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# Finding Transparency in a "Blackout": The USDA's Removal of Animal Welfare Records from Its Public Database

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# Finding Transparency in a “Blackout”: The USDA’s Removal of Animal Welfare Records from Its Public Database

Emily Malhiot\*

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2019; B.A., History, Franciscan University of Steubenville, 2015. First of all, I want to thank my faculty advisor, Professor Courtney Lee, for her immeasurable assistance and expertise in the writing of this article. A special thank you to Delcianna J. Winders of the PETA Foundation for her personal assistance in the development of this article and for her tireless efforts in fighting to end the “Blackout.” I would also like to thank the entire *Law Review* staff for their encouragement and guidance throughout this process. Thank you to all my family, friends, and pets for their endless love, support, and encouragement throughout my life. Lastly, I dedicate this article to my late grandmother Mary, for instilling in me a love for animals and for inspiring me to always follow my dreams.

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I. INTRODUCTION

A monkey named Loretta spent 22 weeks in a pen with other monkeys who attacked her.<sup>1</sup> Loretta suffered numerous lacerations to her face and extensive hair loss.<sup>2</sup> As a result, she experienced severe psychological distress and was terrified of other monkeys.<sup>3</sup> Loretta is only one example of the inhumane treatment of monkeys at Primate Products, Inc. (PPI), a Florida-based company that imports and sells monkeys for experiments.<sup>4</sup> PPI is awarded contracts with federal entities such as the National Institutes of Health and the Centers for Disease Control and Prevention, and major universities, including the University of Maryland and Columbia University.<sup>5</sup> Despite more than 23 verbal and written reports from PPI personnel, Loretta's situation never improved.<sup>6</sup> An investigation conducted by the People for the Ethical Treatment of Animals (PETA) found numerous instances of inhumane treatment, including: workers grabbing monkeys by the tail and pulling them off fences; denial of veterinary care for monkeys with life-threatening injuries such as exposed bones; performance of surgeries with little to no sedation; and monkeys left in filthy cages.<sup>7</sup>

In response to PETA's findings, inspectors from the U.S. Department of Agriculture (USDA) investigated and found "at least 25 violations of nine

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1. *Eyewitness Exposé: Pain, Fear, and Death at Primate Products, Inc.*, PETA, <https://investigations.peta.org/pain-fear-death-primate-products/> (last visited Oct. 28, 2017) (on file with *The University of the Pacific Law Review*).

2. *Id.*; see also *Inspection Report on Primate Products, Inc.*, ANIMAL AND PLANT HEALTH INSPECTION SERV. (May 29, 2015), available at <http://www.mediapeta.com/peta/PDF/2015-06-01Inspection-Report-1.pdf> (on file with *The University of the Pacific Law Review*) ("Many of the primates that were observed on the inspection had varying degrees of alopecia (hair loss) which frequently is a result of stress over grooming, or aggressive activity by others within the enclosure. Primates may not be housed with other primates unless they are compatible and are not known to be hazardous to the health and well-being of each other.").

3. *Eyewitness Exposé*, *supra* note 1 ("Loretta plucked her own hair out, which is a sign of psychological distress that can be caused by inappropriate social groupings, social isolation, or rough handling.").

4. *Id.*

5. *Id.*; Natasha Daly and Rachael Bale, *We Asked the Government Why Animal Welfare Records Disappeared. They Sent 1,700 Blacked-Out Pages.*, NAT'L GEOGRAPHIC (May 1, 2017), <http://news.nationalgeographic.com/2017/05/usda-animal-welfare-records-foia-black-out-first-release/> (on file with *The University of the Pacific Law Review*).

6. *Eyewitness Exposé*, *supra* note 1.

7. *Id.*

animal-welfare regulations.”<sup>8</sup> The USDA published these reports on the Animal and Plant Health Inspection Service (APHIS) website, which posts inspection reports regarding the treatment of animals at businesses, research facilities, zoos, and other locations.<sup>9</sup> Animal welfare groups, journalists, and the public accessed the website to monitor and expose violations of animal welfare laws by public and private entities like PPI.<sup>10</sup>

In February 2017, after decades of making this information public, the USDA removed all “inspection records and annual reports for every commercial animal facility in the U.S.” from the APHIS website.<sup>11</sup> These records documented the mistreatment of animals and other violations of the federal Animal Welfare Act (AWA), which regulates the treatment of animals in research and exhibition.<sup>12</sup> The USDA cited privacy laws and ongoing litigation as reasons for the removal of this information.<sup>13</sup>

When journalists and animal welfare groups filed Freedom of Information Act (FOIA) requests for records about the decision to remove animal welfare records and reports, the USDA responded with 1,771 completely blacked-out pages.<sup>14</sup> This response became known as the “USDA Blackout.”<sup>15</sup> The USDA’s reasoning for this response was that the information contained in these documents related to ongoing lawsuits filed against the agency.<sup>16</sup> The USDA’s decision to remove this information quickly came under fire by animal welfare groups, journalists, members of Congress, the public, and even some of the

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8. *Eyewitness Exposé*, *supra* note 1; *see also Inspection Report on Primate Products, Inc.*, *supra* note 2 (violations include inadequate veterinary care, failure to record daily observations of primates, aggressive capture procedures, lack of supplemental heating during winter months, and inclusion of non-compatible primates in the same enclosures).

9. *See Inspection Report on Primate Products, Inc.*, *supra* note 2 (listing violations incurred by PPI and methods of correction); Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information From Its Website*, WASH. POST (Feb. 3, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm\\_term=.b27ea5f104e0](https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm_term=.b27ea5f104e0) (on file with *The University of the Pacific Law Review*).

10. *Id.*; Daly & Bale, *supra* note 5.

11. *USDA Abruptly Purges Animal Welfare Information From Its Website*, *supra* note 9; Natasha Daly, *U.S. Animal Abuse Records Deleted—What We Stand to Lose*, NAT’L GEOGRAPHIC (Feb. 6, 2017), <https://news.nationalgeographic.com/2017/02/wildlife-watch-usda-animal-welfare-trump-records/> (on file with *The University of the Pacific Law Review*).

12. *Animal Welfare Act*, USDA NAT’L AGRIC. LIBRARY, <https://www.nal.usda.gov/awic/animal-welfare-act> (last visited Oct. 28, 2017) (on file with *The University of the Pacific Law Review*).

13. Daly, *supra* note 11; Daly & Bale, *supra* note 5.

14. *See* Daly & Bale, *supra* note 5 (“National Geographic wanted to know why . . . and filed a [FOIA] request in February for records relating to the decision to take the database offline. In bold disregard for transparency, the department’s response . . . consisted of 1,771 pages of completely blacked-out documents.”); *see also* Delcianna J. Winders, *Blackout Blackout: The Latest in the USDA’s Ongoing Attempts to Stymie Transparency*, SALON (May 29, 2017), <https://www.salon.com/2017/05/29/blackout-blackout-the-latest-in-the-usdas-ongoing-attempts-to-stymie-transparency/> (on file with *The University of the Pacific Law Review*) (“In response to a [FOIA] request for records about the decision to take down the website the USDA sent me 1,771 pages, every one of them completely blacked out. It blacked out the records about the blackout.”).

15. *Id.*

16. Daly & Bale, *supra* note 5.

businesses regulated by the USDA.<sup>17</sup> Animal welfare groups like PETA, the Beagle Freedom Project,<sup>18</sup> and Born Free USA filed a federal lawsuit against the USDA arguing that removing these records violates the FOIA and that the “removal gets in the way of state and local laws banning the sale of dogs from breeders that have violated the [AWA].”<sup>19</sup>

This Comment argues that the USDA should fully reinstate the inspection reports and other records detailing violations of animal welfare regulations committed by public and private entities as previously posted on the APHIS database.<sup>20</sup> Part II provides background information on the AWA and APHIS.<sup>21</sup> Part III briefly discusses the FOIA, primarily focusing on the Electronic Freedom of Information Act Amendments (EFOIA).<sup>22</sup> Part IV considers in more detail the “USDA Blackout,” including the USDA’s reasons for removing the information from the APHIS database.<sup>23</sup> Part V addresses the arguments made by groups in support of and opposition to the removal of information.<sup>24</sup> Part VI analyzes how the “Blackout” contradicts the FOIA in making certain agency information publicly available and in ensuring transparency.<sup>25</sup> Part VII explores the implications on animal welfare caused by the removal of animal cruelty information from the APHIS database.<sup>26</sup> Lastly, Part VIII summarizes this Comment’s proposals and reiterates that the USDA should fully reinstate its records so animals like Loretta are protected from inhumane practices in the names of business and research.<sup>27</sup>

## II. ANIMAL WELFARE ACT

The AWA, enforced by the USDA, “regulates the treatment of animals in

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17. Karin Brulliard, *Resistance Is Growing to the USDA's Blackout of Animal Welfare Records*, WASH. POST (Feb. 16, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/16/resistance-is-growing-to-the-usdas-blackout-of-animal-welfare-records/?utm\\_term=.1f5fb0ff3c73](https://www.washingtonpost.com/news/animalia/wp/2017/02/16/resistance-is-growing-to-the-usdas-blackout-of-animal-welfare-records/?utm_term=.1f5fb0ff3c73) (on file with *The University of the Pacific Law Review*).

18. *The Mission*, RESCUE + FREEDOM PROJECT, <https://rescuefreedomproject.org/mission/> (last visited Apr. 7, 2018) (on file with *The University of the Pacific Law Review*) (as of 2018, the Beagle Freedom Project is now the Rescue + Freedom Project).

19. *Resistance Is Growing to the USDA's Blackout of Animal Welfare Records*, *supra* note 17; see also *Animal Legal Defense Fund Appeals Dismissal of Lawsuit Against USDA Over Blackout of Animal Welfare Records*, ANIMAL LEGAL DEF. FUND (Sept. 13, 2017), <http://aldf.org/press-room/press-releases/animal-legal-defense-fund-appeals-dismissal-lawsuit-usda-blackout-animal-welfare-records/> (on file with *The University of the Pacific Law Review*) (citing another lawsuit filed in February 2017 by the ALDF, Stop Animal Exploitation NOW!, Companion Animal Protection Society, and Animal Folks, arguing that the removal violates both the FOIA and the Administrative Procedure Act (APA)).

20. *Infra* Parts II–VIII.

21. *Infra* Part II.

22. *Infra* Part III.

23. *Infra* Part IV.

24. *Infra* Part V.

25. *Infra* Part VI.

26. *Infra* Part VII.

27. *Infra* Part VIII.

research, exhibition, transport, and by dealers.”<sup>28</sup> It sets the minimum standards for the care and treatment of animals “bred for commercial sale, used in research, transported commercially, or exhibited to the public.”<sup>29</sup> The purposes of the AWA are: (1) to ensure the humane treatment of animals in research facilities and other industries; (2) to provide humane treatment for animals while transporting them for commercial purposes; and (3) to protect animals and their owners from theft and prevent the sale or use of stolen animals.<sup>30</sup>

The creation of the AWA began in 1965 when *Sports Illustrated* published a story about Pepper, a dog who disappeared from her owner’s yard.<sup>31</sup> When the owner located Pepper at a “dog farm”<sup>32</sup> and tried to get her back, the owner was denied entrance.<sup>33</sup> Sadly, Pepper was euthanized during an experiment at a hospital.<sup>34</sup> In response to the story, U.S. Representative Joseph Resnick (D-New York) introduced H.R. 9743, which would require “dog and cat dealers, and the laboratories that purchased the animals, be licensed and inspected by the USDA.”<sup>35</sup>

Additionally, *Life Magazine* published an exposé about the conditions in dog farms in 1966 entitled, “Concentration Camp for Dogs.”<sup>36</sup> The article featured pictures of the skeletal remains of dogs and described the terrible conditions at these farms.<sup>37</sup> Both the *Sports Illustrated* and the *Life Magazine* articles sparked outrage among the public and in response, Congress was pressured to pass a law creating standards for the care and treatment of animals among dealers and research facilities.<sup>38</sup> Congress responded by passing the AWA, which President

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28. *Animal Welfare Act*, *supra* note 12.

29. *Id.*

30. 7 U.S.C.A. § 2131 (West 1976).

31. Coles Phinizy, *The Lost Pets that Stray to the Labs*, *SPORTS ILLUSTRATED* (Nov. 29, 1965), <https://www.si.com/vault/1965/11/29/612645/the-lost-pets-that-stray-to-the-labs> (on file with *The University of the Pacific Law Review*).

32. *Id.* (defining “dog farms” as places collecting unwanted or stolen dogs from dealers and then selling the dogs for a profit to research facilities and other interested buyers).

33. *Id.*

34. *Id.*

35. Benjamin Adams and Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, USDA NAT’L AGRIC. LIBRARY, <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> (last visited Nov. 12, 2017) (on file with *The University of the Pacific Law Review*); *see also* Phinizy, *supra* note 31 (quoting Representative Resnick, “This bill is concerned entirely with the theft of dogs and cats and, to a somewhat lesser degree, the indescribably filthy conditions in which they are kept by the dealer.”).

36. *Concentration Camp for Dogs*, *LIFE MAG.* (Feb. 4, 1966), available at [https://awionline.org/sites/default/files/publication/digital\\_download/LA-Life-Concentration-Camps-for-Dogs.pdf](https://awionline.org/sites/default/files/publication/digital_download/LA-Life-Concentration-Camps-for-Dogs.pdf) (on file with *The University of the Pacific Law Review*).

37. *See id.* (“In a shed behind [compound owner Lester] Brown’s house, dogs, pigeons and other creatures were jammed into filthy coops. The only food in sight was the stale bread piled in a washtub.”); Adams & Larson, *supra* note 35.

38. *Id.* (noting that the *Life Magazine* article generated more written responses than any Vietnam War or civil rights stories).

Johnson then signed into law.<sup>39</sup> The Act underwent numerous amendments in the following years, expanding (and narrowing) its definition of the term “animal” and its regulations to cover a multitude of actions.<sup>40</sup>

The USDA, specifically the Animal Care unit within the APHIS, administers the standards for the humane treatment and care of animals by dealers, research facilities, and exhibitors as set forward in the AWA.<sup>41</sup> To enforce these regulations, USDA inspectors conduct regular, unscheduled inspections of licensed or registered facilities and check compliance with the AWA.<sup>42</sup> If inspectors find a facility complies with the AWA, then the “USDA knows the animals there are receiving humane care and treatment.”<sup>43</sup> If inspectors find the facility does not comply, however, the USDA requires that facility to address and correct the mistakes within a period of time.<sup>44</sup> If the facility fails to make corrections within the specified timeframe, then the APHIS may take further action to enforce the AWA.<sup>45</sup> Further actions include issuing a Letter of Information, which advises a facility that noncompliance may lead to more stringent action, or an Official Warning Letter, which notifies the facility that the USDA may seek civil or criminal penalties for future noncompliance.<sup>46</sup> The USDA also inspects facilities if the agency receives complaints and legitimate concerns from the public.<sup>47</sup>

Before the “Blackout,” the APHIS posted all inspection reports “with limited redactions based on privacy.”<sup>48</sup> The website also featured annual reports of research facilities’ compliance with the AWA while redacting confidential

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39. *Id.*

40. See 7 U.S.C.A. § 2132(g) (West 2014) (excluding rats, mice, and birds used in research from animals protected under the AWA); Adams & Larson, *supra* note 35.

41. 7 U.S.C.A. § 2143(a)(1) (West 1985); see also 7 U.S.C.A. § 2132(a) (West 2014) (defining “person” as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity” engaged in one of the activities regulated by the AWA); *Animal Welfare Act*, *supra* note 12.

42. *Animal Welfare Enforcement*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/ct\\_awa\\_enforcements](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_enforcements) (last modified Feb. 3, 2017) (on file with *The University of the Pacific Law Review*).

43. *Animal Welfare Act*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/ct\\_awa\\_program\\_information](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_program_information) (last modified Sept. 29, 2017) (on file with *The University of the Pacific Law Review*).

44. *Id.*; see, e.g., *Inspection Report on Primate Products, Inc.*, *supra* note 2 (illustrating that time limit is based on severity of mistake: adequacy of veterinary care and handling of animals to be corrected immediately; removal of non-compatible primates from social group to be corrected within two weeks; and provision of heat in outdoor facilities to be corrected within two months).

45. *Animal Welfare Enforcement*, *supra* note 42.

46. *Id.*

47. *Animal Welfare Act Inspections*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/ct\\_awa\\_inspections](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_inspections) (last modified Feb. 23, 2017) (on file with *The University of the Pacific Law Review*).

48. *Animal Care Information System Website Review Chart*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA\\_AWA/acis-table](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA/acis-table) (last modified Aug. 18, 2017) (on file with *The University of the Pacific Law Review*).

business information or signatures of individuals.<sup>49</sup> The APHIS also posted decisions and orders of Administrative Law Judges (ALJs).<sup>50</sup>

### III. FREEDOM OF INFORMATION ACT

The FOIA is an essential foundation for understanding why the USDA should fully reinstate reports and records detailing animal welfare violations.<sup>51</sup> Part A discusses the background and implementation of the FOIA, specifically how to file a request for government records.<sup>52</sup> Part B focuses on the EFOIA Amendments.<sup>53</sup>

#### A. FOIA

Enacted in 1966, the FOIA aims to open agency processes and decisions to the public by requiring executive agencies to provide records upon request,<sup>54</sup> unless the records fall within one of the exemptions.<sup>55</sup> The Act provides three ways in which government records are made available: (1) the agency publishes its records in the Federal Register;<sup>56</sup> (2) the agency makes records publicly available for inspection;<sup>57</sup> and (3) the agency provides records upon request.<sup>58</sup> The FOIA provides that “any person” is entitled to request information.<sup>59</sup> Before filing a request, however, the person or organization must check whether the agency has published the records.<sup>60</sup> If the record is not available, then a person or organization may file a request with the agency’s FOIA office.<sup>61</sup> The request must be in writing and reasonably describe the records requested.<sup>62</sup> Although agencies process the requests “in the order of receipt,” the waiting period depends on the type of request and the number of requests the agency receives.<sup>63</sup>

Initially, the law was not enforced and agencies failed to comply with the

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49. *Id.*

50. *Id.*

51. *Infra* Part III.

52. *Infra* Part III.A.

53. *Infra* Part III.B.

54. 5 U.S.C.A. § 552(a)(3) (West 2016).

55. 5 U.S.C.A. § 552(b) (West 2016) (exemptions include records relating to national defense and foreign policy, trade secrets, personnel and medical files, and law enforcement records).

56. 5 U.S.C.A. § 552(a)(1) (West 2016).

57. 5 U.S.C.A. § 552(a)(2) (West 2016).

58. 5 U.S.C.A. § 552(a)(3) (West 2016).

59. *Id.* (“each agency, upon request for records . . . shall make the records promptly available to any person.”).

60. *How Do I Make a FOIA Request?*, FOIA, <https://www.foia.gov/how-to.html> (last visited Jan. 7, 2018) (on file with *The University of the Pacific Law Review*).

61. *Id.*

62. *Id.*

63. *Id.*



new requirements.<sup>64</sup> Delays in processing requests were cited as the most frequent problem.<sup>65</sup> Congress sought to address this issue by enacting a series of amendments in 1974, including the imposition of deadlines by which the agencies were to respond to requests.<sup>66</sup> Despite these deadlines, agencies still failed to respond to requests.<sup>67</sup> As a result, persons who filed FOIA requests sued the agencies that neglected to respond by the deadline.<sup>68</sup> Because of the overwhelming number of requests and lawsuits, courts excused agencies for failing to comply with the statutory deadlines, hence “requesters often had to wait months, even years on a first come, first served basis.”<sup>69</sup>

## B. EFOIA

In 1996, 30 years after the original enactment of the FOIA, President Clinton signed the EFOIA Amendments into law.<sup>70</sup> Agencies were then required to “make documents available in electronic formats and digitally distributed” in hopes of increasing transparency.<sup>71</sup> The EFOIA sought to address the problems that plagued the FOIA for the past 30 years, especially delays.<sup>72</sup> For example, the agencies’ ten-day deadline to respond increased to 20 days.<sup>73</sup> Additionally, the EFOIA sought to help agencies with the number of submitted requests by requiring agencies to make information publicly available without a request.<sup>74</sup> Known as the affirmative disclosure mandate, all agencies “shall make available for public inspection in an electronic format”: (1) final opinions, (2) “statements of policy and interpretations which have been adopted by the agency,” (3) “copies of all records, regardless of form or format . . . that have been released to any person . . . and that because of the nature of their subject matter, the agency

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64. *History of the FOIA*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> (last visited Jan. 7, 2018) (on file with *The University of the Pacific Law Review*).

65. Mark Grunewald, *E-FOIA and the “Mother of All Complaints:” Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 345 (1998).

66. Freedom of Information Act, Pub. L. No. 93-502, § 552(c), 88 Stat. 1561 (1974) (Each agency shall “determine within ten [business] days . . . after the receipt of any such request whether to comply with such request.”); *History of the FOIA*, *supra* note 64.

67. Grunewald, *supra* note 65, at 350.

68. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660 (1984).

69. *Id.*

70. *History of the FOIA*, *supra* note 64.

71. See 5 U.S.C.A. § 552(f)(2)(A) (West 2016) (defining record as “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format”); *History of the FOIA*, *supra* note 64.

72. Grunewald, *supra* note 65, at 350.

73. 5 U.S.C.A. § 552(a)(6)(A)(i) (West 2016); Grunewald, *supra* note 65, at 350 (“In a statute that has delay reduction as one of its goals, it is somewhat ironic that the most direct and quantifiable change increases the time allowed to agencies for initial processing of a FOIA request. . . . The simplest explanation for this change is that most agencies failed to comply with the ten-day standard. The twenty-day standard is a move to bring the requirement into conformity with reality.”).

74. *Id.* at 367.

determines have become or are likely to become the subject of subsequent requests for substantially the same records,” and (4) “a general index of the records.”<sup>75</sup> Congress further amended the EFOIA in 2016, adding that affirmative disclosure mandates apply to records that “have been requested 3 or more times.”<sup>76</sup> By requiring agencies to proactively post online records—either those it released in response to a request or those the agency believes will be requested more frequently—agencies will be able to manage their intake of requests more efficiently, ultimately decreasing the number of requests they receive.<sup>77</sup>

#### IV. USDA’S REASONING BEHIND THE “BLACKOUT”

Examining the USDA’s reasons for removing animal welfare records and reports from its database is essential to understanding why the “Blackout” must end.<sup>78</sup> Part A examines the USDA’s statements regarding the “Blackout” when it originally removed the database.<sup>79</sup> Part B discusses the alleged lawsuit behind the USDA’s reasoning for the “Blackout.”<sup>80</sup> Part C introduces the USDA’s argument that the agency does not have a duty to post such records under the FOIA.<sup>81</sup> Part D focuses on the USDA’s attempt to repost some of the information on its database.<sup>82</sup>

##### A. *USDA’s Initial Reasoning*

When the USDA originally removed the inspection reports in February 2017, the only explanation offered was that the APHIS “conducted a comprehensive review of the information it posts on its website for the general public to view.”<sup>83</sup> The USDA’s statement did not provide any details about this review or how it was conducted, only that it resulted in the APHIS removing from its website “inspection reports, regulatory correspondence, research facility annual reports,

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75. 5 U.S.C.A. § 552(a)(2) (West 2016); *see also* 5 U.S.C.A. § 552(b) (West 2016) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

76. 5 U.S.C.A. § 552(a)(2)(D)(ii)(II) (West 2016).

77. 5 U.S.C.A. § 552(a)(2) (West 2016); *see also* Grunewald, *supra* note 65, at 367 (“This opportunity is only enhanced by the fact that most newly-created agency records and many records created in the past decade were created, if not stored, in electronic form.”).

78. *Infra* Part IV.

79. *Infra* Part IV.A.

80. *Infra* Part IV.B.

81. *Infra* Part IV.C.

82. *Infra* Part IV.D.

83. *Updates to APHIS’ Website Involving Animal Welfare Act and Horse Protection Act Compliance Information*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2017/sa-02/awa-hpa-compliance](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2017/sa-02/awa-hpa-compliance) (last modified Feb. 7, 2017) (on file with *The University of the Pacific Law Review*) (“In 2016, well before the change of Administration, APHIS decided to make adjustments to the posting of regulatory records.”).

and enforcement records that have not received final adjudication.”<sup>84</sup> Additionally, the USDA provided that the APHIS will “review and redact, as necessary, the lists of licensees and registrants under the AWA.”<sup>85</sup> The only remedy for those seeking access to the reports and other information is to file a FOIA request.<sup>86</sup> If the same records are being requested, however, the APHIS “may post the appropriately redacted versions to its website.”<sup>87</sup>

In an updated version of its original announcement, the USDA cited ongoing litigation concerning animal welfare records and reports as a reason for removing the information.<sup>88</sup> It further stated that although the APHIS is defending its initial publication of such information, “in an abundance of caution,” it is best if the agency takes additional steps to protect individual privacy.<sup>89</sup>

### B. *The Pivotal Lawsuit?*

Although the USDA did not cite a particular lawsuit when it decided to remove animal welfare records and reports from its website, a lawsuit filed by a Texas couple likely played a significant role in this decision.<sup>90</sup> Lee and Mike McGartland sued the USDA for violating their privacy rights by publishing their names on its database.<sup>91</sup> In 2014, the McGartlands entered their horse, The Royal Dollar, in the 74<sup>th</sup> Annual Red Carpet Show of the South in Tennessee.<sup>92</sup> The competition featured Tennessee Walking Horses, which have a high-stepping gait.<sup>93</sup> While this trait can be achieved through breeding and training, some horse trainers practice “soring,” which involves applying caustic chemicals to the

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84. *Id.*

85. *Id.*

86. *Id.* (“Records will be released when authorized and in a manner consistent with the FOIA and Privacy Act.”).

87. *Id.*

88. *Id.*

89. *Id.*

90. *U.S. Animal Abuse Records Deleted*, *supra* note 11.

91. *Id.*

92. Karin Brulliard, *USDA Removed Animal Welfare Reports From Its Site. A Showhorse Lawsuit May Be Why.*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/09/usda-animal-welfare-records-purge-may-have-been-triggered-by-horse-industry-lawsuit/?tid=a\\_inl&utm\\_term=.6df0c9aabe8](https://www.washingtonpost.com/news/animalia/wp/2017/02/09/usda-animal-welfare-records-purge-may-have-been-triggered-by-horse-industry-lawsuit/?tid=a_inl&utm_term=.6df0c9aabe8) (on file with *The University of the Pacific Law Review*); Cary Malone, *Red Carpet Horse Show Is Saturday*, GILES NEWS (July 21, 2016), <https://gilesnews.com/news/red-carpet-horse-show-is-saturday/> (on file with *The University of the Pacific Law Review*) (describing this event as featuring various classes of Tennessee Walking horses, “limited to either amateur exhibitors, professional trainers or feature open competition.”).

93. *A Showhorse Lawsuit May Be Why*, *supra* note 92; Blake Farmer, *Making Sure Those Walking Horses Aren't Hurting Horses*, NPR (Aug. 30, 2014), <https://www.npr.org/2014/08/30/344319283/tennessee-walking-horse-show-steps-up-inspection-efforts> (on file with *The University of the Pacific Law Review*) (“When Tennessee walking horses show off their smooth, high-stepping gait, their powerful back legs swing forward, reaching well beyond their front hooves. Those front hooves then kick up and out, with the knees reaching above the horses’ chests, while the horses shake their heads in cadence.”).

horse's leg.<sup>94</sup> This practice is illegal under the Horse Protection Act (HPA), and its compliance is regulated by the USDA.<sup>95</sup> Although The Royal Dollar placed third in its class, a USDA veterinary medical officer was present at the event and, after inspection, found the horse was sore.<sup>96</sup>

The McGartlands were subsequently named in USDA documents for violating the HPA.<sup>97</sup> Further investigation revealed the couple received several official warnings from the USDA over a three-year period, which were posted on the online database.<sup>98</sup> The publication of this information served as the basis for the lawsuit: the McGartlands claim they were denied due process and the publication of personal information violates their privacy.<sup>99</sup>

Interestingly, the McGartlands dropped their lawsuit shortly after the removal of the animal welfare inspection reports and records from the APHIS website in February 2017.<sup>100</sup> The Tennessee Walking Horse community praised the USDA's decision and claimed the McGartlands' lawsuit directly caused the USDA's removal of such reports and records.<sup>101</sup>

### *C. No Duty to Post Records?*

Ten days after the USDA removed its records from the APHIS database, PETA and other groups filed a complaint against the USDA, asking the U.S. District Court for the District of Columbia to compel the agency to reinstate the records made previously available on the APHIS website.<sup>102</sup>

In response, the USDA filed a motion to dismiss the complaint, arguing that the agency was not legally required to publish the records.<sup>103</sup> The motion

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94. *A Showhorse Lawsuit May Be Why*, *supra* note 92; *U.S. Animal Abuse Records Deleted*, *supra* note 11 (“Horse soring is an illegal practice that involves applying caustic chemicals or nails or screws to horses’ legs and hooves, making it painful to step out normally and encouraging a high, prancing gait in walking competitions.”).

95. *A Showhorse Lawsuit May Be Why*, *supra* note 92.

96. *Id.*

97. *U.S. Animal Abuse Records Deleted*, *supra* note 11.

98. *A Showhorse Lawsuit May Be Why*, *supra* note 92.

99. *Id.*

100. Karin Brulliard, *Lawsuit Linked to USDA's Removal of Animal Welfare Records Is Dropped*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/28/lawsuit-linked-to-usdas-removal-of-animal-welfare-records-is-dropped/?utm\\_term=.c10fad9d423f](https://www.washingtonpost.com/news/animalia/wp/2017/02/28/lawsuit-linked-to-usdas-removal-of-animal-welfare-records-is-dropped/?utm_term=.c10fad9d423f) (on file with *The University of the Pacific Law Review*).

101. *A Showhorse Lawsuit May Be Why*, *supra* note 92 (explaining that the Tennessee Walking Horse community as a whole was under USDA surveillance for alleged “soring” practices).

102. Complaint at 2, *People for the Ethical Treatment of Animals, Inc., et. al. v. U.S. Dep’t of Agric., et. al.*, No. 1:17-cv00269-CRC (D.D.C. Feb. 13, 2017), available at <https://www.courthousenews.com/wp-content/uploads/2017/02/Peta.pdf> (on file with *The University of the Pacific Law Review*).

103. Motion to Dismiss at 1, *People for the Ethical Treatment of Animals, Inc., et. al. v. U.S. Dep’t of Agric., et. al.*, No. 1:17-cv00269-CRC (D.D.C. Apr. 24, 2017), available at <https://www.politico.com/f/?id=0000015b-a528-de92-a17b-adf87d400000> (on file with *The University of the Pacific Law Review*) (“Although not legally required to do so under FOIA, the agency has for many years routinely posted on the APHIS website various categories of records pertaining to its enforcement of the

emphasized the impermanence of removing the records by further explaining that the agency's removal was "tempor[ary]."<sup>104</sup> Rather, the decision to remove the records was "a precautionary measure to protect individual privacy during an ongoing review process."<sup>105</sup> Finally, the agency argues that it republished many of the records, but it would continue to "review and determine which records are appropriate for reposting."<sup>106</sup>

#### D. USDA (Somewhat) Reposts Records

On August 18, 2017, more than six months after the "Blackout," the USDA was "pleased to announce the rollout of the refined public search tool that provides access to [AWA] compliance records."<sup>107</sup> Based on its review of the website, the APHIS "will continue to post annual reports with redactions of confidential business information and to protect privacy interests of individuals, as appropriate."<sup>108</sup> Regarding inspection reports, the APHIS will make appropriate redactions to protect the privacy of individuals, including the removal of identifying information from "inspection reports for individuals or businesses that are co-located with personal residences (homestead)."<sup>109</sup> Additionally, the APHIS will no longer post its enforcement records on the website.<sup>110</sup> Persons or organizations interested in receiving additional information may continue to file FOIA requests.<sup>111</sup>

### V. CONCERNS VOICED BY SUPPORT AND OPPOSITION

This section discusses the various arguments made in support of and opposition to the USDA's decision to remove animal welfare information from the APHIS website.<sup>112</sup> Part A focuses on the arguments made in support of the "Blackout."<sup>113</sup> Part B examines the arguments made in opposition to the

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AWA.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *USDA Rolls Out New APHIS Compliance Database and Search Tool*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/SA\\_By\\_Date/SA-2017/SA-08/compliance-database](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/SA_By_Date/SA-2017/SA-08/compliance-database) (last modified Aug. 23, 2017) (on file with *The University of the Pacific Law Review*).

108. *Animal Care Information System Website Review Chart*, *supra* note 48; *see also USDA Rolls Out New APHIS Compliance Database and Search Tool*, *supra* note 107 ("APHIS is offering the [Animal Care Information Service] search tool to the public to provide information on APHIS' performance of its statutory duties under the [AWA], in accordance with privacy laws.").

109. *Animal Care Information System Website Review Chart*, *supra* note 48.

110. *Id.*

111. *USDA Rolls Out New APHIS Compliance Database and Search Tool*, *supra* note 107.

112. *Infra* Part V.

113. *Infra* Part V.A.

“Blackout.”<sup>114</sup>

### A. Support for the Removal of Information

Despite widespread criticism,<sup>115</sup> there is some support of the USDA’s removal of animal welfare records.<sup>116</sup> The USDA cited ongoing litigation as a reason for the removal.<sup>117</sup> As previously stated, members of the Tennessee Walking Horse community welcomed the USDA’s decision and even took credit for the removal of the records.<sup>118</sup> Should the USDA decide to reinstate the database, the plaintiffs in the lawsuit stated their intent to resume their suit.<sup>119</sup>

The Tennessee Walking Horse community is not the only group satisfied with the USDA’s removal of information.<sup>120</sup> Some animal-related businesses, including breeders, view the USDA’s publication of information as government overregulation, spurred by the demands of animal welfare groups.<sup>121</sup> These animal-related businesses argue that the publication of such personal information allows animal welfare activists to harass them.<sup>122</sup> Additionally, they argue that such publication occurs before the alleged violators have a chance to defend themselves.<sup>123</sup>

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114. *Infra* Part V.B.

115. Karin Brulliard, *People Who Care About Animal Welfare Are Demanding Information From USDA*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/08/10/people-who-care-about-animal-welfare-are-demanding-information-from-usda/?utm\\_term=.a27dc000645c](https://www.washingtonpost.com/news/animalia/wp/2017/08/10/people-who-care-about-animal-welfare-are-demanding-information-from-usda/?utm_term=.a27dc000645c) (on file with *The University of the Pacific Law Review*) (“[USDA] abruptly removed all animal welfare reports from its website in February, sparking public outcry, denouncements from Congress, and a lawsuit.”).

116. *See USDA Abruptly Purges Animal Welfare Information From Its Website*, *supra* note 9 (“Advocates for businesses that rely on animals, including agriculture and exotic pet breeders, have long resented government oversight that they say is overly aggressive and influenced by animal protection groups.”).

117. *Updates to APHIS’ Website Involving Animal Welfare Act and Horse Protection Act Compliance Information*, *supra* note 83.

118. *See supra* Part IV.B (discussing the McGartland lawsuit and the subsequent reaction from the Tennessee Walking Horse community); *see also A Showhorse Lawsuit May Be Why*, *supra* note 92 (“This move is a direct result of the lawsuit,” reads a post on the Facebook page of TWH Facts, which is run by a prominent advocate.”).

119. David Abel, *Animal Advocates Say Removal of Database Hurts Efforts to Prevent Abuse*, BOS. GLOBE (July 19, 2017), <https://www.bostonglobe.com/metro/2017/07/19/animal-advocates-say-removal-database-hurts-efforts-prevent-abuse/9Mnw6yUaNDTMGCG0URAIZM/story.html> (on file with *The University of the Pacific Law Review*).

120. *Id.*

121. *A Showhorse Lawsuit May Be Why*, *supra* note 92.

122. Abel, *supra* note 119 (“Some breeders . . . have been the victims of violence as a result of the database.”); *see also The Threat of Extremism to Medical Research*, FED’N OF AM. SOC’YS FOR EXPERIMENTAL BIOLOGY 1 (2014), *available at* [https://www.ssr.org/sites/ssr.org/files/uploads/attachments/node/216/4\\_animal\\_extremism\\_report\\_final.pdf](https://www.ssr.org/sites/ssr.org/files/uploads/attachments/node/216/4_animal_extremism_report_final.pdf) (on file with *The University of the Pacific Law Review*) (“Most of those who oppose research with animals participate in ethical, legal, and civil disclosure to promote their viewpoint. However, a small minority have rejected legal, civil discourse. . . . Campaigns of violence by [animal rights] extremists are a major cause for concern for researchers, their institutions, and funding agencies that support their work.”).

123. *A Showhorse Lawsuit May Be Why*, *supra* note 92.

B. Opposition to the Removal

Although there is some support for the USDA's removal of information, the response has mostly been negative.<sup>124</sup> The USDA's decision has met criticism from animal welfare groups, politicians on both sides of the aisle, journalists, and the public.<sup>125</sup> The main concern is that the missing database makes it impossible to track businesses and facilities that do not comply with the AWA.<sup>126</sup> Animal welfare advocates argue the information is not used to harass or target individuals, but rather to create an incentive for businesses to treat animals humanely, and to ensure the AWA regulations are being enforced.<sup>127</sup> In fact, critics assert that the records were already redacted to remove any private or personal information on inspection and enforcement reports.<sup>128</sup> Additionally, opponents argue filing a FOIA request is not a proper remedy because the requests can take months or years to process, thus delaying the rescue of mistreated animals.<sup>129</sup>

The USDA's removal of its database caught the attention of numerous federal lawmakers who have called on the USDA to restore this information.<sup>130</sup> In February 2017, shortly after the USDA's decision became public, a letter signed by 18 Senate Democrats urged the USDA to reverse its decision.<sup>131</sup> The following day, bipartisan members of the House of Representatives sent a letter to President Trump urging him to restore the records.<sup>132</sup>

Members of the public have also expressed outrage at the USDA.<sup>133</sup> Pet owners posted pictures of their pets on social media with the hashtag "#USDABlackout," tagging the USDA and legislators who failed to sign either the Senate or House letters.<sup>134</sup>

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124. *USDA Abruptly Purges Animal Welfare Information From Its Website*, *supra* note 9 ("Animal welfare organizations quickly condemned the removal of the information, which they called unexpected and said would allow animal abuse to go unchecked.").

125. *Resistance Is Growing to the USDA's Blackout of Animal Welfare Records*, *supra* note 17.

126. Abel, *supra* note 119.

127. *Id.*

128. Complaint, *supra* note 102, at 10.

129. *U.S. Animal Abuse Records Deleted*, *supra* note 11 (quoting Adam Roberts, CEO of Born Free USA, "[w]aiting months for a FOIA report for information that previously could be obtained with the click of a button 'may mean prolonged suffering for an animal in need'"); *USDA Abruptly Purges Animal Welfare Information From Its Website*, *supra* note 9.

130. *Resistance Is Growing to the USDA's Blackout of Animal Welfare Records*, *supra* note 17.

131. *Id.*

132. *Id.* ("Public release of inspection reports and laboratory annual reports increases pressure on entities to abide by the rules. Access to these records has enabled the public to learn about many animal-care violations including by puppy mills, roadside zoos and training barns engaged in cruel horse soring. It has also provided accountability for research facilities that violate the law, and allowed assessment of how many animals are used (often with taxpayer funding) for research that causes unrelieved pain.").

133. *Id.*

134. *Id.*; *Blackout Blackout*, *supra* note 14.

VI. “BLACKOUT” CONTRADICTORY TO FOIA

The removal of information from the APHIS website is contradictory to the purpose of the FOIA, which Congress amended to require agencies to proactively post records online.<sup>135</sup> This section explains why the USDA has a duty to post animal welfare records under the FOIA and the EFOIA Amendments.<sup>136</sup> Part A addresses the USDA’s argument that it does not have a duty to publish its records and reports.<sup>137</sup> Part B focuses on government accountability and transparency—questioning how the removal of animal welfare records contradicts these notions.<sup>138</sup> Part C addresses privacy concerns, specifically the ones raised by the USDA.<sup>139</sup>

A. *USDA Claims No Duty to Post Records Under FOIA*

The USDA claims the FOIA does not require the agency to publish records on its website.<sup>140</sup> According to the USDA, most FOIA lawsuits allege th agency is “improperly withholding” information from the plaintiff who files a request.<sup>141</sup> PETA and its co-parties do not make such a claim; instead, the plaintiffs argue that the “removal of records from the website deprived them of access to records to which they are entitled” without submitting a formal FOIA request.<sup>142</sup> Instead, the USDA claims the provision is “expressly limited to records that have already been processed and ‘released’ to a ‘person’ in response to a specific request.”<sup>143</sup> This does not include “whole categories of records that the agency proactively makes available to the public on its website when it is under no legal obligation to do so.”<sup>144</sup>

Additionally, the USDA argues that before the plaintiffs can seek a remedy under the affirmative disclosure provision, they must file a formal FOIA request.<sup>145</sup> Finally, since the removal of information was a temporary action to evaluate the personal privacy concerns arising from such publication, there is no need for judicial action, especially since the agency has reposted much of the information.<sup>146</sup>

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135. *Id.*

136. *Infra* Part VI.

137. *Infra* Part VI.A.

138. *Infra* Part VI.B.

139. *Infra* Part VI.C.

140. Motion to Dismiss, *supra* note 103, at 2.

141. *Id.*

142. 5 U.S.C.A. § 552(a)(2)(D) (West 2016); Motion to Dismiss, *supra* note 103, at 2.

143. *Id.*

144. *Id.*

145. *Id.* at 2–3 (“By failing to file such a request, plaintiffs are effectively asking the Court to let them jump to the front of the line, to the detriment of other requesters who have properly availed themselves of the remedies Congress provided.”).

146. *Id.* at 3.



B. Transparency and Accountability

The purpose of the FOIA is to promote government transparency by granting citizens the right to request records from government agencies.<sup>147</sup> In particular, the enactment of the EFOIA aims to assist agencies in meeting this purpose by requiring agencies to make such information available online to reduce the high volume of requests.<sup>148</sup>

Prior to the “Blackout,” the USDA routinely published reports and records on the APHIS website.<sup>149</sup> According to the USDA, the most frequently requested records under the FOIA were facility inspection reports.<sup>150</sup> The USDA stated, “making [the facility inspection reports] available on [the] Web site will go a long way toward informing the public of our commitment to animal welfare, while also supporting our FOIA backlog reduction efforts.”<sup>151</sup> Due to the USDA’s compliance, the records assisted animal welfare organizations, journalists, and others in “expos[ing] inhumane treatment of animals that in turn led the USDA to take appropriate enforcement action against facilities that fail to comply with applicable AWA standards and requirements.”<sup>152</sup>

Although the USDA has somewhat reposted inspection reports and records,<sup>153</sup> the new database quickly came under fire by animal welfare organizations for its inadequacies.<sup>154</sup> The reports are missing “critical identifying information, including breeder names, addresses, and federal license numbers.”<sup>155</sup> Additionally, the APHIS will no longer publish its enforcement actions on the website, “meaning the public will not know whether the USDA has pursued action against breeders violating the [AWA].”<sup>156</sup> Delcianna J. Winders, Vice President and Deputy General Counsel for PETA, called the new search tool “virtually unusable in many cases, as the USDA has made it impossible to search for records from some of the worst abusers by concealing their identities.”<sup>157</sup> The

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147. *History of the FOIA*, *supra* note 64.

148. Grunewald, *supra* note 65.

149. Motion to Dismiss, *supra* note 103, at 1.

150. Letter from Kevin Shea, APHIS Acting Administrator, and Bill Clay, Acting Associate Administrator, to APHIS Management Team and Agency’s Program Leaders Group (June 19, 2009), *available at* <https://www.aphis.usda.gov/foia/downloads/APHIS%20Commitment%20to%20Transparency.pdf> (on file with *The University of the Pacific Law Review*).

151. *Id.*

152. Complaint, *supra* note 102, at 11.

153. *See supra* Part IV.D (discussing the USDA’s partial reinstatement of its database).

154. *See Blackout Update: USDA Unveils Weak, Watered-Down Breeder Database*, ASPCA (Aug. 22, 2017), <https://www.aspc.org/news/blackout-update-usda-unveils-weak-watered-down-breeder-database> (on file with *The University of the Pacific Law Review*) (“The diminished database and search tool, launched with no warning or input from animal welfare stakeholders, is essentially useless and the ASPCA denounces it as a massive step backward in the protection of our nation’s animals.”).

155. *Id.*

156. *Id.*

157. *Update: USDA’s New ‘Public Search Tool’ Falls Short*, PETA (Aug. 18, 2017), <https://www.peta.org/blog/leading-animal-protection-groups-others-sue-usda-website-blackout/> (on file with

withholding of enforcement records is especially worrisome because the USDA is notoriously inefficient in regulating the AWA.<sup>158</sup> The unavailability of such records makes it extremely difficult to monitor the USDA and the businesses and entities regulated by the AWA.<sup>159</sup>

Due to the inadequate database for inspection reports and records, the only real option is to file a FOIA request, which can take months or even years to process.<sup>160</sup> If an individual or organization is fortunate enough to receive a response,<sup>161</sup> the USDA continues to heavily redact its records, rendering the information useless.<sup>162</sup> The lengthy FOIA request process delays or prevents the public and animal welfare organizations from monitoring questionable policies and practices at these animal-related businesses and facilities.<sup>163</sup> It is worth remembering that when animal welfare advocates, journalists, and members of the public did file FOIA requests, some of them received 1,771 blacked-out pages.<sup>164</sup>

The USDA's assertion that the agency is under no obligation to publish its records is unfounded.<sup>165</sup> The affirmative disclosure mandate under the FOIA "require[s] federal agencies to provide certain records to the public as a whole, as

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*The University of the Pacific Law Review*).

158. See *Animal Plant and Health Inspection Service Oversight of Research Facilities*, OFF. OF INSPECTOR GEN. (Dec. 2014), available at <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf> (on file with *The University of the Pacific Law Review*) ("[Animal Care (AC)] did not make the best use of its limited resources, which could have been assigned to inspect other more problematic facilities, including breeders, dealers, and exhibitors. . . . AC did not follow its own criteria in closing at least 59 cases that involved grave (e.g., animal deaths) or repeat welfare violations.").

159. Delcianna J. Winders, *Why I Sued the USDA*, THE HILL (Feb. 16, 2017), <http://thehill.com/blogs/congress-blog/judicial/319916-why-i-sued-the-usda#.WKXwWwoV4jL>.twitter (on file with *The University of the Pacific Law Review*) ("The USDA's egregious and longstanding disregard of its statutory duties screams out for *more*—not less—oversight.").

160. *U.S. Animal Abuse Records Deleted*, *supra* note 11.

161. See Delcianna J. Winders, *Year After Blackout, Public Still in the Dark About Animal Welfare Enforcement*, THE HILL (Feb. 9, 2018), <http://thehill.com/blogs/congress-blog/politics/373122-year-after-blackout-public-still-in-the-dark-about-animal> (on file with *The University of the Pacific Law Review*) ("The agency assures us, we can still obtain those records by submitting a FOIA request. I did submit a FOIA request—a year ago. And I've yet to receive anything. When I periodically check in on the status of my USDA FOIA requests—some of which have now been languishing for *years*—I'm told that, since the removal of information from the website, the agency has 'been overwhelmed with hundreds of requests and record reviews.'").

162. See *Blackout Update*, *supra* note 155 ("While the USDA insists that animal welfare inspection records are still obtainable through [FOIA] requests, this is disingenuous—the ASPCA has obtained reports using this method only to find that they, too, are heavily redacted, allowing animal abusers to operate without accountability. Neither the online database nor the FOIA process have any value whatsoever for discovering which breeders have AWA violations.").

163. *U.S. Animal Abuse Records Deleted*, *supra* note 11.

164. See sources cited *supra* note 14 (providing examples of persons who received 1,771 blacked-out pages in response to their FOIA requests).

165. See *Blackout Blackout*, *supra* note 14 ("[T]he USDA has brazenly asserted that it was never under any legal duty to post the records—this despite the clear statutory mandate that agencies proactively post frequently requested records, the agency's acknowledgement that the records at issue were *the* single-most frequently requested, and even its prior recognition that it was legally required to post the records.").

well as provisions requiring agencies to disclose any other records to individuals in response to FOIA requests.”<sup>166</sup> Records that “have become or are likely to become the subject of subsequent requests for substantially the same records” must be affirmatively disclosed.<sup>167</sup> Not only does the FOIA explicitly mandate this requirement, the USDA both acknowledged and complied with the requirement prior to the “Blackout.”<sup>168</sup> The USDA understands the significance of its inspection reports, and recognizes they are the most frequently requested agency records.<sup>169</sup> For the USDA to suddenly adopt a no-duty platform seriously contradicts the FOIA and “its prior recognition that it was legally required to post the records.”<sup>170</sup>

### C. Privacy Concerns

As previously stated, the USDA cites privacy concerns as a reason for the removal of its records on the APHIS website.<sup>171</sup> Throughout its motion to dismiss, the agency repeatedly refers to “personal privacy information,” suggesting that it is concerned with the privacy of individuals, not of entities or businesses.<sup>172</sup> Individual breeders, exhibitors, and trainers like the McGartlands certainly object to the publication of their personal information.<sup>173</sup> Individuals operating in capacities regulated by the AWA, however, are still required to comply with animal welfare regulations and therefore are not immune to inspections or other corrective measures the USDA finds necessary.<sup>174</sup> The AWA treats individuals and businesses engaged in animal-related industries, whether it be a university engaged in research or an individual breeder, the same: both must fully comply with such regulations.<sup>175</sup>

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166. 5 U.S.C.A. § 552(a)(2) (West 2016); Complaint, *supra* note 102, at 9.

167. *Id.*

168. *Id.* at 10.

169. Letter from Kevin Shea, *supra* note 151.

170. *Blackout Blackout*, *supra* note 14.

171. Motion to Dismiss, *supra* note 103, at 1 and 3 (emphasizing that this was a “temporary precaution to ensure protection of personal privacy information while the agency continues the ongoing review process to determine what could properly be reposted on the website and in what form”).

172. *Id.*; *Why I Sued the USDA*, *supra* note 160 (noting that thousands of the records removed by the agency involve corporations and universities, not individuals).

173. *A Showhorse Lawsuit May Be Why*, *supra* note 92.

174. 7 U.S.C.A. § 2132(a) (West 2014) (defines “person” as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity” engaged in one of the activities regulated by the AWA).

175. *Id.*; Editorial Board, *USDA Puts Blinders On Animal Abuse: Our View*, USA TODAY (Feb. 15, 2017, 5:27 P.M.), <https://www.usatoday.com/story/opinion/2017/02/15/animal-welfare-cruelty-website-usda-database-editorials-debates/97950640/> (on file with *The University of the Pacific Law Review*) (“[According to the McGartlands’ logic], police would violate the rights of every person arrested, but not yet tried, by releasing their names to the public. And the Food and Drug Administration would violate the rights of every regulated business that receives ‘warning letters,’ which FDA publicly posts after inspections. The public would be left in the dark.”).

It is worth noting that prior to the “Blackout,” the USDA already redacted personal information from the inspection reports and other records before publication.<sup>176</sup> The issue, however, is not the removal of records detailing animal welfare violations by individuals alone, but also violations committed by research facilities and other animal-related industries.<sup>177</sup>

The agency’s repetitive use of the term “personal privacy” could be related to the fact that corporate entities do not have privacy rights under the FOIA.<sup>178</sup> In *FCC v. AT&T*, the Supreme Court held that corporations do not have personal privacy rights under FOIA Exemption 7(C).<sup>179</sup> Using ordinary meaning, the Court reasoned the word “personal” implies and refers to individuals, not to corporations or entities.<sup>180</sup> The Court referred to the “personal privacy” exemption,<sup>181</sup> where the term first appeared in the FOIA exemptions.<sup>182</sup> Acknowledging the question of whether Exemption 6 applies only to individuals has never been brought before the Court, it nonetheless concluded the exemption involves an “individual’s right of privacy.”<sup>183</sup> Based on the *FCC* ruling, the USDA can redact the information pertaining to individuals in the corporation, a practice it performed prior to the “Blackout.”<sup>184</sup>

Although there are valid concerns about protecting the privacy of individuals, the USDA cannot entirely remove all its animal welfare records and reports from its database.<sup>185</sup> The FOIA explicitly provides that if any of the information contained in a record falls under an exemption, the record must still be produced with the exempted material redacted.<sup>186</sup> The USDA previously complied with this requirement, invoking one of the exemptions like the personal privacy exemption

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176. Complaint, *supra* note 102, at 10.

177. Abel, *supra* note 119 (quoting Ryan Merkley, director of research advocacy at Physicians Committee for Responsible Medicine, “There are powerful industries regulated by the USDA that don’t like the public knowing they violate the law. The public should know when there are violations. We feel the USDA is bending to the industry, at the cost [of] the public.”).

178. See *FCC v. AT&T*, 562 U.S. 397 (2011) (although this case does not address FOIA’s relation to the AWA, the same principle applies).

179. *Id.* at 409–10 (“The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.”); see also 5 U.S.C.A. § 552(b)(7)(C) (West 2016) (exemption for “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”).

180. *FCC*, 562 U.S. at 403.

181. 5 U.S.C.A. § 552(b)(6) (West 2016).

182. *FCC*, 562 U.S. at 407.

183. *Id.* at 408.

184. See *id.* at 397 (“The Bureau found that Exemption 7(C) applied to individuals identified in AT&T’s submissions but not to the company itself.”).

185. Complaint, *supra* note 102, at 13 (“Despite the fact that the agency already redacted personal information from the records before posting them, it asserted that the reason for its decision was its desire to ‘remove certain personal information from documents it posts on APHIS’ website.”).

186. 5 U.S.C.A. § 552(b) (West 2016) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

and redacting personal information such as signatures and addresses.<sup>187</sup> To entirely remove all records of animal welfare violations committed by entities contradicts the *FCC* decision and the FOIA's affirmative disclosure mandate.<sup>188</sup>

## VII. IMPLICATIONS OF REMOVING ANIMAL CRUELTY INFORMATION FROM THE APHIS WEBSITE

The “Blackout” has far-reaching consequences on animal welfare as a whole.<sup>189</sup> This section analyzes the potential implications of the USDA's removal of animal welfare information from the APHIS database.<sup>190</sup> Part A discusses the impact the “Blackout” may have on tracking animal cruelty, especially in zoos, circuses, research facilities, and other animal-related businesses.<sup>191</sup> Part B examines the introduction of animal abuse registries, comparing the registries' publication of personal information to the APHIS website's publication of business information.<sup>192</sup> Finally, Part C analyzes the potential effects of the “Blackout” on animal-related businesses.<sup>193</sup>

### A. *The Inability to Track Animal Cruelty*

Animal welfare organizations, journalists, and members of the public cited the documents and reports previously made available by the USDA as influential and effective in helping to prosecute businesses that have violated animal welfare regulations and to develop legislation that protect these animals.<sup>194</sup> The USDA's publication of inspection reports and AWA violations has “exposed abuses at roadside zoos, uncovered controversial government-funded animal experiments, and revealed the mistreatment of circus elephants.”<sup>195</sup> The website also “confirmed dog breeders weren't running puppy mills and that horse trainers weren't exploiting their racers and jumpers.”<sup>196</sup> Exposing such violations and inhumane treatment practices is not only in the interest of animal welfare groups and some journalists;<sup>197</sup> the American public takes animal cruelty very seriously and pays attention to such cases.<sup>198</sup> The USDA's removal of its public database

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187. Complaint, *supra* note 102, at 10.

188. 5 U.S.C.A § 552(a)(2) (West 2016); *FCC*, 562 U.S. 397.

189. *Infra* Part VII.

190. *Infra* Part VII.

191. *Infra* Part VII.A.

192. *Infra* Part VII.B.

193. *Infra* Part VII.C.

194. Daly & Bale, *supra* note 5.

195. *Id.*

196. *Id.*

197. *Id.*

198. *See Resistance Is Growing to the USDA's Blackout of Animal Welfare Records*, *supra* note 17 (illustrating the public backlash against the USDA for its removal of animal welfare records).

now prohibits all persons or organizations from accessing these records to which they were previously entitled.<sup>199</sup>

In March 2016, *Mother Jones* published an article detailing the violations committed by DEW Haven, “a family-run roadside zoo outside Mount Haven, Maine” that previously served as the setting for the Animal Planet reality show, *Yankee Jungle*.<sup>200</sup> The article described the “illegal importation of animals, poor sanitation, inadequate shelter, feces-ridden food, pens too small for movement, and premature death.”<sup>201</sup> Author James West gathered his information from the USDA reports and cited to their availability as the reason for reporting on DEW Haven.<sup>202</sup> As a result of the exposé, Animal Planet cancelled the show, but the zoo remains operational.<sup>203</sup> Because the zoo is still open, it will be very difficult to monitor the zoo’s activity and the USDA’s regulation of the zoo.<sup>204</sup> West stated that without the reports and documents, the public cannot properly understand the facts and may not understand or realize how difficult it is to get information from law enforcement agencies at any level.<sup>205</sup>

Animal welfare organizations such as PETA, Born Free USA, and the Rescue + Freedom Project rely “on such records to advocate for the protection of animals used in research, exhibition, and the pet trade.”<sup>206</sup> Additionally, the availability of these records allow these organizations to “petition the USDA to more diligently enforce the AWA, to promulgate standards for animal protection, and to formulate and institute policies and practices that will advance the protection of animals.”<sup>207</sup> The removal of inspection reports and animal welfare records seriously limits the ability of these organizations to promote the humane treatment of animals, to inform the public about the facilities, and to monitor the USDA’s enforcement of its regulations.<sup>208</sup>

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199. Complaint, *supra* note 102, at 11; *see also Blackout Update: USDA Unveils Weak, Watered-Down Breeder Database*, *supra* note 155 (“In their complete, unaltered states, USDA inspection reports and enforcement documentation provide critical information about the commercial dog breeding industry and about how competently the agency is enforcing the AWA. The formerly available reports were valuable tools for educating the public on the inhumane conditions commonly found at USDA-licensed breeders. They were also vitally important assets for passing and enforcing laws that protect breeding dogs.”).

200. *U.S. Animal Abuse Records Deleted*, *supra* note 11.

201. *Id.*

202. *Id.* (quoting West, “The USDA documents provided such a strong spine of documentary evidence right out of the gate, [that they were] completely rich, primary source evidence documents, full of information, which then led me to other leads.”).

203. *Id.*

204. *Id.*

205. *Id.*

206. Complaint, *supra* note 102, at 2.

207. *Id.*

208. *Id.* at 11.

B. Animal Abuser Registries

The establishment of animal abuse registries is a recent trend in animal and criminal law.<sup>209</sup> Similar to sex offender registries, animal abuse registries require persons convicted of animal cruelty or neglect to register with a government online database.<sup>210</sup> This database would be publicly accessible, specifically allowing individuals or businesses who sell animals or put them up for adoption to ensure the animals are going to rightful owners.<sup>211</sup> Suffolk County, New York, enacted the first registry, with a number of other New York counties following suit.<sup>212</sup> Tennessee established the nation's first statewide registry in 2016.<sup>213</sup>

Although the idea of such a registry is a relatively new one, legislators are hesitant to pass such laws due to privacy concerns and the effects of making an individual's information public.<sup>214</sup> The USDA is certainly concerned about this in publishing its own inspection reports.<sup>215</sup>

The issue, however, is that the USDA inspection reports detail animal welfare violations committed at animal-related facilities and businesses, not necessarily the actions of individuals (unless individual breeders or dealers acting in such a capacity).<sup>216</sup> It seems distorted that individuals' personal information can be published through animal abuse registries whereas business and research entities (which do not have personal privacy rights) are protected when the USDA removes such records.<sup>217</sup>

C. Effects on Other Animal-Related Businesses

Animal welfare groups and the public are not the only ones concerned about the USDA's decision: industries under the USDA's regulation, including zoos,

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209. Danielle K. Campbell, Note, *Animal Abusers Beware: Registry Laws in the Works to Curb Your Abuse*, 48 VAL. U. L. REV. 271, 272 (2013).

210. *Id.*; see also S. B. 405, 2017 Leg., 2016–2017 Sess. (Nev. 2017) (as amended on May 30, 2017, but not enacted) (creating an animal abuser registry website and requiring offenders convicted of certain animal cruelty offenses to register with the website).

211. See *Tennessee Animal Abuse Registry*, TENN. BUREAU OF INVESTIGATION, <https://www.tn.gov/tbi/tennessee-animal-abuse-registry.html> (last visited Apr. 8, 2018) (on file with *The University of the Pacific Law Review*) (listing the names of the convicted persons, addresses, dates of birth, offenses committed, dates of conviction, and dates of expiration).

212. Campbell, *supra* note 210.

213. *Tennessee becomes first state to launch animal abuse registry*, ABC13 (Jan. 3, 2016), <http://abc13.com/pets/tennessee-becomes-first-state-to-launch-animal-abuse-registry/1144460/> (on file with *The University of the Pacific Law Review*).

214. Campbell, *supra* note 210, at 314; see also S.B. 405, 2017 Leg., 2016–2017 Sess. (Nev. 2017) (as amended on May 30, 2017, but not enacted) (establishing an animal abuse registry website and requiring offenders convicted of animal cruelty to register with the website).

215. Motion to Dismiss, *supra* note 103, at 1.

216. 7 U.S.C.A. § 2132(a) (West 2014) (defining “person” as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity” engaged in one of the activities regulated by the AWA).

217. Motion to Dismiss, *supra* note 103, at 1.

pet stores, and research facilities, have also expressed opposition.<sup>218</sup> Many states and municipalities across the country have recently enacted laws that require pet stores to do business with breeders who have clean USDA inspection reports.<sup>219</sup> In 2017, California Governor Jerry Brown signed a law requiring pet stores selling dogs, cats, or rabbits to get them from animal shelters or rescue operations, ultimately banning the sale of animals from puppy mills.<sup>220</sup> Pet stores used the APHIS database to perform checks on breeders and other businesses to ensure compliance with the AWA and other regulations.<sup>221</sup> With the removal of this database, pet stores are forced to “[do] business in the dark.”<sup>222</sup> Besides filing a FOIA request, which is not a feasible option for a pet store selling animals, stores are forced to go directly to the breeders and see if they are complying with regulations.<sup>223</sup>

An example of the impact on animal-related businesses is Petland, a national chain store that sells puppies.<sup>224</sup> Petland requires its commercial breeders to have clean USDA inspection reports for at least two years.<sup>225</sup> Due to the “Blackout,” however, Petland employees must now get the reports directly from the breeders.<sup>226</sup> Petland CEO Joe Watson stated while the chain supports protecting the privacy of some breeder information, the USDA must “find a solution that balances the privacy needs of breeders, while providing relevant inspection information to the general public.”<sup>227</sup> Watson said the removal of the database has “created an extra burden” for Petland since employees must go to the breeders directly for inspection reports instead of easily accessing the APHIS website.<sup>228</sup>

## VIII. CONCLUSION

The USDA must restore the inspection reports and other records detailing animal welfare violations committed by research facilities and animal-related businesses to the APHIS website, as the agency has done in the past.<sup>229</sup> The USDA’s argument that it is not legally obligated to post such reports on the

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218. *People Who Care About Animal Welfare Are Demanding Information From USDA*, *supra* note 115.

219. Daly & Bale, *supra* note 5.

220. The Associated Press, *California Becomes First State to Ban Sales From Puppy Mills*, N.Y. TIMES (Oct. 13, 2017, 7:24PM), <https://www.nytimes.com/aponline/2017/10/13/us/ap-us-puppy-mills-california.html> (on file with *The University of the Pacific Law Review*).

221. Daly & Bale, *supra* note 5.

222. *Id.* (quoting John Goodwin, Humane Society of the United States’ Stop the Puppy Mill campaign).

223. *People Who Care About Animal Welfare Are Demanding Information From USDA*, *supra* note 115.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Supra* Parts II–VII.



APHIS website contradicts the language and purpose of the FOIA and EFOIA.<sup>230</sup> The USDA's concern for privacy is unfounded as corporate entities are not entitled to the same privacy rights as individuals under the FOIA, and information pertaining to individuals was already redacted from the previously published reports.<sup>231</sup>

Research facilities, businesses, and other industries engaging in the mistreatment of animals must be held accountable for their failure to comply with the AWA and other animal welfare regulations.<sup>232</sup> The publication of such information will assist in prosecuting those industries that are treating animals inhumanely.<sup>233</sup> The mistreatment of animals is not good business practice, and the lengthy process of filing a FOIA request should not delay any actions to end such mistreatment.<sup>234</sup> PETA used the information on the APHIS database to prove that PPI engaged in the inhumane treatment of Loretta and other primates, leading to the USDA's subsequent investigation into the facility.<sup>235</sup> Through the republication of inspection reports and records, more animals like Loretta may be saved from such practices.<sup>236</sup>

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230. *Supra* Part VI.B (discussing the affirmative disclosure mandate and its requirement that agencies publish certain records).

231. *Supra* Parts VI.C (summarizing the principle stated in *FCC v. AT&T* that corporations do not have personal privacy rights).

232. See *Blackout Update: USDA Unveils Weak, Watered-Down Breeder Database*, *supra* note 155 (quoting Matt Bershader, ASPCA President and CEO, "Animal advocates, consumers, and government officials have relied on the USDA's database to track enforcement against commercial breeders, many of whom raise dogs in deplorable conditions. This revision fails to protect vulnerable animals from suffering and cruelty, which is a prime responsibility of the USDA. Instead, it continues to protect animal industries looking to hide their practices from public scrutiny.").

233. Daly & Bale, *supra* note 5 (illustrating the importance of access to animal welfare records in exposing the inhumane treatment of animals).

234. *U.S. Animal Abuse Records Deleted*, *supra* note 11 (quoting Adam Roberts, CEO of Born Free USA, "[w]aiting months for a FOIA report for information that previously could be obtained with the click of a button 'may mean prolonged suffering for an animal in need'").

235. Complaint, *supra* note 102, at 11 ("In another instance, PETA used information from APHIS's website to corroborate evidence that primates were being inhumanely treated at a research facility, leading to . . . multiple citations of the facility for violations of AWA standards.").

236. *Supra* Parts II–VII.