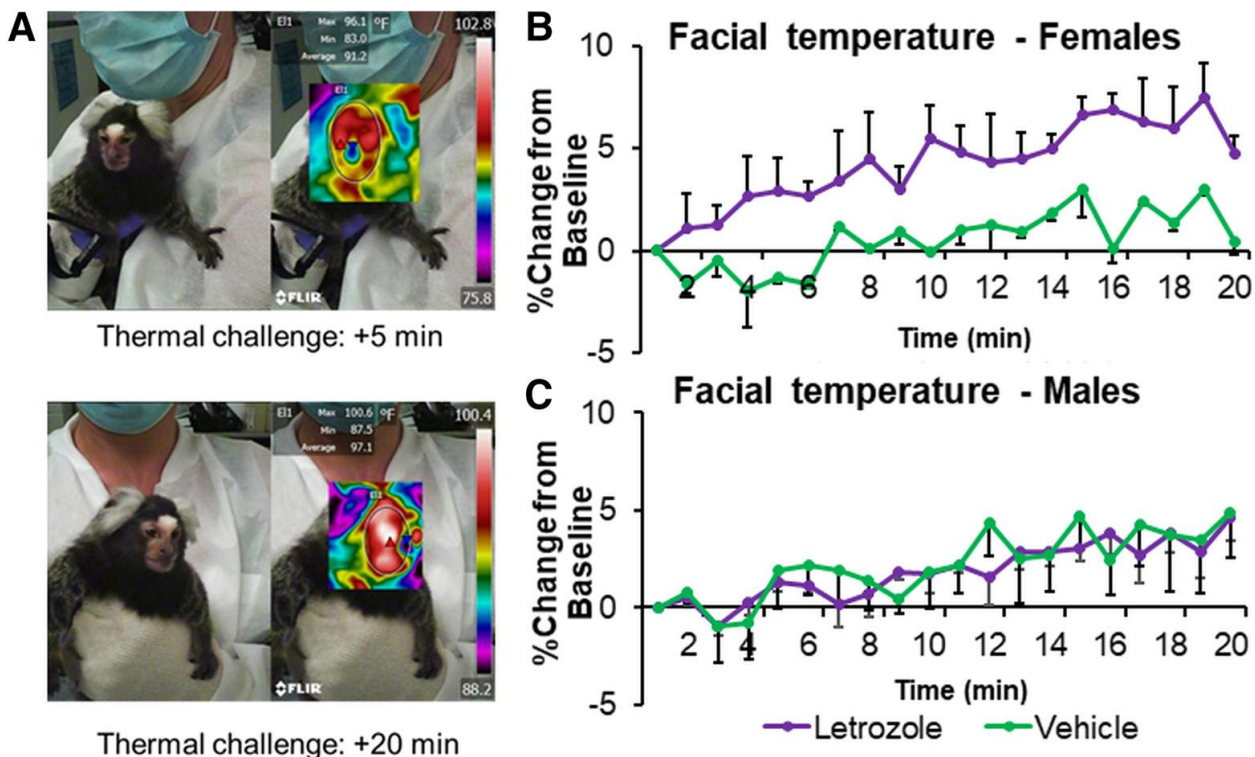
B



C



Id. at 922.



Id.

Implicit in the Gervais, et al. article is the claim that the research is valid (and valuable), because protocols were approved and followed, and it is moreover expressly claimed that the animals “were cared for in accordance with the guidelines published in the *Guide for the care and use of laboratory animals*, eighth edition.” *Id.* at 919. Significantly, these claims cannot be verified, because the University refused to produce the video recordings described in the Gervais, et al. article, and redacted the relevant portions of the experiments’ Protocols.

iii. Vaughan, et al.

The Vaughn, et al. article describes Lacreuse’s “temporary social separation” experiments in which

each marmoset was removed from its colony for 7 hr and placed alone in an unfamiliar room, in a cage similar to their home cage. The monkey could not see, smell or hear conspecifics during the separation phase. Food and water was provided ad libitum. Behavior was video-recorded with a SONY Handycam (HDD 2000x digital zoom) video camera ... Animals were video-recorded at Baseline (30 min. before separation), throughout the separation period, upon reunion with partner, and 24 hr postseparation ... Behaviors included locomotor, social, and anxiety measures ... as well as vocalizations.

Ex. 12 page 4.

The researchers involved in this experiment are also identified in the article by name, and a photograph of a marmoset from one of the experiments is included in the article:



Id. at 4.

The Vaughan, et. al. article assures the readers that “[t]he research was consistent with the American Society of Primatologists Principles of Ethical Treatment of Non-Human Primates” and that “[t]he animals were cared for in accordance with the guidelines of the US National Research Council's Guide for the Care and Use of Laboratory Animals, the US Public Health Service's

Policy on Humane Care and Use of Laboratory Animals, and the Guide for the Care and Use of Laboratory Animals[.]” *Id.* at 3. Furthermore, the studies “were approved by the University of Massachusetts Institutional Animal Care and Use Committee.” *Id.* However, because the University did not produce the videos of these studies, and redacted most relevant portions of the Protocols that were supposedly followed, PETA and the public cannot independently confirm that this work was carried out capably and lawfully.

II. APPLICABLE LEGAL STANDARD

A. PRL overview

The primary purpose of the PRL is to “give the public broad access to governmental records.” *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-83 (Mass. 2002); *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 436 (Mass. 1983). This policy expresses the Legislature’s judgment that “[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner,” *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (Mass. 1979), and that “[g]reater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government.” *New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Ct. of Bristol*, 377 Mass. 404, 417 (Mass. 1979) (Abrams, J., concurring).

If an agency does not intend to permit inspection or furnish a copy of a requested record, it must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding.” G.L.c. 66, § 10(b)(iv).

In disputes over withheld information, there exists a “presumption that the record sought is public.” G.L. c. 66 § 10(c); *see also* G.L. c. 66 § 10A(d)(1)(iv). To rebut this presumption, an agency must demonstrate “with specificity” that the record is exempt from disclosure pursuant to one of the enumerated exemptions in Chapter 4, Section 7(26) of the General Laws. G.L. c. 66 § 10(c); *Suffolk Const. Co., Inc. v. Division of Capital Asset Mgmt.*, 449 Mass. 444, 454 (Mass. 2007). Given the statutory presumption in favor of disclosure, exemptions must be construed “strictly” and “narrowly.” William Francis Galvin, *A Guide to the Massachusetts Public Records Law* 12 (Jan. 2017), <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>; *Attorney Gen. v. Assistant Comm’r of the Real Prop. Dep’t of Boston*, 380 Mass. 623, 625 (Mass. 1980).

If a portion of a record falls within the scope of one of the exemptions, the PRL requires that all non-exempt, reasonably segregable portions be disclosed. G.L. c. 66 § 10(a); *Worcester Telegram & Gazette Corp.*, 436

Mass. at 383; *Reinstein v. Police Comm'r of Boston*, 378 Mass. 281, 288 n.15 (Mass. 1978).

B. Exemption (n)

Chapter 4, Section 7(26)(n) “concerns records related to public safety,” *People for the Ethical Treatment of Animals, Inc. v. Dep’t of Ag. Res.*, 477 Mass. 280, 282 (Mass. 2017), and exempts from disclosure:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

G.L. c. 4 § 7(26)(n). Applying exemption (n) requires a two-part analysis: (1) a “threshold determination” concerning the “nature of the requested record”; and (2) an evaluation as to whether the applicable records custodian exercised their “reasonable judgment” in determining that the disclosure of the requested record is “likely to jeopardize public safety.” *People for the Ethical Treatment of Animals*, 477 Mass. at 286.

Importantly, while the class of records potentially protected from disclosure by exemption (n) is open, the Supreme Judicial Court has noted that the “any other records” language embraces “*only* those records that, when released, are ‘likely to jeopardize public safety’ *in a similar way to one of the examples listed . . .*” *People for the Ethical Treatment of Animals*, 477 Mass. at 288 (emphasis added). This is due to the fact that exemption (n) was enacted in September 2002, as part of a bill in response to the terrorist attacks of September 11, 2001, and sought to carve out, in the words of Massachusetts’ Acting Governor at the time, “a *very narrow* exemption to the definition of public records for those materials pertaining to public safety including threat assessments, security plans and certain records depicting critical infrastructure.” *Id.* at 289 (emphasis added). The Acting Governor further clarified that the exemption specifically contemplated exempting from disclosure “certain records pertaining to state and local government’s ability to protect its resources as well as other sensitive infrastructure,” a framing echoed by the Executive Office of Public Safety (“EPOS”), which “described exemption (n) as encompassing records of ‘the type that terrorists would find useful to maximize damage, such as threat assessments, security plans, and structural documents depicting critical infrastructure.’” *Id.*

The Supreme Judicial Court has further explained: “[t]he first prong . . . probes whether, and to what degree, the record sought resembles the records listed as examples in the statute,” with the key consideration being “whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage,’ EPOS Memorandum, and in that sense jeopardize public safety.” *Id.* The second prong “probes the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety,’” with the key aim of determining “whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” *Id.* at 290 (quoting G.L. c. 4 § 7(26)(n)).

Notably, the two prongs of exemption (n) have an inverse relationship, such that in situations where the records sought “yield a strong resemblance” to the examples of exempt records listed in the statute, the custodian’s burden of demonstrating that she/he exercised reasonable judgment in determining that the disclosure of the records would be likely to jeopardize public safety is relatively low; whereas in cases where “the requested record bears little or no resemblance to the listed examples,” the custodian’s burden of demonstrating that she/he exercised reasonable judgment “will be at its highest.” *Id.* at 290-91.

C. Exemption (u)

Chapter 4, Section 7(26)(u) exempts from disclosure “trade secrets or other proprietary information of the University of Massachusetts,” as well as trade secrets or proprietary information “provided to the University by research sponsors or private concerns.” G.L. c. 4 § 7(26)(u). Although the PRL does not define the terms “trade secret[]” or “proprietary information,” the Supreme Judicial Court has clarified that a “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to a production of goods, as, for example, a machine or formula for the production of an article.

J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 357 Mass. 728, 736 (Mass. 1970) (quoting Restatement of Torts § 757 cmt. b (1934)). In determining whether information at issue in a given case constitutes a trade

secret, the Supreme Judicial Court frequently turns to the six factors set forth in the Restatement of Torts:

(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (Mass. 1972).

D. Exemption (c)

Chapter 4, Section 7(26)(c) exempts from disclosure: “personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” G.L. c. 4 § 7(26)(c). Exemption (c) creates “two distinct categories of information for exemption with different standards for exemption established for each.” *Wakefield Teachers Ass’n v. School Comm. of Wakefield*, 431 Mass. 792, 800 (Mass. 2000). Of particular relevance here, “[p]ublic employees have a diminished expectation of privacy in matters relating to their public employment.” *A Guide to the Massachusetts Public Records Law* 16 (Jan. 2017), available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf> (citing *Brogan v. School Comm. of Westport*, 401 Mass. 306 (Mass. 1987), which held that exemption (c) does not protect public school teachers’ absentee records).

The second category, “any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy,” requires a balancing of three factors: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources. *People for the Ethical Treatment of Animals*, 477 Mass. at 291-92. Where the consideration of these factors indicates that “the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy,” the records must be disclosed. *Id.* at 291.

III. ARGUMENT

A. The University's response does not properly identify which records it withheld and on what bases, in violation of G.L.c. 66, § 10(b)(iv)

The University's response fails to properly identify which records it withheld, as required by G.L.c. 66, § 10(b). Among other things, the University does not articulate how many Videos (or how much footage) were responsive to the Request, but withheld. Therefore, PETA cannot determine which responsive records exist—let alone assess the validity of the University's supposedly claimed exemptions as to any part of the withheld footage.

Relatedly, the response fails to identify which Videos and/or portions of the Videos are claimed to be subject to which of the potentially claimed exemptions. For example, the University asserts that Videos containing human images were withheld on personal privacy grounds. It is unclear, however, whether all of the Videos even show human researchers and/or whether the University has withheld footage that does not show images of any humans, on personal privacy grounds.

Lastly, the conclusory and grammatically ambiguous response also requires PETA to guess whether the University intended to assert *each* of the three claimed exemption with respect to *each* of the redacted portions of the Protocols. For example, the Protocols redact the office phone numbers of the University's employees, and the numbers of rooms where certain procedures would be carried out. On its face, such information cannot be deemed "trade secrets or other proprietary information of the University of Massachusetts," within the scope of exemption (u). Yet, from its response, it cannot be determine whether the University withheld this information pursuant to this (or another) particular exemption.

Similarly, the University redacted sections in the Protocols that identify potential adverse consequences that marmosets could suffer as a result of the experiments. Disclosure of that information could not conceivably invade any University employee's personal privacy. Yet, from the University's response, PETA can only speculate if the University intended to rely on exemption (c) with respect to such redactions.

B. Exemption (n) does not protect any information contained in any of the requested records

On their face, video recordings of marmosets sitting in their cages or on the laps of researchers, protocols of marmoset experiments, and the names and office contact information of researchers are not "blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, [and] threat

or vulnerability assessments.” G.L. c. 4 § 7(26)(n). Nor are they in any way akin to records critical public infrastructure, disaster preparedness plans, threat or vulnerability assessments, or other similar structural documents that terrorists would seek.

Given that the requested records “bear[] little or no resemblance to the listed examples,” the University’s burden of demonstrating the exercise of reasonable judgment in determining that disclosure is likely to jeopardize public safety is “at its highest.” *See People for the Ethical Treatment of Animals*, 477 Mass. at 290-91. Far from meeting this “highest” burden of providing sufficient detail and “factual heft” for its claimed safety risk concerns (*see id.*) the University relies on threadbare conjecture that disclosing the requested information “*may . . . jeopardize public safety.*” Ex. 4 (emphasis added).

The University’s purported safety concerns also cannot be reconciled with the fact that information about how—and by whom—the experiments were carried out is already publicly available, and its publication caused no untoward consequences. The disclosure of their work and work contact information by the University and the researchers themselves further belies the University’s contention that publicizing such information is likely to jeopardize public safety.

C. Exemption (u) does not protect any information contained in any of the requested records

As is clear from the detailed *published* information about how (and by whom) the experiments were conducted, the Videos and Protocols do not contain trade secrets or other proprietary information. Nor do they constitute a “formula, pattern, [or] device,” or a “process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.” *See J.T. Healy & Son, Inc.*, 357 Mass. at 736.

The University also has no basis for claiming that video recordings of taxpayer funded experiments, and the names and office contact information of public employees who carry out such work at this non-profit institution are a “compilation of information which is used in one’s *business*, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it” or a “process or device for continuous use in *the operation of the business.*” *Id.* (emphasis added)

D. Exemption (c) does not protect any information contained in any of the requested records

The University’s reliance on exemption (c) fares no better. The exemption’s first prong requires that the records be “personnel and medical files or

information.” G.L. c. 4 § 7(26)(c); *Globe Newspaper Co.*, 388 Mass. at 438 (“We conclude that medical and personnel files and information are absolutely exempt from disclosure where the files or information are of a personal nature and relate to a particular individual.”). Videos recordings and Protocols of experiments on *non-human* primates are obviously not “medical files” as they do not pertain to any specific human patient or to that patient’s medical history.

Information about how marmosets react to certain drugs or conditions, or the identity and work contact information of those who perform such experiments also do not constitute personnel files or contain personnel information, such as “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information *pertaining to a particular employee*” of the University. *Wakefield Teachers Ass’n*, 431 Mass. at 798 (emphasis added). The mere mention of a researcher’s name and work contact information, or details of the procedures they carry out as part of their work, does not transform the information into “personnel” files or information. To conclude otherwise would render many of the University’s webpages, research publications, and press releases personnel files, which they obviously are not. *See, e.g.*, <https://blogs.umass.edu/ions/2019/07/02/sexdifferencesmarmosets/> (describing Lacreuse’s research on marmosets); [https://alacreuse.wixsite.com/lacreuselab/research-1\(describing Lacreuse’s research on marmosets\);](https://alacreuse.wixsite.com/lacreuselab/research-1(describing Lacreuse’s research on marmosets);) <https://www.pbs.umass.edu/people/agn%C3%A8s-lacreuse> (providing a picture of Lacreuse and describing research); <https://alacreuse.wixsite.com/lacreuselab> (listing published papers from Lacreuse’s lab members).

Exemption (c)’s second prong requires a determination of whether “the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy.” *People for the Ethical Treatment of Animals*, 477 Mass. at 291. Here, the scale clearly tips in favor of disclosure, because the requested information pertains *solely* to how public employees performed their publicly funded work at a public institution. *See Boston Globe Media Partners, LLC v. Dep’t of Criminal Justice Info. Servs.*, 484 Mass. 279, 293–94 (2020) (noting that public officials have a significantly diminished privacy interest with respect to information relevant to the conduct of their office). In short, “[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.” *Id.*, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). It therefore is disingenuous for the University to pocket millions of dollars in public grants, and then complain about efforts by members of the public to confirm that the work was performed in a lawful, efficient, and capable manner.

In any event, given the purely public nature of the conduct at issue, the University has not provided (nor can it provide) factual support for the claim that disclosing the information in the Videos or Protocols impinges on anyone's personal privacy. It merely speculates in conclusory fashion that "records that contain images of individuals, the disclosure of which *may* constitute an unwarranted invasion of personal privacy." *See* Ex. 4 (emphasis added). Such speculation falls far short of meeting the University's burden of proof. It is moreover fatally inconsistent with the fact that the persons shown in the Videos were public employees, carrying out publicly funded activities at a public institution.

The University's privacy claim is further undermined by its own conduct—and the conduct of its researchers—whose images and work contact information are published on the University website and numerous other published sources. *See, e.g.* <https://alacreuse.wixsite.com/lacreuselab>, <https://alacreuse.wixsite.com/lacreuselab/research-1> (information about research conducted at Lacreuse's lab, including photographs of the researchers); <https://www.lacreuselab.com/alumni> (photographs of alumni researchers at Lacreuse's lab); <https://www.pbs.umass.edu/people/agn%C3%A8s-lacreuse> (picture of Lacreuse, contact information for Lacreuse, and summary of research); <https://www.pbs.umass.edu/people/nicole-gervais> (photograph and contact information for Gervais); <https://twitter.com/lacreuselab/status/1263980434574258176> (screenshot from Lacreuse's lab meeting showing pictures of researchers); <https://blogs.umass.edu/lacreuse/lab-members/> (list of Lacreuse's lab members); <https://alacreuse.wixsite.com/lacreuselab/people> (photographs of researchers); <https://www.pbs.umass.edu/news/agnes-lacreuse-selected-section-member-center-scientific-review-national-institutes-health> (providing a picture of Lacreuse); <https://www.umass.edu/cns/directory/agn%C3%A8s-lacreuse> (providing a picture of Lacreuse and contact information).

Lastly, the University's privacy claim fails with respect to the researchers depicted in the Videos for an additional reason: the researchers' faces and heads were covered with surgical masks and head coverings, as required by protocol. *See supra*. Therefore, even if these researchers had any expectation of privacy regarding their published and publicly funded work at a public institution (and they could not have)—disclosing images of their masked faces and covered heads would not infringe on this expectation.

IV. CONCLUSION

For the above reasons, the University failed to properly assert any basis for exemptions (n), (u) and (c) and it should be directed to disclose all withheld records and information promptly.

In the event that the Supervisor nevertheless determines that some of the Videos, portions of Videos, or redacted portions of the Protocols do contain information protected by one or more of the claimed exemptions, the University should be directed to segregate the remaining records and information to the fullest extent possible and disclose that remainder. *See Worcester Telegram & Gazette Corp.*, 436 Mass. at 383 (“To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt ‘segregable portion’ of the record is subject to public access.”).

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'M. Bernstein', written in a cursive style.

Martina Bernstein
Pro Bono Counsel

PETA Foundation
2154 W. Sunset Blvd. | Los Angeles, CA 90026
626.376.3744

Exhibit C



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

October 8, 2021
SPR21/2454

Christine Wilda
Associate Chancellor for Compliance
University of Massachusetts, Amherst
340 Whitmore Building
181 President's Drive
Amherst, MA 01003

Dear Ms. Wilda:

I have received the petition of Lindsay Waskey, Esq., on behalf of Kaylie Flaughner, both of *People for the Ethical Treatment of Animals (PETA)*, appealing the response of the University of Massachusetts Amherst (University) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On May 11, 2021, Kaylie Flaughner requested the following records from January 1, 2017, to the present:

- [1] All photographic and videographic records related to experiments carried out by UMass-Amherst faculty member, . . . (Department of Psychological and Brain Sciences); and
- [2] All protocol(s) for which [named faculty member] is the Principal Investigator or Co-Investigator.

The University initially responded on May 25, 2021, providing a fee estimate. Subsequently, the University provided a supplemental response on July 26, 2021, providing certain records in redacted form and denying access to other portions of the records pursuant to Exemptions (c), (n), and (u) of the Public Records Law. G. L. c. 4, § 7(26)(c),(n),(u). Unsatisfied with the University's response, Attorney Waskey petitioned this office and this appeal, SPR21/2454, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the

Christine Wilda
Page 2
October 8, 2021

SPR21/2454

Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

The University's July 26th response

In its July 26, 2021 response, the University provided certain responsive records, and indicated that it “. . . will not provide video graphic records for unpublished work and research currently being conducted which constitutes trade secrets or other proprietary information of the University of Massachusetts nor records that contain images of individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy and jeopardize public safety. In addition, we have redacted personally identifiable information and unpublished material. We are withholding those materials under exemptions (n), (u) and (c) to Section 7(26) of the Massachusetts General Laws.”

Exemption (c)

Exemption (c) permits the withholding of:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

G. L. c. 4, § 7(26)(c).

Analysis under Exemption (c) is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Torres v. Att'y Gen., 391 Mass. 1, 9 (1984); Att'y Gen. v. Assistant Comm'r of Real Prop. Dep't, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case by case basis.

This exemption does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal

Christine Wilda
Page 3
October 8, 2021

SPR21/2454

nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass. 280, 292 (2017).

The types of personal information which this exemption is designed to protect includes: marital status, paternity, substance abuse, government assistance, family disputes and reputation. Id. at 292 n.13; see also Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 (1988) (holding that a motor vehicle licensee has a privacy interest in disclosure of his social security number).

This exemption requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law-abiding and efficient manner. Id. at 292.

Exemption (n)

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security. Exemption (n) allows for the withholding of certain records which if released would jeopardize public.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what degree, the record sought resembles the records listed as examples in the statute,” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist would find useful to maximize damage.” PETA, 477 Mass. at 289-90.

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” Id. at 289-90. The PETA decision further provides that “[because the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s

Christine Wilda
Page 4
October 8, 2021

SPR21/2454

determination given the context of the particular case.” Id.

PETA also provides that “[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian’s burden in demonstrating ‘reasonable judgment’ and vice versa.” PETA at 290.

Exemption (u)

Exemption (u) applies to:

trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

G. L. c. 4, § 7(26)(u).

The University’s response did not contain the specificity required in a denial of access to public records. Instead, the University’s response merely cites Exemptions (c), (n), and (u) without any further explanation as to the exemptions’ applicability to the requested records. The University is not permitted to issue a blanket denial without providing any further information with respect to the requested records. The University must provide a more in-depth explanation of what records or portions of records are being withheld and how these records are exempt under Exemptions (c), (n), and (u). The University must identify the record(s) withheld under each exemption and explain why the exemption applies. See G. L. c. 66, § 10(b)(iv) (a written response must identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding); see Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). Consequently, I find the University has not met its burden of specificity to withhold and/or redact responsive records under the claimed exemptions.

Conclusion

Accordingly, the University is ordered to provide Attorney Waskey with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (10) business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

Christine Wilda
Page 5
October 8, 2021

SPR21/2454

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first name "Rebecca" and last name "Murray" clearly distinguishable.

Rebecca S. Murray
Supervisor of Records

cc: Lindsay Waskey, Esq.

Exhibit D

Lindsay Waskey

From: Christine Wilda <cwilda@umass.edu>
Sent: Monday, October 4, 2021 12:24 PM
To: Kaylie Flaughner
Subject: FW: Public Records Request
Attachments: Protocol_70_Redacted.pdf; IMG_1243.jpg; 2019-02-07 15.39.55.jpg

Kaylie,
Attached are responsive records for the request detailed below.

The University is unable to produce records for research currently being conducted as such records constitutes trade secrets or other proprietary information of the University of Massachusetts. This exemption is set forth at G.L. c. 4, §7, cl. Twenty-sixth (u). Videographic records associated with Vaughan et al. (2019) cannot be shared at this time. The videos are still undergoing analyses for 4 different projects that are crucial for honor theses and forthcoming publications. There are 2 pictures attached associated with Protocol #2016-0065. Experimental findings #2016-0065 have not yet been published, therefore photos associated with the publication of findings are not released at this time. Personal information has been redacted in accordance with exemption (c) of the Massachusetts Public Records Law, M.G.L. Ch. 66, § 10.

Under Chapter 66 of the MA General Laws, you have the right to appeal our disposition of your request to the Supervisor of Public Records, Office of the Secretary of State, pre@sec.state.ma.us and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

Sincerely,
Christine

Christine M. Wilda
Associate Chancellor for Compliance
UMASS Amherst
340 Whitmore Building
Amherst, MA 01003
Ph: 413-545-2148
Fax: 413-545-2114
cwilda@umass.edu

From: Christine Wilda
Sent: Monday, August 23, 2021 1:19 PM
To: 'Kaylie Flaughner' <kaylief@peta.org>
Cc: Records Administrator - UMass Amherst <recordsadmin@umass.edu>
Subject: RE: Public Records Request

Kaylie,
I am in receipt of your records request as detailed below.

At this time, we have made a good faith estimate of the fees necessary to produce the records you have requested.

Segregate/Redaction: 15 hours at \$25/hour =	\$375
No charge for first 4 employee hours =	<u>-\$100</u>
Total =	\$275

Once we receive your payment (check payable to the University of Massachusetts) we will begin the process to provide the records. If the total cost of production exceeds this estimate, we will advise you of the additional cost; if the total cost is less than the estimate, we will refund that amount to you. Please address all correspondence regarding your request to me at the address below.

Under Chapter 66 of the MA General Laws, you have the right to appeal our disposition of your request to the Supervisor of Public Records, Office of the Secretary of State, pre@sec.state.ma.us and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

Sincerely,
Christine

Christine M. Wilda
Associate Chancellor for Compliance
UMASS Amherst
340 Whitmore Building
Amherst, MA 01003
Ph: 413-545-2148
Fax: 413-545-2114
cwilda@umass.edu

From: Kaylie Flaughner <kaylief@peta.org>
Sent: Tuesday, August 10, 2021 5:30 PM
To: Records Administrator - UMass Amherst <recordsadmin@umass.edu>
Subject: Public Records Request

August 10, 2021

Christine Wilda
Associate Chancellor for Compliance
341 Whitmore
Administration Building
UMass Amherst
181 Presidents Drive
Amherst, MA 01003

Dear Ms. Wilda:

I am submitting this request for public information on behalf of People for the Ethical Treatment of Animals (PETA) pursuant to the Massachusetts Public Records Law (M. G. L. Chapter 66, Section 10).

For the period from January 1, 2015, to the present, PETA hereby requests the following public records from the University of Massachusetts Amherst: (UMass-Amherst):

- All videographic records referenced and collected for study in the published paper:

Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A. (2019). Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *American journal of primatology*, 81(9), e23057.

- A copy of protocol # 2016-0065, for which Dr. Agnès Lacreuse is the Principal Investigator or Co-Investigator.
- All photographic records associated with Protocol #2016-0065.

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

PETA is a non-profit public interest animal protection organization whose federal tax-exempt number is 52-1218336. As such, we request that a non-profit fee waiver be applied to our request. PETA has no commercial interest in the records requested but seeks them strictly in an effort to ensure the public is fully informed about operations and regulations involving the use of animals in laboratories (an issue of well-established public importance). If the foregoing request for a non-profit fee waiver is denied, and fees are expected to exceed \$50.00, please notify me by telephone to this effect before this disclosure request is processed.

If you have any questions about our request, please contact me at KaylieF@peta.org. Thank you very much for your kind assistance with this matter.

Sincerely,

Kaylie Flaughner (she/her)

Executive Assistant to the Vice Presidents
Laboratory Investigations Department
People for the Ethical Treatment of Animals (PETA)
501 Front St. Norfolk, VA 23510
E-mail: KaylieF@peta.org | Web: www.PETA.org



Exhibit E

AN INTERNATIONAL ORGANIZATION DEDICATED TO PROTECTING THE RIGHTS OF ALL ANIMALS



PEOPLE FOR
THE ETHICAL
TREATMENT
OF ANIMALS
FOUNDATION

Washington
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

October 13, 2021

Supervisor of Records
Office of the Secretary of the Commonwealth
Public Records Division
McCormack Building, Room 1719
One Ashburton Place
Boston, MA 02108
Via e-mail to pre@sec.state.ma.us

**Appeal of University of Massachusetts-Amherst's Withholding of
Videographic Records Under G.L. c. 4 § 7(26) (u)**

Dear Supervisor of Records:

Pursuant to the Massachusetts Public Records Law ("PRL"), Chapter 66 § 10A of the Massachusetts General Laws, and 950 CMR 32.08(1), People for the Ethical Treatment of Animals, Inc. ("PETA") appeals the University of Massachusetts-Amherst ("University")'s withholding of videographic records requested by PETA on August 10, 2021 ("Request").¹ Copies of the Request, correspondence between PETA and the University, and the University's written response thereto, are attached. Exs. 1-4.²

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Request

The Request seeks "[f]or the period from January 1, 2015, to the present", the following three categories of records:

¹ The University redacted information from the protocol and failed to produce all of the photographs. Although PETA has chosen to appeal only the withholding of the videographic records, PETA expressly reserves the right to appeal similar redactions and withholdings in the future.

² PETA submitted an appeal to the Supervisor of Records on September 24, 2021, challenging the University's withholding of information related to that at issue in today's appeal, including videographic records, but the request at issue in today's appeal was for the broader timeframe of January 1, 2015, to present. Thus, there may be overlap in the information that is subject to the September 24 appeal and the information at issue in the current request. PETA's September 24 appeal includes any such information that overlaps with the current request, and PETA expressly challenges these redactions or withholdings therein. In an attempt to resolve the current matter without the need for an appeal, on October 5, 2021, PETA requested that the University inform PETA whether there are responsive videographic records that exist for the timeframe of January 1, 2015 to December 31, 2016, (the timeframe that is not covered by PETA's September 24, 2021, appeal), but as of the date of this letter the University has not responded. Ex. 4.

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.)

{00376932}

- All videographic records referenced and collected for study in the published paper:
Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A. (2019). Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *American journal of primatology*, 81(9), e23057.
- A copy of protocol # 2016-0065, for which Dr. Agnès Lacreuse is the Principal Investigator or Co-Investigator.
- All photographic records associated with Protocol #2016-0065.

See Ex. 1.

B. The University's response

The University acknowledged receipt of the Request via email on August 23, 2021, and provided a fee estimate for responding to PETA's request. Ex. 2. The University formally responded to the Request on October 4, 2021, by providing a redacted protocol, two pictures, and stating

The University is unable to produce records for research currently being conducted as such records constitutes trade secrets or other proprietary information of the University of Massachusetts. This exemption is set forth at G.L. c. 4, §7, cl. Twenty-sixth (u). Videographic records associated with Vaughan et al. (2019) cannot be shared at this time. The videos are still undergoing analyses for 4 different projects that are crucial for honor theses and forthcoming publications. There are 2 pictures attached associated with Protocol #2016-0065. Experimental findings #2016-0065 have not yet been published, therefore photos associated with the publication of findings are not released at this time. Personal information has been redacted in accordance with exemption (c) of the Massachusetts Public Records Law, M.G.L. Ch. 66, § 10.

Ex. 3a-d.

PETA appeals the University's withholding of the videographic records (the "Videos").

C. The information at issue in the Request

i. Overview

In the past, public records requested by PETA have uncovered research misconduct and violations of animal welfare regulations in connection with experiments on animals carried out at the University. Ex. 5 Affidavit of

Kathy Guillermo. Given the University's track record of non-compliances with protocols and animal welfare regulations and guidelines, the Request aimed to shed light on whether Dr. Agnès Lacreuse ("Lacreuse") and her colleagues carried out their publicly funded work at the University in a law abiding and capable manner, and in accordance with required protocols. Where, as here, "the conduct at issue occurred in the performance of the official's professional duties or materially bears on the official's ability to perform those duties honestly or capably," the "public interest furthered by the public records law—transparency, accountability, and public confidence—are at their apex[.]" *Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 293 (2020) (internal quotations and citation omitted).

ii. Vaughan, et al.

Precise details and results of the experiments for which PETA seeks videographic records have been published in the scientific journal article Vaughan E, Le A, Casey M, Workman KP, Lacreuse A. Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *Am J Primatol.* 2019 Sep;81(9):e23057. doi: 10.1002/ajp.23057. Epub 2019 Sep 30. PMID: 31566763 ("Vaughan et al.") (Ex. 6). The following excerpts are illustrative of the detailed information published in the article.

The Vaughn, et al. article describes Lacreuse's "temporary social separation" experiments in which

each marmoset was removed from its colony for 7 hr and placed alone in an unfamiliar room, in a cage similar to their home cage. The monkey could not see, smell or hear conspecifics during the separation phase. Food and water was provided ad libitum. Behavior was video-recorded with a SONY Handycam (HDD 2000x digital zoom) video camera ... Animals were video-recorded at Baseline (30 min. before separation), throughout the separation period, upon reunion with partner, and 24 hr postseparation ... Behaviors included locomotor, social, and anxiety measures ... as well as vocalizations.

Ex. 6 page 4.

A photograph of a marmoset from one of the experiments is included in the article:



Id. at 4.

The Vaughan, et. al. article assures the readers that “[t]he research was consistent with the American Society of Primatologists Principles of Ethical Treatment of Non-Human Primates” and that “[t]he animals were cared for in accordance with the guidelines of the US National Research Council's Guide for the Care and Use of Laboratory Animals, the US Public Health Service's Policy on Humane Care and Use of Laboratory Animals, and the Guide for the Care and Use of Laboratory Animals[.]” *Id.* at 3. Furthermore, the studies “were approved by the University of Massachusetts Institutional Animal Care and Use Committee.” *Id.* However, because the University did not produce the videos of these studies, PETA and the public cannot independently confirm that this work was carried out capably and lawfully; a

matter of great public interest in light of the University's record of noncompliance with applicable animal welfare laws and regulations..

II. APPLICABLE LEGAL STANDARD

A. PRL overview

The primary purpose of the PRL is to “give the public broad access to governmental records.” *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-83 (Mass. 2002); *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 436 (Mass. 1983). This policy expresses the Legislature’s judgment that “[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner,” *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (Mass. 1979), and that “[g]reater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government.” *New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Ct. of Bristol*, 377 Mass. 404, 417 (Mass. 1979) (Abrams, J., concurring).

If an agency does not intend to permit inspection or furnish a copy of a requested record, it must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding.” G.L.c. 66, § 10(b)(iv).

In disputes over withheld information, there exists a “presumption that the record sought is public.” G.L. c. 66 § 10(c); *see also* G.L. c. 66 § 10A(d)(1)(iv). To rebut this presumption, an agency must demonstrate “with specificity” that the record is exempt from disclosure pursuant to one of the enumerated exemptions in Chapter 4, Section 7(26) of the General Laws. G.L. c. 66 § 10(c); *Suffolk Const. Co., Inc. v. Division of Capital Asset Mgmt.*, 449 Mass. 444, 454 (Mass. 2007). Given the statutory presumption in favor of disclosure, exemptions must be construed “strictly” and “narrowly.” William Francis Galvin, *A Guide to the Massachusetts Public Records Law* 12 (Jan. 2017), <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>; *Attorney Gen. v. Assistant Comm’r of the Real Prop. Dep’t of Boston*, 380 Mass. 623, 625 (Mass. 1980).

If a portion of a record falls within the scope of one of the exemptions, the PRL requires that all non-exempt, reasonably segregable portions be disclosed. G.L. c. 66 § 10(a); *Worcester Telegram & Gazette Corp.*, 436 Mass. at 383; *Reinstein v. Police Comm’r of Boston*, 378 Mass. 281, 288 n.15 (Mass. 1978).

B. Exemption (u)

Chapter 4, Section 7(26)(u) exempts from disclosure “trade secrets or other proprietary information of the University of Massachusetts,” as well as trade secrets or proprietary information “provided to the University by research sponsors or private concerns.” G.L. c. 4 § 7(26)(u). Although the PRL does not define the terms “trade secret[]” or “proprietary information,” the Supreme Judicial Court has clarified that a “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to a production of goods, as, for example, a machine or formula for the production of an article.

J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 357 Mass. 728, 736 (Mass. 1970) (quoting Restatement of Torts § 757 cmt. b (1934)). In determining whether information at issue in a given case constitutes a trade secret, the Supreme Judicial Court frequently turns to the six factors set forth in the Restatement of Torts:

(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (Mass. 1972).

III. ARGUMENT

A. Exemption (u) does not protect any information contained in any of the requested records

As is clear from the detailed *published* information about how (and by whom) the experiments were conducted, the Videos do not contain trade secrets or other proprietary information. Nor do they constitute a “formula, pattern, [or] device,” or a “process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.” *See J.T. Healy & Son, Inc.*, 357 Mass. at 736.

The University also has no basis for claiming that video recordings of taxpayer funded experiments, at this non-profit institution are a “compilation of information which is used in one’s *business*, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it” or a “process or device for continuous use in *the operation of the business*.” *Id.* (emphasis added)

IV. CONCLUSION

For the above reasons, the University failed to properly assert any basis for withholding the Videos under exemption (u) and it should be directed to disclose all withheld videographic records promptly.

In the event that the Supervisor nevertheless determines that some of the Videos, portions of Videos, do contain information protected the claimed exemption, the University should be directed to segregate the remaining records and information to the fullest extent possible and disclose that remainder. *See Worcester Telegram & Gazette Corp.*, 436 Mass. at 383 (“To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt ‘segregable portion’ of the record is subject to public access.”).

Respectfully submitted,



Martina Bernstein
Pro Bono Counsel

PETA Foundation
2154 W. Sunset Blvd. | Los Angeles, CA 90026
626.376.3744

Exhibit F



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

October 27, 2021
SPR21/2695

Christine M. Wilda
Associate Chancellor for Compliance
UMass Amherst
340 Whitmore Building
181 President's Drive
Amherst, MA 01003

Dear Ms. Wilda:

I have received the petition of Lindsay Waskey, Esq., of *PETA Foundation*, appealing the response of UMass Amherst (UMass) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On August 10, 2021, Attorney Waskey requested the following records, “[f]or the period from January 1, 2015, to the present...”:

- [1.] All videographic records referenced and collected for study in the published paper: Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A. (2019). Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). *American journal of primatology*, 81(9), e23057.
- [2.] A copy of protocol # 2016-0065, for which Dr. Agnès Lacreuse is the Principal Investigator or Co-Investigator.
- [3.] All photographic records associated with Protocol #2016-0065.

UMass responded on October 4, 2021. Unsatisfied with the response, Attorney Waskey petitioned this office and this appeal, SPR21/2695, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(d)(iv) (written response must “identify any

Christine M. Wilda
Page 2
October 27, 2021

SPR21/2695

records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based..."); 950 C.M.R. 32.06(3); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).

UMass' October 4th response

In its October 4th response, UMass cited Exemptions (c) and (u) to withhold the requested records.

In camera inspection

In order to facilitate a determination as to the applicability of UMass' claims to withhold the requested records, UMass must provide this office with an un-redacted copy of the responsive records for *in camera* inspection. After I complete my review of the documents, I will return the records to your custody and issue an opinion on the public or exempt nature of the record. See 950 C.M.R. 32.08(4).

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations, 950 C.M.R. 32.08(4); see also G.L. c. 66, § 1. This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Massachusetts Comm'n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding. Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community. Please be aware, any cover letter submitted to accompany the relevant records may be subject to disclosure.

Order

Accordingly, UMass is ordered to provide this office with an un-redacted copy of the requested records for *in camera* inspection without delay.

Christine M. Wilda
Page 3
October 27, 2021

SPR21/2695

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive style with a large, stylized "R" and "M".

Rebecca S. Murray
Supervisor of Records

cc: Lindsay Waskey, Esq.

Exhibit G

FW: UMass' Response to the Supervisors' Orders: FW: Compliance Inquiry for SPR21/2454 Waskey/University of Massachusetts - Amherst

1 message

From: Christine Wilda <cwilda@umass.edu>
Sent: Monday, January 3, 2022 1:17 PM
To: 'SEC-DL-PREWEB' <SEC-DL-PREWEB@sec.state.ma.us>; 'joshua.stair@state.ma.us' <joshua.stair@state.ma.us>
Cc: Records Administrator - UMass Amherst <recordsadmin@umass.edu>; Lindsay Waskey <lindsayw@petaf.org>; 'Alexandra Deal' <adeal@pbdlaw.com>; Stockwell, Joshua <JStockwell@umassp.edu>
Subject: FW: Compliance Inquiry for SPR21/2454 Waskey/University of Massachusetts - Amherst

Supervisor of Records

Division of Public Records

Office of the Secretary of the Commonwealth of Massachusetts

pre@sec.state.ma.us

By Electronic Mail

Re: SPR21-2454 and SPR-2695

Regarding Appeal SPR21/2695, Requester has asked for production "[f]or the period from January 1, 2015, to the present...":

[1.] All videographic records referenced and collected for study in the published paper: Vaughan, E., Le, A., Casey, M., Workman, K. P., & Lacreuse, A. (2019). Baseline cortisol levels and social behavior differ as a function of handedness in marmosets (*Callithrix jacchus*). American journal of primatology, 81(9), e23057.

[2.] A copy of protocol # 2016-0065, for which Dr. Agnès Lacreuse is the Principal Investigator or Co-Investigator.

[3.] All photographic records associated with Protocol #2016-0065.

Regarding Appeal SPR21/2454, Requester has asked for production "from January 1, 2017, to the present:"

[1] All photographic and videographic records related to experiments carried out by UMass-Amherst faculty member, . . . (Department of Psychological and Brain Sciences); and

[2] All protocol(s) for which [named faculty member] is the Principal Investigator or Co-Investigator.

The underlying substantive nature of the records sought under both appealed requests here are the same. And, given this nature, the requested records are exempt under the protections afforded under both state and federal law for trade secrets and proprietary information held by either the University or its research sponsors or private concerns.

Consider that G.L. c. 4, s. 7(26)(a) sets forth the exemption that applies to records "specifically or by necessary implication exempted from disclosure by statute." The Federal Defends Trade Secret Act of 2016 ("DTSA"), 18 USC § 1836, et seq. and the Massachusetts Uniform Trade Secrets Act G. L. c. 93, § 42 to 42G ("MUTSA") by implication both protect from disclosure the records sought here.

And, there is no need to even invoke G.L. c. 4, s. 7(26)(a) and implied federal and statutory protections because the Massachusetts Legislature - in its pragmatic and collective wisdom - specifically set forth for the University and its research sponsors and private concerns exemption (u), so that the importance and need of proprietary protections would be clear and unequivocal. G.L. c. 4, s. 7(26)(u) exempts from the public records statute: "trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns." G. L. c. 4, § 7(26)(u).

The Supervisor of Records stated that the University's response did not contain the specificity required in a denial of access to public records. In response, the University states that the redacted portions of the requested protocols, procedures and preliminary results, and withheld photographs and video **are unpublished research materials**. Unpublished research materials constitute the trade secrets and proprietary information of the University, and, accordingly, are exempt from disclosure under the Public Records Law, pursuant to G.L. c. 4, s. 7(26)(a) (18 USC § 1836, et seq. and G. L. c. 93, § 42 to 42G) and G. L. c. 4, § 7(26)(u), for the foregoing reasons.

A trade secret is any information that derives independent economic value, actual or potential, from not being generally known or reproducible by proper means, and for which reasonable efforts are made to keep the information secret by the owner. Trade secrets are protected under both Massachusetts^[1] and Federal^[2] law.

On the other hand, confidential and proprietary information encompass more than just trade secrets, and can be any information that is not generally known to the public.^[3] Confidential information and proprietary information are not defined by any statute.

In-process intellectual property is considered the trade secrets and proprietary information of the creators. Simple examples are an author who is writing a new novel or a film producer making a movie. Or consider the lab notebooks of a chemist who is working out how to make new molecules for use in drug therapies. If this information is available under a public records request, prior to publication, its value is damaged or destroyed to the researcher and the University.

[1] Massachusetts adopted the Uniform Trade Secrets Act on October 1, 2018, codified as G. L. c. 93, § 42 to 42G ("MUTSA"). Section 42(c)(4) defines a "Trade Secret" as

specified or specifiable information, whether or not fixed in tangible form or embodied in any tangible thing, including but not limited to a formula, pattern, compilation, program, device, *method, technique, process*, business strategy, customer list, invention, or *scientific, technical*, financial or customer *data* that

(i) at the time of the alleged misappropriation, *provided economic advantage, actual or potential, from not being generally known to*, and not being readily ascertainable by proper means by, others who might obtain economic advantage from its acquisition, disclosure or use; and

(ii) at the time of the alleged misappropriation was the *subject of efforts that were reasonable* under the circumstances, which may include reasonable notice, *to protect against it being acquired, disclosed or used without the consent* of the person properly asserting rights therein or such person's predecessor in interest.

(emphasis added)

[1] Under the Federal Defends Trade Secret Act of 2016 ("DTSA"), 18 USC § 1836, et seq. a trade secret is defined as: "all forms and types of financial, business, *scientific, technical*, economic, or engineering information, including patterns, plans, compilations,

program devices, formulas, designs, prototypes, *methods, techniques, processes, procedures*, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if— (A) the owner thereof has *taken reasonable measures to keep such information secret*; and (B) the information *derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by*, another person who can obtain economic value from the disclosure or use of the information.” (emphasis added).

[1] See, e.g., Trade Secrets Throughout the World § 4:4

In this particular case, the materials are being used to prepare scientific papers and, if students involved, theses that are yet to be defended. If the materials are released to the public, the papers or significant portions of them will not be eligible for publication, thus destroying the value of the research to the creators and damaging their careers. As a result, for the requested protocols, ***all unpublished methods, procedures and preliminary results have been withheld or redacted because the University researchers are currently preparing this data for publication.***

Similarly, all videos and photographic material related to experiments unpublished during the requested period as well as videos that are still being analyzed, cannot be disclosed because disclosing this material ***(1) would make the material unsuitable for publication and (2) would allow other investigators in larger laboratories to rapidly implement the procedures and publish the results before our University researchers.*** Not being able to publish these data first would undermine the University’s competitiveness in the field and would have widespread detrimental financial and career consequences for all involved in the research process, including trainees for which these data are key to career development.

The University takes a combination of extensive measures to protect its research data from premature disclosure to outside third parties, including physical and electronic security measures to its facilities and computer systems, respectively, internal policy controls to educate those on proper handling of trade secrets and proprietary materials, implementation of University Board of Trustee policies, and contractual controls, such as non-disclosure and confidentiality agreements, employment and participation agreements with University faculty, staff, students, and University sponsors, where applicable.

And this case aside, the Department of Justice has made preventing IP theft from universities in many science and technology areas that are important to the economy and to the national defense a focus of its enforcement efforts. If these materials are available by a public records request prior to patenting or publication, they are rendered worthless in economic terms. People have been arrested, charged, and convicted for theft of trade secrets and proprietary information from companies and from universities.

Furthermore, although the University is willing to provide the protected and withheld materials to the Supervisor for an *in camera* inspection, the University questions how such a viewing will aid the Supervisor to determine whether the exempted materials are in fact trade secrets or proprietary information of the University because Exemption (u) applies to a status of the information that is not readily ascertainable by an *in camera* inspection. For instance, an *in camera* inspection will not show whether the information is in fact unpublished, or whether the University, faculty, or students will be economically harmed by the disclosure to the exempted materials, or whether the exempted materials derive independent economic value by virtue of the exempted information not being generally known.

The analysis above is sufficient reason to support withholding the records here. Another wholly applicable and dispositive exemption applies here given press reports citing prior actions and activities of the requester’s organization and the unique and identifiable nature of the records being requested. G.L. c. 4, s. 7(26)(n) applies because the requested records show building locations, room numbers, etc. which indicate location where the sponsored work is being conducted. In light of press reports citing prior activities of the requester’s organization such as: <http://www.petakillsanimals.com/fbi-anti-terror-unit-investigated-peta/>; <https://cei.org/content/petas-cruelty-humans-and-animals>; <https://archives.fbi.gov/archives/news/testimony/animal-rights-extremism-and-ecoterrorism>, it is our reasonable judgment, exercised within our legislatively conferred discretion, that the records should not be made public so as to not jeopardize public safety.

Sincerely,

Christine

Cc:

Joshua Stockwell, Esq.

University of Massachusetts

Office of the General Counsel

Intellectual Property

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Christine M. Wilda

Associate Chancellor for Compliance

UMASS Amherst

340 Whitmore Building

Amherst, MA 01003

Ph: 413-545-2148

Fax: 413-545-2114

cwilda@umass.edu

Exhibit H

AN INTERNATIONAL ORGANIZATION DEDICATED TO PROTECTING THE RIGHTS OF ALL ANIMALS



PEOPLE FOR
THE ETHICAL
TREATMENT
OF ANIMALS
FOUNDATION

Washington
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

January 25, 2022

Christine Wilda
Associate Chancellor for Compliance
341 Whitmore Administration Building
UMass Amherst
181 Presidents Drive
Amherst, MA 01003

Via e-mail: recordsadmin@umass.edu

Dear Ms. Wilda:

This is a request for public records made on behalf of People for the Ethical Treatment of Animals ("PETA") pursuant to the Massachusetts Public Records Law ("PRL"), Chapter 66 § 10A of the Massachusetts General Laws. PETA requests the names of all current members of UMass-Amherst Institutional Animal Care and Use Committee, as well as the Committee's meeting notices, agendas, and meeting minutes since January 1, 2020.

I look forward to your response within ten business days. G.L. ch. 66, § 10(a). The responsive records can be e-mailed to me at Annaw@petaf.org. Thank you for your attention to this request. If you have any questions about this request, please do not hesitate to contact me by e-mail or by phone at (716) 510-8411.

Very truly yours,

A handwritten signature in black ink that reads "Anna Whistler". The signature is written in a cursive, flowing style.

Anna Whistler
Legal Fellow

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

ENTITIES:

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

Exhibit I

From: Christine Wilda <cwilda@umass.edu>
Sent: Friday, April 1, 2022 20:16
To: Anna Whistler <annaw@petaf.org>
Cc: Records Administrator - UMass Amherst <recordsadmin@umass.edu>
Subject: IACUC records

Anna,
I am in receipt of your payment for the records request attached.

Please see responsive records attached. Please be advised that we have redacted and withheld records that are exempt from disclosure pursuant to the following provisions of the public records statute, Chapter 66 of the General Laws:

- We have redacted any names or initials that could serve to identify specific individuals, either staff, committee members or faculty submitting protocols under (c) - the privacy exemption.
- We have redacted references to locations where animal research is conducted or IACUC meetings are held under (n) – the security exemption.
- We have redacted information related to unpublished research under (u) – the trade secret exemption.
- We have withheld the names of the IACUC members under (c) and (n) – the privacy and security exemptions. The disclosure of this information may constitute an unwarranted invasion of personal privacy and jeopardize public safety. Note that a federal judge recently issued a temporary restraining order preventing the public records law release of the type of information you seek. The judge ruled that IACUC members’ fear of harassment “sharply” outweighed any “incremental knowledge” gained from disclosure of IACUC names. See Sullivan et al v. University of Washington et al, US District Court for the Western District of Washington.

Under Chapter 66 of the General Laws, you have the right to appeal our disposition of your request to the Supervisor of Public Records, Office of the Secretary of State, pre@sec.state.ma.us and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

Regards,
Christine

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