

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
AMERICAN SOCIETY FOR THE	:	
PREVENTION OF CRUELTY TO ANIMALS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. _____
	:	
THE ANIMAL AND PLANT HEALTH	:	
INSPECTION SERVICE, and	:	
THE UNITED STATES DEPARTMENT	:	
OF AGRICULTURE,	:	
	:	
Defendants.	:	
	:	
	:	
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the American Society for the Prevention of Cruelty to Animals (“ASPCA”), files suit against Defendants, the Animal and Plant Health Inspection Service (“APHIS”) and the United States Department of Agriculture (“USDA”) (together, “Defendants”), seeking declaratory and injunctive relief, and alleges as follows:

NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the Defendants to release public records and information, in their entirety, unlawfully withheld from the ASPCA in response to five separate FOIA requests.
2. The records that Defendants have improperly withheld or redacted relate to entities and individuals regulated under the Animal Welfare Act (“AWA”), 7 U.S.C. § 2131, *et seq.*, and Defendants’ statutory obligation to ensure those entities and individuals humanely treat

and care for animals. They include enforcement action records, inspection reports, and inspection photographs, access to which is critical for effective oversight and monitoring of the Defendants' implementation and enforcement of the AWA, which has historically been abysmal.

3. The Defendants have inappropriately relied on FOIA Exemptions 6, 7(A), and 7(C) in withholding or redacting the records that the ASPCA requested, none of which properly applies. The Defendants should be required to turn the requested records over immediately, without unlawful redactions, and should be further prohibited from using similar tactics to avoid full disclosure and compliance with FOIA in the future.

PARTIES

4. Plaintiff ASPCA is a not-for-profit corporation that the New York State legislature incorporated in 1866 by a special act. The ASPCA's mission is to provide an effective means for the prevention of cruelty to animals throughout the United States. It is North America's oldest humane organization, and one of the largest in existence today, with roughly 3 million supporters nationwide.

5. Defendant USDA is a United States government agency, with possession and control of the records at issue in this lawsuit. The USDA is responsible for implementing the AWA.

6. Defendant APHIS is a United States government agency within the USDA, with possession and control of the records at issue in this lawsuit. The USDA has charged APHIS with administering the AWA.

JURISDICTION & VENUE

7. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as the district court of the United States in the district in which the complainant resides and has its principal place of business, and 28 U.S.C. § 1331.

8. Venue is proper pursuant to 28 U.S.C. § 1391(e)(1). This is a civil action against agencies of the United States, and venue is therefore proper where the ASPCA resides as no real property is involved in the action.

STATUTORY FRAMEWORK

The Animal Welfare Act

9. The AWA, codified in Chapter 54 of Title 7 of the U.S. Code, was enacted in 1966, and has the stated policy objective of ensuring “that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment[.]” 7 U.S.C. § 2131(1).

10. The USDA, through APHIS, enforces the AWA, and its implementing regulations, 9 C.F.R. §§ 1.1, *et seq.*

11. The AWA authorizes Defendants to issue licenses to animal “dealers” and “exhibitors,” as defined therein, once “the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary” *Id.* § 2133. Such standards “govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.” *Id.* § 2143(a)(1).

12. Dealers and exhibitors are prohibited from selling or transporting to a research facility, for exhibition, for use as a pet, or to or from any other dealer or exhibitor, any animal unless the dealer or exhibitor has a valid license from Defendants. *Id.* § 2134.

13. Defendants are charged with “mak[ing] such investigations or inspections” as “necessary to determine whether any [*inter alia*] dealer, exhibitor, [or] research facility ... has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the [Defendants] shall, at all reasonable times, have access to

the places of business and the facilities, animals, and those records required to be kept” *Id.* § 2146(a).

14. Thus, regulated entities and persons under the AWA are subject to inspection by Defendants, including prior to receiving a license and unannounced compliance inspections. 9 C.F.R. § 2.3; *see also* USDA APHIS, *AWA Inspection and Annual Reports*, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports (last modified Aug. 18, 2017).

15. Inspection records include inspections reports and photographs taken by the inspector(s) at the time of inspection.

16. Inspection reports detail the name and address of the licensee, customer ID number, certification number, location number (if applicable), type of inspection, date of inspection, name and title of the inspector(s) or agency representative(s) present during inspection, notes taken during inspection, description(s) of any violations observed during inspection (with specific reference to AWA code section(s)), AWA classification of any violation(s) observed during inspection, and an inventory of all animals present on the property at the time of inspection.

17. Inspection photographs document violations of the AWA and correlate with inspection reports. Inspection photographs include the name of the licensee, certificate number, inspection number, date and time of the inspection, photographer name, and a written description of the image(s) depicted in the photograph(s).

18. By way of example, the following is a copy of an unredacted inspection report and an unredacted inspection photograph for a licensee, which the USDA provided to the ASPCA in response to a FOIA request prior to those at issue in this case:



United States Department of Agriculture
 Animal and Plant Health Inspection Service

JWES1
 35151518250269 insp_id

Inspection Report

Alison Hawkins
 H C 69 Box 1580
 Finley, OK 74543

Customer ID: **25223**
 Certificate: **73-A-2145**
 Site: 001
 ALISON HAWKINS

Type: ROUTINE INSPECTION
 Date: Jan-29-2015

3.6 (a) (1)

PRIMARY ENCLOSURES.

On the south building the east side has a center washdown that is part of the structural strength of the kennel, as the cages are attached to the washdown. There is a broken spot on the middle upright pipe where the washdown is broken loose. this has let the bottom row of cages sag down and the upper washdown is curved twisted with a lot of pressure on the plastic structure. This needs to be kept in good repair at all times.

This needs to be corrected to maintain the structural strength of the kennel and to protect the animals from injury. To be corrected by February 8 2015

Exit interview conducted with facility representative.

Prepared By:

JERRY L WEST, A.C.I. USDA, APHIS, Animal Care
 Title: ANIMAL CARE INSPECTOR Inspector 4056

Date:
 Feb-06-2015

Received By:

SENT BY EMAIL
 Title: SENT BY EMAIL

Date:
 Feb-06-2015



United States Department of Agriculture Customer: 25223
 Animal and Plant Health Inspection Service Inspection Date: Jan-29-15
Animals Inspected at Last Inspection

Cust No	Cert No	Site	Site Name	Inspection
25223	73-A-2145	001	ALISON HAWKINS	Jan-29-15

Count Species
 000054 DOG PUPPY
 000070 DOG ADULT

124 Site Total



Photographer:	Jerry west	Legal Name:	73-A-2145
Photo Taken:	Thu, Jan 29, '15 1:19 pm	ALISON HAWKINS	
Inspection:	35151518250269		
Description:	washdown sagging broken loose from upright pipe, bottom cages are attached to washdown, with pressure on structure of kennel.		

19. Enforcement action records include administrative complaints, administrative decisions, settlement agreements, warnings, and records detailing cases initiated, civil penalties, monetary penalties, non-monetary stipulations, referrals to the Office of General Counsel, and stipulated penalties assessed. Enforcement action records often incorporate, by reference, inspection reports and photographs.

20. Violation of the AWA may result in suspension or revocation of a dealer or exhibitor's license, in addition to civil penalties of up to \$10,000 per violation. 7 U.S.C. § 2149(a)-(b). Knowing violations have potential criminal penalties of one year imprisonment, a \$2,500 fine, or both. *Id.* § 2149(d).

21. Defendants' enforcement of the AWA has been the subject of much consternation, including by the USDA's own Office of the Inspector General ("USDA OIG"). The USDA OIG has issued a number of reports finding Defendants' activities woefully deficient. *See, e.g.,* USDA OIG, *APHIS: Animal Welfare Act – Marine Mammals (Cetaceans)* (May 2017), available at <https://www.usda.gov/oig/webdocs/33601-0001-31.pdf>; USDA OIG, *Controls Over APHIS Licensing of Animal Exhibitors* (June 2010), available at <http://www.usda.gov/oig/webdocs/33601-10-CH.pdf>; USDA OIG, *APHIS Animal Care Program Inspections of Problematic Dealers* (May 2010) available at <https://www.usda.gov/oig/webdocs/33001-4-SF.pdf>; USDA OIG, *APHIS Animal Care Program Inspection and Enforcement Activities* (Sept. 2005); available at <https://www.usda.gov/oig/webdocs/33601-0002-41.pdf>. This precedent underscores the need for continued public scrutiny of the Defendants' administration and enforcement of the AWA.

The Freedom of Information Act

22. Enacted the same year as the AWA in 1966, the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check

against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It is “a means for citizens to know ‘what their Government is up to.’” *NARA v. Favish*, 541 U.S. 157, 171 (2004); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quoting S. Rep. No. 89-813, at 3 (1965)). “This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *NARA*, 541 U.S. at 171-72 (citation omitted).

23. Pursuant to FOIA, an agency “shall make [] records promptly available to any person” upon request, unless the records fall within nine categories of statutorily exempt material. 5 U.S.C. § 552(a)(3)(A).

24. The USDA and APHIS are both “agencies” subject to the FOIA statute. *Id.* §§ 551(1), 552(f)(1). The Secretary is ultimately responsible for the USDA and APHIS’ actions.

25. The categories of records exempt from disclosure under FOIA include, *inter alia*, “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552(b)(6) (“Exemption 6”).

26. Also exempted are “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings. ... [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]” *Id.* § 552(b)(7) (“Exemption 7(A)” and “Exemption 7(C)” respectively).

27. While these Exemptions, if lawfully applied, may allow withholding of requested records in their entirety, an agency must make an effort to determine if partial release is possible instead: an agency must release “[a]ny reasonably segregable portion of a record” that was requested and is otherwise releasable after deleting (*i.e.*, redacting) the portions legally exempt

from disclosure, indicating “[t]he amount of information deleted, and the exemption under which the deletion is made.” *Id.* § 552(b).

28. Agencies must respond to FOIA requests within 20 business days, notifying the requester of its decision regarding release of the records, and, in the case of an adverse determination, the requester’s right to appeal the decision. *Id.* § 552(a)(6)(A)(i).

29. If a requester appeals a denial, agencies must likewise decide the appeal within 20 business days. *Id.* § 552(a)(6)(A)(ii).

30. “Any person making a request for agency records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.” *Id.* § 552(a)(6)(C).

31. To enforce these FOIA provisions, Congress provided for *de novo* judicial review: “On complaint the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

32. In such a case, “the burden is on the agency to sustain its action.” *Id.*

33. Furthermore, the court may order the United States to pay reasonable attorneys’ fees and costs incurred if the complainant substantially prevails. *Id.* § 552(a)(4)(E).

34. Thus, FOIA vests district courts with broad equitable authority to enforce its provisions. “With the express vesting of equitable jurisdiction in the district court ... there is little to suggest, despite the Act’s primary purpose, that Congress sought to limit the inherent

powers of an equity court.” *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974). In addition to ordering the production of documents currently withheld, district courts may frame an injunction so as to prevent future violations that are likely to occur.

FACTUAL ALLEGATIONS

USDA’s Previously Available Online Databases

35. Since at least 2010, the ASPCA relied on two online databases – the Animal Care Information Search (“ACIS”) and Enforcement Action (“EA”) databases (collectively, the “Databases”) – maintained by Defendants and made available through their website.

36. The Databases provided access to agency records detailing inspections of AWA-licensed facilities, including commercial breeding facilities, and enforcement actions taken by Defendants against these licensees for AWA violations.

37. The ASPCA regularly reviewed inspection records and enforcement actions for commercial dog and cat breeders, reports of which were immediately accessible through the Databases, providing critical information about breeders and brokers subject to AWA regulation and Defendants’ AWA enforcement activities.

38. This information enabled the ASPCA not only to warn the public about cruel puppy mill operations, but also to identify needed policy changes and provide guidance to lawmakers.

39. The ASPCA has worked with jurisdictions across the country seeking to improve animal welfare standards through legislation, some of which now require pet stores by law to identify the sources of the puppies and kittens they sell. Often, this is accomplished by requiring the stores to post, or provide directly to customers, records sufficient to document the source of each puppy or kitten, such as the USDA license numbers of the breeders from which the pet store obtained the animals they are selling. Armed with this information, consumers could readily do

an online search to confirm that they were not supporting the puppy mill industry by purchasing a puppy from a breeder with AWA violations.

40. On February 3, 2017, without warning, Defendants blocked public access to the Databases, which had been publicly available for nearly a decade, with the stated justification of furthering their “commitment to being transparent.”

41. To the contrary, the blackout undermined state and local regulatory structures that were premised on the availability of these records and deprived animal protection organizations, concerned consumers, policy-makers, and law enforcement of vital information about the commercial breeding industry and the USDA’s enforcement of the AWA.

42. Without submitting an individual FOIA request and waiting months or even years for a response (addressed in further detail below), consumers could no longer confirm that the pet they wanted to purchase came from a breeder in compliance with the AWA; law enforcement and state and local regulators could no longer quickly and independently verify a pet store or commercial breeder’s compliance; and animal protection groups and policy-makers could no longer monitor Defendants’ enforcement of the AWA. These efforts are inherently time-sensitive, and the Defendants’ information blackout has materially obstructed them.

43. There was widespread public outcry following Defendants’ actions, and Congress has likewise indicated its disapproval:

On February 3, 2017, USDA restricted the public’s access to the search tool for the Animal Care Inspection System in order to conduct a comprehensive review of the information on its website. Such an action limited the public’s review of inspection reports, research facility annual reports, and lists of persons licensed and registered under the AWA, as well as lists of persons licensed by USDA-certified horse industry organizations and associations to inspect horses for compliance with the Horse Protection Act (HPA). While the Committee recognizes the need to strike a balance between the privacy rights and personal identifiable information of regulated entities and the public’s need to know if regulated parties or institutions are complying with federal law, USDA must

utilize the resources provided in this bill to promptly finish reviewing the information on its website, restore all legally permissible records previously removed, and resume posting on the USDA website. The online searchable database should allow analysis and comparison of data and include all inspection reports, annual reports, and other documents related to enforcement of the HPA and the AWA.

H. Rept. 115-232 to H.R. 3268.

44. Under pressure from the public, courts, and Congress, Defendants have partially repopulated the Databases with some records since their initial blackout. Specifically, Defendants published a list of license holders identified only by name, city, and state. Although Defendants eventually published some inspection records online via the “Animal Care Search Tool” and “Frequently Requested Records” webpages, a substantial portion of these records are heavily redacted to either conceal information that would link a licensee to a particular inspection or otherwise conceal the status of a license holder’s compliance with the AWA. In summary, the Defendants repopulated the Databases with heavily redacted records – what remains represents only a fraction of the information previously available to the public on the Databases. The records currently available on the Databases fail to provide any meaningful insight into the activities of either licensees or Defendants.

45. Otherwise, Defendants have directed the public to obtain the information sought through FOIA requests: “Those seeking information from APHIS regarding inspection reports not currently posted to the website, regulatory correspondence, and enforcement related matters may submit Freedom of Information Act (FOIA) requests for that information.” USDA APHIS, *AWA Inspection and Annual Reports*, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports (last modified Aug. 18, 2017).

46. As a predictable consequence, a systemic breakdown of Defendants' FOIA process has followed, and Defendants' backlog of FOIA requests now numbers in the thousands. Their efforts or ability to process these requests and related appeals has declined precipitously.

47. It is in this broader context that Defendants have failed to fulfill their statutory obligations in response to multiple FOIA requests from the ASPCA.

The ASPCA's Attempts to Obtain Public Records Through FOIA

A. The ASPCA's FOIA Requests

48. The ASPCA submitted five separate FOIA requests to Defendants that are at issue in this case.

49. On September 30, 2015, the ASPCA requested all photographs taken in connection with inspections conducted in September 2015 for dog breeders. This FOIA request was assigned tracking number 2015-APHIS-05893-F, and a true and correct copy is attached hereto as Exhibit A.

50. On August 17, 2016, the ASPCA requested all photographs, and inspectors' notes pertaining to those photographs, taken in connection with inspections conducted in July 2016 for dog breeders. This FOIA request was assigned tracking number 2016-APHIS-05289-F, and a true and correct copy is attached hereto as Exhibit B.

51. On September 26, 2016, the ASPCA requested all photographs, and inspectors' notes pertaining to those photographs, taken in connection with inspections conducted in August 2016 for dog breeders. This FOIA request was assigned tracking number 2016-APHIS-05840-F, and a true and correct copy is attached hereto as Exhibit C.

52. On November 7, 2016, the ASPCA requested all photographs, and inspectors' notes pertaining to those photographs, taken in connection with inspections conducted in

September 2016 for dog breeders. This FOIA request was assigned tracking number 2017-APHIS-00565-F, and a true and correct copy is attached hereto as Exhibit D.

53. On May 31, 2017, the ASPCA requested all documents from AWA enforcement actions for May 2017. This FOIA request was assigned tracking number 2017-APHIS-05726-F, and a true and correct copy is attached hereto as Exhibit E.

B. Defendants' Responses

54. Defendants provided a final response to the ASPCA's September 2015 request on March 9, 2017, nearly a year and a half later. Defendants redacted 15 pages of responsive records citing Exemptions 6 and 7(C), and entirely withheld 85 pages of responsive records citing Exemption 7(A). A true and correct copy of Defendants' response is attached hereto as Exhibit F.¹

55. Defendants provided a final response to the ASPCA's August 2016 request on April 11, 2017. Defendants redacted all 149 pages of responsive records citing Exemptions 6, 7(A), and 7(C). A true and correct copy of Defendants' response is attached hereto as Exhibit G.

56. Defendants provided a final response to the ASPCA's September 2016 request on April 12, 2017. Defendants redacted portions of the responsive records citing Exemptions 6 and 7(C). A true and correct copy of Defendants' response is attached hereto as Exhibit H.

57. Defendants provided a final response to the ASPCA's November 2016 request on December 13, 2017. Defendants withheld responsive information citing Exemptions 6 and 7(C). A true and correct copy of Defendants' response is attached hereto as Exhibit I.

¹ The ASPCA has not attached as exhibits hereto all of the records Defendants produced to the ASPCA with Defendants' responses to the ASPCA's FOIA requests, because of the volume. One example of a redacted inspection photograph is included in paragraph 82 below. The ASPCA can and will provide a full copy of the records received at the time and in the manner deemed appropriate by the Court.

58. Defendants provided a final response to the ASPCA's May 2017 request on November 13, 2017. Defendants redacted 26 pages of responsive records citing Exemptions 6 and 7(C). A true and correct copy of Defendants' response is attached hereto as Exhibit J.

59. Defendants responses to the ASPCA's five FOIA requests stated nearly identical reasons for withholding records and information.

60. First, Defendants asserted basis for the applicability of Exemption 6 for all five requests was that the inspection reports, photographs, and enforcement records constitute "similar files" because they contain information about individuals. Defendants therefore withheld businesses' and individuals' names, addresses, phone numbers, certificate/license numbers, customer ID numbers, inspection report numbers, enforcement case numbers, animals' microchip numbers, faces, and the day and month photographs were taken. Defendants claimed that this identifying information could be used to harass, or make unwanted contact or communication with the individuals, or cause them embarrassment or other stigma.

61. Notably, Defendants have taken inconsistent positions regarding whether the release of the requested records would further the public interest by shedding light on the operations and activities of the Government – a critical step in determining the applicability of Exemption 6. In response to Plaintiff's September 2015 request, Defendants asserted that the burden was on the Plaintiff to establish that disclosure would serve the public interest. In response to Plaintiff's August and September 2016 and May 2017 requests, Defendants made a blanket conclusion that the public does not have an interest in release of the requested records because the requested records *would not* shed any light on Defendant's activities. However, in Defendant's response to Plaintiff's September 2016 request – Defendant's most recent response to Plaintiff – Defendants took the opposite position by admitting that the public does, in fact,

have an interest in the requested records, because release of the requested records *would* shed light on Defendant's activities.

62. Regardless, for all five requests, Defendants went on to state their determination that Exemption 6 applies because the privacy interests alleged outweigh any public interest in the records.

63. Second, Defendants asserted basis for the applicability of Exemption 7(C) for all five requests was that administrative enforcement actions constitute "law enforcement purposes," and the same privacy interests described in relation to Defendants' application of Exemption 6 likewise applied for Exemption 7(C), outweighing any public interest in release.

64. Third, Defendants asserted basis for the applicability of Exemption 7(A) to withhold or redact certain records responsive to the ASPCA's September 2015 and August 2016 FOIA requests was that some of the photographs pertain to active Investigative and Enforcement Service ("IES") investigations, and releasing this information would harm those open investigations. Specifically, Defendants claimed that disclosing the records could "provide the individuals involved an opportunity to fabricate defenses, change the version of events, and alter and/or destroy evidence." In response to the ASPCA's September 2015 request, Defendants added that "[i]n addition, if these photographs were released to the public while the investigation is on-going, the subjects of the investigations could be subjected to intimidation, harassment or retaliation and could consequently become uncooperative with IES[.]" Thus, Defendants withheld or redacted photographs Defendants asserted relate to active IES investigations.

C. The ASPCA's Appeals

65. On June 7, 2017, the ASPCA timely appealed Defendants' decision on its September 2015 request, challenging the applicability of Exemptions 6, 7(A), and 7(C) as a basis

for the Defendants' redaction or withholding of responsive records. A true and correct copy of the ASPCA's appeal is attached hereto as Exhibit K.

66. On July 10, 2017, the ASPCA timely appealed Defendants' decision on its August and September 2016 requests, challenging the applicability of Exemptions 6, 7(A), and 7(C) as a basis for the Defendants' redaction or withholding of responsive records. A true and correct copy of the ASPCA's appeal is attached hereto as Exhibit L.

67. On or about March 14, 2018, the ASPCA timely appealed Defendants' decision on its November 2016 request, challenging the applicability of Exemptions 6 and 7(C) as a basis for the Defendants' redaction or withholding of responsive records. A true and correct copy of the ASPCA's appeal is attached hereto as Exhibit M.

68. On February 12, 2018, the ASPCA timely appealed Defendants' decision on its May 2017 request, challenging the applicability of Exemptions 6 and 7(C) as a basis for the Defendants' redaction or withholding of responsive records. A true and correct copy of the ASPCA's appeal is attached hereto as Exhibit N.

69. Defendants have not responded to any of the ASPCA's four appeals related to its five FOIA requests at issue in this case, and the statutory deadline for Defendants to do so has passed.

70. The ASPCA has therefore exhausted its administrative remedies with Defendants.

D. Defendants' Unlawful Reliance on Exemptions to Withhold or Redact Records

71. Defendants' assertions of Exemptions 6, 7(A), and 7(C) are misplaced and do not provide a lawful basis for withholding or redacting the records the ASPCA requested through its five FOIA requests at issue in this lawsuit.

72. The Supreme Court has “often noted [FOIA’s] goal of broad disclosure and insisted that the exemptions be given a narrow compass.” *Milner v. Dep’t of the Navy*, 562 U.S. 562, 571 (2011) (internal quotation marks omitted).

73. The reference to “personal privacy” in Exemptions 6 and 7(C) focus on protecting “an individual’s right of privacy” and the Supreme Court has explicitly held that this protection does not extend to corporations. *FCC v. AT&T Inc.*, 562 U.S. 397, 408-410 (2011).

74. Likewise, even with respect to individuals, the privacy exemption “does not apply to information regarding professional or business activities” and such information “must be disclosed even if a professional reputation may tarnished.” *Cohen v. EPA*, 575 F. Supp. 425, 429 (D.D.C. 1983) (citations omitted).

75. The records that the ASPCA requested pertain to corporations and other business entities operating breeding facilities, or the professional or business activities of individual breeders. These operations are, by definition, commercial, and the breeders and licensees have brought themselves within the ambit of Defendants’ regulation and inspection.

76. Defendants’ claim that the information could be used to harass, or make unwanted contact or communication with the individuals, or cause them embarrassment or other stigma, is entirely speculative, and not a validly protectable privacy interest under Exemptions 6 and 7(C). As noted above, information regarding professional or business activities, even that which may tarnish a professional reputation, must be disclosed.

77. Even if there was a cognizable privacy interest for purposes of Exemptions 6 and 7(C) (there is not), it must be balanced against the public interest in disclosure of the requested information. *See DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 758-59 (1989).

78. Here, “disclosure would serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government[,]” *U.S. Dep’t of Def. v. FLRA*, 510 U.S. 487, 495 (1994) (internal quotation marks omitted), namely ensuring Defendants’ effective enforcement of the AWA and adequate oversight of commercial breeders. These breeders are responsible for the health and wellbeing of tens of thousands of animals, and the substantial public interest in disclosure of the requested records far outweighs any privacy interest Defendants maintain exists.

79. Prior to Defendants’ removal of the Databases, the inspection reports, photographs, and enforcement records included breeder names, addresses, USDA license numbers, and customer numbers. Since that time, all of this identifying information has been redacted. As a result, while the unredacted portions of the records that the ASPCA received may reveal the nature of the documented violation, without any identifying information regarding the breeder to which the records pertain, the records are useless. The ASPCA has no ability to determine if Defendants are effectively administering the AWA because it cannot link violations discovered during inspections to subsequent compliance and enforcement activity – critical to determining the effectiveness and accuracy of inspections, and whether breeders with apparent violations are ultimately subjected to penalties – without identifying information.

80. Congress raised similar concerns following Defendants’ removal of the Databases: “While the Committee recognizes the need to strike a balance between the privacy rights and personal identifiable information of regulated entities and the public’s need to know if regulated parties or institutions are complying with federal law, USDA must utilize the resources provided in this bill to promptly finish reviewing the information on its website, restore all legally permissible records previously removed, and resume posting on the USDA website. The

online searchable database should allow analysis and comparison of data and include all inspection reports, annual reports, and other documents related to enforcement of the HPA and the AWA.” *See* H. Rept. 115-232 to H.R. 3268.

81. Notably, in February 2018, Defendants created a “Frequently Requested Records” webpage and added to their website some inspection records of the type that the ASPCA requested, but without redacting the licensees’ names, license numbers, or customer numbers. *See* <https://www.aphis.usda.gov/aphis/resources/foia/FOIA-Request/frequent-foia-requests>. Instead, Defendants redacted the inspection details and photographs. By comparison, this represents an inconsistent position with Defendants’ responses to the ASPCA’s requests, which revealed the opposite, *i.e.*, the nature of the violations (photographs and written descriptions of the violations), but not the breeder’s identifying information (names, license numbers, addresses, or customer numbers).

82. By way of illustration, the following inspection photograph was released by Defendants in response to Plaintiff’s August 2016 request – all information identifying the licensee responsible for “Freckles” care was redacted pursuant to Exemptions 6 and 7:



Photographer:	Randall Wagner	Legal Name:	(b) (6), (b) (7)(C)
Photo Taken:	Wed, Jul 13, '16	(b) (6), (b) (7)(C)	
Inspection:	(b) (6), (b) (7)(C)	(b) (6), (b) (7)(C)	
Description:	* Overview of "Freckles", a seven year old female Saint Bernard, (ID#: who had an open sore on top of the nose that was reddened and moist.		

Meanwhile, the following inspection report was recently made available on the “Frequently Requested Records” webpage – the licensee is identified, but the nature of the violation, if any, is redacted pursuant to Exemptions 6 and 7:



United States Department of Agriculture
Animal and Plant Health Inspection Service

CRANSLEM

(b) (6), (b) (7)(C) Insp_id

Inspection Report

Michele Kruse

(b) (6), (b) (7)(C)

Customer ID: 10789

Certificate: 42-B-0294

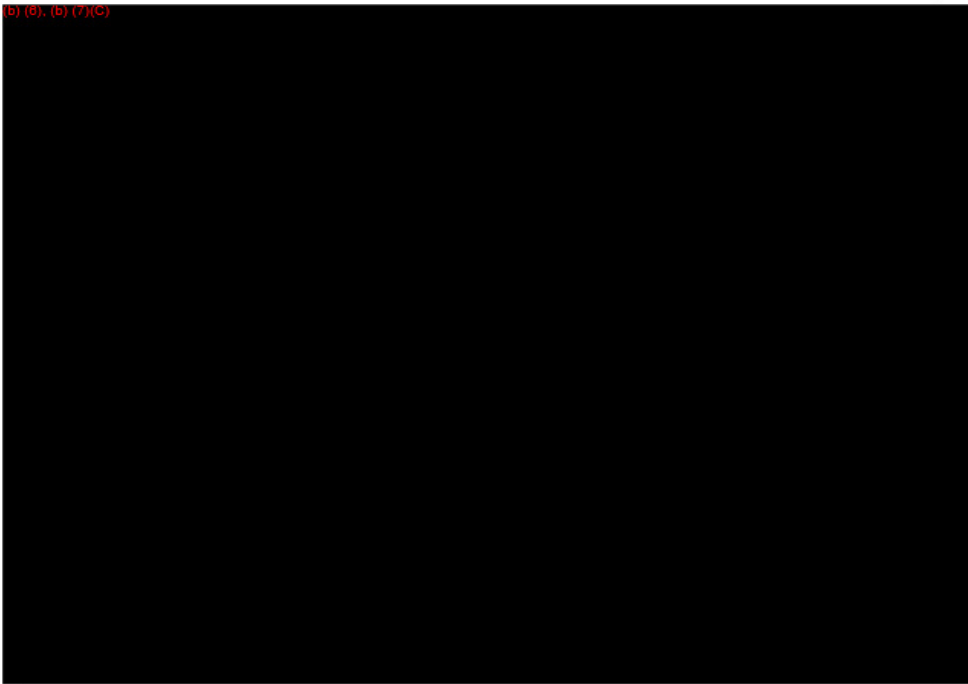
Site: 001

Michele Kruse

Type: (b) (6), (b) (7)(C)

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(b) (6), (b) (7)(C)



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Date:

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Title: ANIMAL CARE INSPECTOR 6079

Received By:

(b) (6), (b) (7)(C)

Date:

(b) (6), (b) (7)(C) 2016

Title: FACILITY REPRESENTATIVE

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The inconsistencies in the categories of information Defendants have withheld or redacted in response to Plaintiff's requests undermine the validity of Defendants' asserted basis for claiming any portion of the requested records are exempt from FOIA disclosure.

83. Disclosure of records concerning enforcement actions is particularly warranted in light of the USDA OIG's 2010 findings and conclusions, which reported that Animal Care inspectors did not cite or document violations properly to support enforcement actions. To increase AWA compliance, the USDA OIG recommended that Defendants modify the Dealer Inspection Guide to require an enforcement action for direct and serious violations – a recommendation Defendants agreed with. Without complete and unredacted access to the requested records, the ASPCA is unable to discern the extent to which Defendants have followed the USDA OIG's recommendations.

84. Furthermore, there is a heightened public interest concerning violations of AWA standards. In the past several years, legislatures in a number of states have determined that direct violations of the AWA are serious matters that may disqualify commercial breeders and brokers from lawfully selling to retail pet stores in their jurisdiction. *See, e.g.*, Pet Purchase Protection Act, NJ Rev Stat § 56:8-95.1 ("No pet shop shall sell or offer for sale, or purchase for resale whether or not actually offered for sale by the pet shop, any animal purchased from any breeder or broker who: . . . has been cited on a USDA inspection report for a direct violation of the federal "Animal Welfare Act," 7 U.S.C. s.2131 et seq., or the corresponding federal animal welfare regulations at 9 C.F.R. s.1.1 et seq., during the two-year period prior to the purchase of the animal by the pet shop.). These jurisdictions rely on unredacted access to Defendants' inspection reports to protect consumers and to monitor and enforce compliance with their own state law. As such, the public has a heightened interest in transparency regarding, both prompt and complete access to, Defendants' records concerning direct violations of the AWA.

85. Exemption 7(A) is likewise inapplicable to the records that the ASPCA requested in its September 2015 and August 2016 FOIA requests. First, in order to withhold materials

under this Exemption, Defendants must first establish that the records at issue were compiled for “law enforcement purposes” by identifying “a concrete prospective law enforcement proceeding” or an enforcement proceeding that is “pending or reasonably anticipated.” *Boyd v. Criminal Div. of U.S. Dep’t of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007); *FBI v. Abramson*, 456 U.S. 615, 622 (1982). Defendants have not substantiated their claims that IES functions as a law enforcement agency for purposes of FOIA, or that the withheld or redacted records relate to open investigations.

86. Second, the requested records could not “reasonably be expected to interfere with [law] enforcement proceedings.” 5 U.S.C. § 552(b)(6); *see North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (“[T]he government must show that disclosure of those documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding.”).

87. The ASPCA sought all inspection reports and photographs from the months of September 2015 and July 2016 – its request was not limited to those related to ongoing investigations. Producing all responsive records would not give the ASPCA (or the subjects or anyone else) any indication as to whether any particular breeder was under active investigation by IES. The breeders who were inspected and photographed in September 2015 and July 2016 are already well aware of the fact that the inspection took place, and of the photographic evidence collected during that inspection, because Defendants’ requirements mandate that the breeder be present at all times while inspections are conducted.

88. Additionally, violations are documented in the inspection report and photographs. The inspector briefs the facility owner on the contents thereof at the end of the inspection, the facility owner signs the report, and the inspector provides the owner with a final copy, such that

the subsequent release of the report or photographs would not “provide the individuals involved” any new “opportunity to fabricate defenses, change the version of events, and alter and/or destroy evidence.” In other words, the inspection reports and photographs *are* the evidence, the originals of which Defendants maintain, and the subjects are already fully aware of their contents. *See, e.g., Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1084-85 (9th Cir. 2004) (rejecting USDA’s Exemption 7(A) argument where subject of investigation already had copies of requested documents, and finding that documents could not be tampered with where request sought copies of USDA-retained originals)²; *Campbell v. Dep’t of Health & Human Servs.*, 682 F.2d 256, 262 (D.C. Cir. 1982) (addressing documents the investigation target itself submitted); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174 (C.D. Cal. 2002) (document previously disclosed to investigation target not subject to law enforcement exemption).

89. Finally, the notion that release could lead to “intimidation, harassment or retaliation” of the subjects resulting in their non-cooperation with IES is entirely speculative and, in any case, a non-sequitur. Concerns of this nature are reserved for information regarding third-party witnesses, not targets. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978) (discussing danger of witness intimidation and witness’s desire to maintain confidentiality); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) (finding that the “concerns to which Exemption 7(A) is addressed [were] patently inapplicable” where the requested documents involved the target’s own statements); *J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 141-43 (4th Cir. 1983) (expressing concern that premature disclosure could cause chilling effect on potential witnesses). Moreover, the cooperation of a facility owner during an investigation after an inspection – to which he or she is required to submit as a regulated entity

² Overruled in unrelated part by *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016).

under the AWA – is largely irrelevant to the prosecution of AWA violations, the evidence of which was already collected. Exemption 7(A) is therefore wholly inapplicable.

90. Even if Exemption 7(A) applied to some of the responsive documents Defendants withheld entirely (they do not), FOIA requires Defendants to release any reasonably segregable portion after redacting only those portions that are exempt, which Defendants failed to do. 5 U.S.C. § 552(b).

91. In sum, for these reasons (all pointed out to Defendants in the ASPCA’s appeals), and others, Defendants had no lawful basis to withhold or redact records that the ASPCA requested through the five FOIA requests at issue in this lawsuit, nor to continue doing so.

CAUSES OF ACTION

Count I: FOIA Violation – September 2015 Request

92. Plaintiff re-alleges and incorporates by reference paragraphs 1-91 as if fully set forth herein.

93. FOIA requires that Defendants “shall make [] records promptly available to any person” upon request, unless a statutory exemption lawfully permits withholding of the record or redaction of a segregable portion of the record. 5 U.S.C. §§ 552(a)(3)(A), (b).

94. Defendants violated FOIA by failing to comply this requirement.

95. The ASPCA submitted a FOIA request on September 30, 2015 for agency records in Defendants’ possession, custody and control.

96. In its March 9, 2017 response, Defendants improperly relied on FOIA Exemptions 6, 7(A), and 7(C) to withhold or redact all or portions of requested agency records to which the stated Exemptions did not lawfully apply.

97. Subsequently, the ASPCA exhausted its administrative remedies with Defendants: the ASPCA timely appealed Defendants' determination of the ASPCA's September 2015 FOIA requests on June 7, 2017, and Defendants have not responded to that administrative appeal.

98. Thus, in violation of FOIA, Defendants have and continue to improperly withhold requested agency records, in part or in their entirety, from the ASPCA.

99. Further, it is substantially likely that Defendants will similarly improperly rely on Exemptions 6, 7(A), and 7(C) to withhold or redact inspection photographs, enforcement records, and inspection reports in response to future FOIA requests.

Count II: FOIA Violation – August 2016 Request

100. Plaintiff re-alleges and incorporates by reference paragraphs 1-91 as if fully set forth herein.

101. FOIA requires that Defendants "shall make [] records promptly available to any person" upon request, unless a statutory exemption lawfully permits withholding of the record or redaction of a segregable portion of the record. 5 U.S.C. §§ 552(a)(3)(A), (b).

102. Defendants violated FOIA by failing to comply this requirement.

103. The ASPCA submitted a FOIA request on August 17, 2016 for agency records in Defendants' possession, custody and control.

104. In its April 11, 2017 response, Defendants improperly relied on FOIA Exemptions 6, 7(A), and 7(C) to withhold or redact all or portions of requested agency records to which the stated Exemptions did not lawfully apply.

105. Subsequently, the ASPCA exhausted its administrative remedies with Defendants: the ASPCA timely appealed Defendants' determination of the ASPCA's August 2016 FOIA request on July 10, 2017, and Defendants have not responded to that administrative appeal.

106. Thus, in violation of FOIA, Defendants have and continue to improperly withhold requested agency records, in part or in their entirety, from the ASPCA.

107. Further, it is substantially likely that Defendants will similarly improperly rely on Exemptions 6, 7(A), and 7(C) to withhold or redact inspection photographs, enforcement records, and inspection reports in response to future FOIA requests.

Count III: FOIA Violation – September 2016 Request

108. Plaintiff re-alleges and incorporates by reference paragraphs 1-91 as if fully set forth herein.

109. FOIA requires that Defendants “shall make [] records promptly available to any person” upon request, unless a statutory exemption lawfully permits withholding of the record or redaction of a segregable portion of the record. 5 U.S.C. §§ 552(a)(3)(A), (b).

110. Defendants violated FOIA by failing to comply this requirement.

111. The ASPCA submitted a FOIA request on September 26, 2016 for agency records in Defendants’ possession, custody and control.

112. In its April 12, 2017 response, Defendants improperly relied on FOIA Exemptions 6 and 7(C) to withhold or redact all or portions of requested agency records to which the stated Exemptions did not lawfully apply.

113. Subsequently, the ASPCA exhausted its administrative remedies with Defendants: the ASPCA timely appealed Defendants’ determination of the ASPCA’s September 2016 FOIA request on July 10, 2017, and Defendants have not responded to that administrative appeal.

114. Thus, in violation of FOIA, Defendants have and continue to improperly withhold requested agency records, in part or in their entirety, from the ASPCA.

115. Further, it is substantially likely that Defendants will similarly improperly rely on Exemptions 6 and 7(C) to withhold or redact inspection photographs, enforcement records, and inspection reports in response to future FOIA requests.

Count IV: FOIA Violation – November 2016 Request

116. Plaintiff re-alleges and incorporates by reference paragraphs 1-91 as if fully set forth herein.

117. FOIA requires that Defendants “shall make [] records promptly available to any person” upon request, unless a statutory exemption lawfully permits withholding of the record or redaction of a segregable portion of the record. 5 U.S.C. §§ 552(a)(3)(A), (b).

118. Defendants violated FOIA by failing to comply this requirement.

119. The ASPCA submitted a FOIA request on November 7, 2016 for agency records in Defendants’ possession, custody and control.

120. In its December 13, 2017 response, Defendants improperly relied on FOIA Exemptions 6 and 7(C) to withhold or redact all or portions of requested agency records to which the stated Exemptions did not lawfully apply.

121. Subsequently, the ASPCA exhausted its administrative remedies with Defendants: the ASPCA timely appealed Defendants’ determination of the ASPCA’s November 2016 FOIA request on March 14, 2018, and Defendants have not responded to that administrative appeal.

122. Thus, in violation of FOIA, Defendants have and continue to improperly withhold requested agency records, in part or in their entirety, from the ASPCA.

123. Further, it is substantially likely that Defendants will similarly improperly rely on Exemptions 6 and 7(C) to withhold or redact inspection photographs, enforcement records, and inspection reports in response to future FOIA requests.

Count V: FOIA Violation – May 2017 Request

124. Plaintiff re-alleges and incorporates by reference paragraphs 1-91 as if fully set forth herein.

125. FOIA requires that Defendants “shall make [] records promptly available to any person” upon request, unless a statutory exemption lawfully permits withholding of the record or redaction of a segregable portion of the record. 5 U.S.C. §§ 552(a)(3)(A), (b).

126. Defendants violated FOIA by failing to comply this requirement.

127. The ASPCA submitted a FOIA request on May 31, 2017 for agency records in Defendants’ possession, custody and control.

128. In its November 13, 2017 response, Defendants improperly relied on FOIA Exemptions 6 and 7(C) to withhold or redact all or portions of requested agency records to which the stated Exemptions did not lawfully apply.

129. Subsequently, the ASPCA exhausted its administrative remedies with Defendants: the ASPCA timely appealed Defendants’ determination of the ASPCA’s May 2017 FOIA request on February 12, 2018, and Defendants have not responded to that administrative appeal.

130. Thus, in violation of FOIA, Defendants have and continue to improperly withhold requested agency records, in part or in their entirety, from the ASPCA.

131. Further, it is substantially likely that Defendants will similarly improperly rely on Exemptions 6 and 7(C) to withhold or redact inspection photographs, enforcement records, and inspection reports in response to future FOIA requests.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court provide the following relief:

- a. Declare that Defendants have violated FOIA by unlawfully withholding or redacting requested agency records;

- b. Enjoin Defendants from continuing to unlawfully withhold requested agency records and information;
- c. Order Defendants to immediately produce to the ASPCA all requested agency records in their entirety, without redaction;
- d. Enjoin Defendants from improperly withholding or redacting agency records in the future on the basis of the improperly relied upon Exemptions Defendants asserted in response to the ASPCA's FOIA requests at issue herein;
- e. Award the ASPCA its costs and reasonable attorneys' fees for in-house and outside counsel; and
- f. Grant such additional and further relief as the Court deems just and proper.

Dated: New York, New York
May 23, 2018

Respectfully Submitted,

COOLEY LLP

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