FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND; STOP ANIMAL EXPLOITATION NOW; COMPANION ANIMAL PROTECTION SOCIETY; ANIMAL FOLKS, *Plaintiffs-Appellants*, v. UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE, *Defendants-Appellees*.	No. 17-16858 D.C. No. 3:17-cv-00949-WHO OPINION

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted December 17, 2018
San Francisco, California

Filed August 29, 2019

Before: Consuelo M. Callahan and N. Randy Smith, Circuit Judges, and Fernando M. Olguin,* District Judge.

Opinion by Judge N.R. Smith;
Dissent by Judge Callahan

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* The Honorable Fernando M. Olguin, United States District Judge for the Central District of California, sitting by designation.

SUMMARY[**]

Freedom of Information Act

The panel reversed in part and affirmed in part the district court's dismissal for lack of subject matter jurisdiction of plaintiffs' action against the U.S. Department of Agriculture, alleging claims under the Freedom of Information Act ("FOIA") and the Administrative Procedure Act ("APA").

FOIA requires federal agencies to make certain agency records "available for public inspection in an electronic format." 5 U.S.C. § 552(a)(2). FOIA's judicial-review provision authorizes district courts to enjoin violations of this "reading room" provision. The Animal and Plant Health Inspection Service ("APHIS") enforces the Animal Welfare Act on behalf of the U.S. Department of Agriculture. In February 2017, APHIS removed various compliance and enforcement records from its website, and has represented that it will no longer post certain records.

Plaintiffs are animal rights organizations, and they alleged that defendants violated FOIA's reading-room provision. Plaintiffs requested that the district court enjoin the agency from withholding the records and order the agency to make the records publicly available in an electronic format on an ongoing basis.

The panel held that plaintiffs have standing because their inability to inspect documents in virtual reading rooms

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

harmed them in real-world ways, their injuries were different from the injuries sustained by other Americans who never regularly visited the online reading rooms, and their alleged injuries were "fairly traceable" to the agency's action, and likely to be redressed by their requested relief.

The panel held that 5 U.S.C. § 552(a)(4)(B) provided district courts with authority to order an agency to post records in an online reading room, and reversed the dismissal of the FOIA claims. The panel rejected APHIS's challenges to this holding. In addition to the text and structure of FOIA, several lines of Supreme Court and Ninth Circuit precedent support interpreting FOIA's judicial-review provision as authorizing district courts to order agencies to comply with their § 552(a)(2) obligations. The panel noted its disagreement with the D.C. Circuit's analysis in *Citizens for Responsibility & Ethics in Washington v. DOJ* ("*CREW I*"), 846 F.3d 1235, 1238–44 (D.C. Cir. 2017) (holding that FOIA constrains judicial enforcement of the reading-room provision).

The panel left it to the district court on remand to decide in the first instance whether plaintiffs have exhausted their reading room claim, or whether such exhaustion would be futile.

The panel affirmed the district court's dismissal of plaintiffs' Administrative Procedure Act claims because the potential for meaningful relief under FOIA displaced these claims.

Judge Callahan dissented in part. For the reasons set forth in *CREW I*, Judge Callahan would hold that FOIA provided an adequate alternative remedy, and courts lacked authority under FOIA to order agencies to make records available for public inspection. She would affirm the dismissal of plaintiffs' FOIA claim for lack of subject matter jurisdiction.

COUNSEL

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OPINION

N.R. Smith, Circuit Judge:

The Freedom of Information Act ("FOIA") requires federal agencies to make certain agency records "available for public inspection in an electronic format." 5 U.S.C. § 552(a)(2). FOIA's judicial-review provision authorizes district courts to enjoin violations of this "reading-room" provision. *See id.* § 552(a)(4)(B).

BACKGROUND

The Legal Landscape

Congress designed FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). Corruption, government inefficiency, and mistrust of public institutions all flourish "unless the people are permitted to know *what their government is up to.*" *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)); *see also id.* at 772 n.20. After all, public scrutiny and an informed citizenry are "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).

To implement these goals, FOIA creates three different mechanisms for making agency records available to the

public. First, the law compels agencies to publish certain categories of documents in the Federal Register. 5 U.S.C. § 552(a)(1). Second, in the provision at issue in this case, FOIA requires agencies to make certain records "available for public inspection in an electronic format." *Id.* § 552(a)(2). Third, under FOIA's most-recognized provision, members of the public may request agency records, and the agency—subject to limited exemptions—must produce them. *Id.* § 552(a)(3). Agencies must provide the record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." *Id.* § 552(a)(3)(B).

Unlike FOIA's "reactive" mechanism in § 552(a)(3), § 552(a)(2) identifies certain categories of records the agency must make available on an ongoing basis, no request necessary. This affirmative obligation applies to:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
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> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> (D) copies of all records, regardless of form or format—

> > (i) that have been released to any person under paragraph (3) [§ 552(a)(3)]; and
> >
> > (ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
> >
> > > (II) that have been requested 3 or more times; and
>
> (E) a general index of the records referred to under subparagraph (D)[.]

Id. § 552(a)(2).

Section 552(a)(2) became known as the "reading-room" provision because, as the Department of Justice ("DOJ") explains, agencies historically met their § 552(a)(2) obligations by placing the appropriate records in a physical, public reading room. DOJ, *Dep't of Justice Guide to the Freedom of Information Act: Proactive Disclosures* ("*DOJ 2014 Guide to FOIA*"), 12–13 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. However, Congress ushered FOIA into the electronic age in 1996, amending the statute to require proactively disclosed records created after November 1, 1996, to be available by "electronic means." *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996). In 2016, Congress again amended § 552(a)(2), this time specifying that agencies shall make records available "for public inspection in an electronic format." FOIA Improvement

Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). As a result, agencies today simply post records in electronic reading rooms on their websites rather than requiring citizens to visit an agency's physical reading room in person. *See* DOJ, *Dep't of Justice Guide to the Freedom of Information Act: Introduction*, 6 (April 11, 2019), https://www.justice.gov/oip/foia-guide/proactive_disclosures/download; *DOJ 2014 Guide to FOIA* at 12–13.

The 1996 amendments also added a new category of records to the reading-room provision: frequently requested records. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231. Legislative reports, the DOJ, and the DOJ's Office of Information Policy ("OIP") justify the availability of frequently requested records in terms of reducing requests for copies, streamlining processing, and trimming bloated agency backlogs.[1] The

[1] *See* S. Rep. No. 114-4, at 2 (2015), *as reprinted in* 2016 U.S.C.C.A.N. 321, 322 (identifying increasing requests and corresponding backlogs as a barrier to "ensur[ing] that FOIA remains the nation's premier transparency law"); H.R. Rep. No. 104-795, at 11, 21 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3454, 3464 ("An underlying goal of H.R. 3802 is to encourage on-line access to Government information available under the FOIA, including requests ordinarily made pursuant to section 552(a)(3)."); S. Rep. No. 104-272, at 5, 11, 13–14 (1996) (explaining that § 552(a)(2)(D) reduces duplicative FOIA requests); *DOJ 2014 Guide to FOIA* at 11; DOJ OIP, *Congress Enacts FOIA Amendments*, FOIA Update, Vol. XVII, No. 4 (Jan. 1, 1996), https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments ("Ideally, [reading room availability of frequently requested records] will satisfy much of the future public demand for those processed records, in a more efficient fashion."); DOJ OIP, *OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline*, FOIA Update, Vol. XIX, No. 1 (Jan. 1, 1998),

2016 amendments retained an agency's ability to determine which records deserved § 552(a)(2) treatment based on the likelihood of "becom[ing] the subject of subsequent requests[,]" but also codified the "Rule of 3," requiring automatic reading-room treatment for records previously released under § 552(a)(3) and requested three or more times. 5 U.S.C. § 552(a)(2)(D).

In addition to the three key disclosure provisions, FOIA vests jurisdiction in federal courts "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). This provision provides for de novo review and places the burden on the agency "to sustain its action," except that courts must defer to an agency's affidavit concerning technical feasibility for purposes of the reading-room requirement to post manuals and instructions that affect a member of the public. *Id.*[2]

https://www.justice.gov/oip/blog/foia-update-oip-guidance-electronic-foia-amendments-implementation-guidance-outline ("[A]gencies should keep in mind that its purpose is to reduce the number of future requests for the same information.").

[2] The judicial-review provision, § 552(a)(4)(B), provides that "a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)." Paragraph (2)(C) refers to § 552(a)(2)(C), which requires agencies to "make available for public inspection in an electronic format . . . administrative staff manuals and instructions to staff that affect a member of the public[.]" Subsection (b) sets forth the statutory exemptions from FOIA disclosure. *Id.* § 552(b). Paragraph (3)(B) refers to § 552(a)(3)(B), which provides that "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."

The Records

The Animal Welfare Act ("AWA") sets minimum standards for the humane treatment of animals and regulates several categories of commercial animal enterprises. *See* 7 U.S.C. §§ 2131–59. The Animal and Plant Health Inspection Service ("APHIS") enforces the AWA on behalf of the U.S. Department of Agriculture ("USDA"). *See id.*; 9 C.F.R. §§ 1–12. These enforcement activities generate the five categories of agency records at issue in this case: annual reports;[3] inspection reports;[4] official warning letters;[5] pre-litigation settlement agreements;[6] and administrative complaints.[7]

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[3] Federal regulations require scientific research facilities to submit these annual reports detailing the number and species of animals used in research, including descriptions of procedures producing pain and reasons why pain-relieving drugs were not used. *See* 9 C.F.R. § 2.36(b).

[4] APHIS inspectors assess whether facilities are complying with AWA standards for housing, ventilation, sanitation, veterinary care, and so on. These inspectors document violations—including instances of serious animal abuse or neglect—in inspection reports.

[5] Depending on the case, an inspection report may prompt a formal investigation, and these formal investigations can lead to issuing an official warning letter.

[6] When APHIS brings administrative enforcement actions seeking monetary penalties, it occasionally negotiates pre-litigation settlement agreements, which typically include a formal finding of an AWA violation and an agreed-upon fine.

[7] APHIS files administrative complaints before the Office of the Administrative Law Judge ("OALJ"). These documents explain APHIS's position on a violation and trigger the adjudicatory process.

For roughly the last decade, APHIS housed these records in databases in the FOIA reading-room portion of its website.[8] In its responses to particular record requests and internal guidance documents, APHIS has described the records as frequently requested. *See* USDA APHIS, *Letter from Kevin Shea, Acting APHIS Administrator, and Bill Clay, Acting APHIS Associate Administrator, to APHIS Management Team and Program Leaders Group* ("*APHIS Letter*"), 1 (June 19, 2009), https://www.aphis.usda.gov/foia/downloads/APHIS%20Committment%20to%20Transparency.pdf. If already-posted information was responsive to a later FOIA request, APHIS would generally refer requesters to the APHIS online reading room.

Although APHIS reviewed the documents before posting and redacted them to protect personal privacy, APHIS grew concerned that its system for reviewing and redacting records was insufficient. In February 2017, APHIS removed the various compliance and enforcement records from its website. APHIS represents that it has devoted substantial resources to reviewing and re-posting the records. While it has made progress in re-posting some reports, APHIS has represented on appeal that it will no longer post official warning letters, stipulations, pre-litigation settlement agreements, and administrative complaints. *See* USDA APHIS, *Animal Care Information System Website Review Chart* (Aug. 18, 2017), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/

[8] The Animal Care Information Search ("ACIS") database included annual reports and inspection reports; the Enforcement Actions ("EA") database contained the agency's enforcement responses, including all official warning letters, settlement agreements, and administrative complaints before the OALJ.

SA_AWA/acis-table. Instead, it "will post statistical summaries each calendar quarter." *Id.*

The Dispute

Plaintiffs include the Animal Legal Defense Fund ("ALDF"), a national nonprofit headquartered in California that seeks to advance the interests of animals through the legal system; Stop Animal Exploitation Now ("SAEN"), an Ohio nonprofit geared at ending animal abuse in laboratories; Companion Animal Protection Society ("CAPS"), a national nonprofit dedicated to preventing animal abuse in pet shops and puppy mills; and Animal Folks, a Minnesota nonprofit that uses research and collaboration with local authorities to improve enforcement of animal protection laws.

Plaintiffs allege that FOIA's reading-room provision requires APHIS to post all of the documents at issue, because they are "frequently requested." *See* 5 U.S.C. § 552(a)(2)(D); *APHIS Letter*. Plaintiffs further allege that APHIS must affirmatively disclose inspection reports, Letters of Information, official warning letters, and pre-litigation settlement agreements for the additional reason that these records constitute final agency orders. *See* 5 U.S.C. § 552(a)(2)(A).

Plaintiffs allege that (1) they frequently used APHIS databases to access these records, (2) without access to the databases, they have been forced to issue individual FOIA requests for categories of information previously available in the APHIS databases, (3) they will continue to submit requests as long as the databases remain offline, (4) individual FOIA requests will consume more staff time and resources than using the free APHIS databases, and

(5) they have experienced extended wait periods for records requested from APHIS—a lapse of time that makes information they ultimately receive both stale and less helpful in achieving their goals. For example, declarations from ALDF and Animal Folks allege how the organizations have visited the online reading rooms, using agency records to identify areas of animal welfare concern and seek enforcement actions, including asking the USDA to revoke licenses or bring facilities into compliance. ALDF also pursues legal actions on behalf of its members, such as a recent lawsuit against a pet store chain, alleging the company violated consumer protection laws by representing it did not obtain puppies from "puppy mills."

The Executive Director of SAEN averred that he checked the databases up to ten times a day, and often issued press releases and filed enforcement actions within twenty-four hours of APHIS uploading records about problematic animal research facilities. One campaign culminated in the USDA revoking the company's dealer license, canceling its research registration, and imposing a $3.5 million fine.

CAPS has alleged its work involves acting as a watchdog, in that it performs its own investigations, compares them to APHIS's reports, and refers discrepancies to the Office of Inspector General ("OIG"). This work partly prompted the OIG's 2010 report exposing APHIS's continued lackluster enforcement. *See* USDA OIG, *Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers*, 1–3 (May 14, 2010), https://www.usda.gov/oig/webdocs/33002-4-SF.pdf.

The Proceedings Below

Plaintiffs' complaint first alleges the USDA and APHIS violated FOIA's reading-room provision. They request that the district court enjoin the agency from withholding the aforementioned records and order the agency to make the records publicly available in an electronic format on an ongoing basis. Plaintiffs' second claim requests the same relief under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §§ 702, 704. Plaintiffs' third claim for relief alleges that APHIS's decision to remove two key databases from its website is a final agency action that is arbitrary, capricious, and an abuse of discretion. *See id.* § 706.

After filing suit, Plaintiffs sought a preliminary injunction. The district court ruled against them. Specifically, the district court concluded that Plaintiffs were unlikely to succeed on the merits of their claims, because FOIA plaintiffs "may seek injunctive relief and production of documents to them personally," but "they cannot compel an agency to make documents available to the general public." The district court also preliminarily concluded Plaintiffs had not properly exhausted their claim, because they had only made requests for particular records, but not "the precise relief they seek here (for APHIS to repost all previously available files to the APHIS databases)."

Plaintiffs then sent a letter to APHIS, requesting that the agency resume posting the records. APHIS responded that "this submission is not a proper request under FOIA."[9]

[9] APHIS responded that "ALDF may request its own copy of these records or an opportunity to inspect them[,] . . . [h]owever, the USDA FOIA regulations, and FOIA itself, do not require the agency to comply

The district court subsequently granted APHIS's motion to dismiss for lack of subject matter jurisdiction, determining that courts may not compel agencies to publish records in online reading rooms under FOIA's reading-room provision. It did not address the exhaustion question. Plaintiffs appealed, and we have jurisdiction under 28 U.S.C. § 1291. We reverse the dismissal of Plaintiffs' FOIA claim, but affirm with respect to Plaintiffs' APA claims, and remand.

DISCUSSION

"We review de novo the district court's dismissal for lack of subject matter jurisdiction." *Yagman v. Pompeo*, 868 F.3d 1075, 1078 (9th Cir. 2017).

I.

APHIS has not challenged Plaintiffs' standing. However, courts have an "independent obligation" to police their own subject matter jurisdiction, including the parties' standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Accordingly, we must assure ourselves that Plaintiffs have alleged an injury in fact, fairly traceable to the defendant's conduct, and likely to be redressed by a favorable judicial decision. *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1547 (2016). Demonstrating injury in fact requires a plaintiff to show she suffered "'an invasion of a legally protected

with requests to publish records online. Instead, they provide a means for those who wish to inspect or obtain copies of records to seek such relief from the agency." Whether an "opportunity to inspect" is synonymous with "public inspection in an electronic format," *id.* § 552(a)(2), is not before us.

interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A "particularized" injury affects the plaintiff personally, and a "concrete" injury "must actually exist." *Id.*

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (alteration in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). Our independent obligation to assure ourselves of standing mimics the standard on a motion to dismiss, *see Bennett v. Spear*, 520 U.S. 154, 168 (1997), and "turns on the nature and source of the claim asserted," *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Plaintiffs have alleged "procedural" injuries, in that the reading-room provision requires government agencies to follow a particular procedure in making certain categories of documents available (i.e., making them "available for public inspection in an electronic format" without a triggering request, 5 U.S.C. § 552(a)(2), rather than just providing the records to individual requesters). The Supreme Court has explained that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo, Inc.*, 136 S. Ct. at 1549. "In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.* In this case, we need not decide whether a bare statutory violation constitutes a cognizable injury in fact, because Plaintiffs allege that the agency's failure to make records available in its virtual reading rooms has "caused some

real—as opposed to purely legal—harm to the plaintiff." *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018). For example, ALDF has alleged that, because the agency has failed to affirmatively disclose the records, its members lack timely information to inform their daily lives (such as whether they are about to purchase a pet from a puppy mill known for abuses). Managing voluminous FOIA requests costs time and money to access the records on previously public and free APHIS databases. Waiting for the agency to produce records after a request makes information stale, allegedly hampering SAEN's rapid response tactics.

Plaintiffs also allege "informational" injuries. A plaintiff sustains a cognizable informational injury in fact when agency action cuts her off from "information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). Informational injuries remain firmly embedded in both Supreme Court and circuit cases. *See, e.g.*, *Spokeo, Inc.*, 136 S. Ct. at 1549–50; *Akins*, 524 U.S. at 20–25; *Pub. Citizen v. DOJ*, 491 U.S. 440, 449 (1989); *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 971 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 640 (2018); *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1105 (9th Cir. 2015), *as amended* (Jan. 19, 2016) (explaining the basis for informational injuries under FOIA); *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1258–60 (9th Cir. 2010) (describing how courts have found informational standing based on the deprivation of a statutory rights to information).

Informational injuries exist absent the denial of a request for particular information. *See Akins*, 524 U.S. at 21 (holding that a group of voters had suffered a cognizable injury because they were denied information that the Federal

Election Campaign Act required be made public); *Waterkeeper All. v. Envtl. Prot. Agency*, 853 F.3d 527, 533 (D.C. Cir. 2017) (concluding an agency's action that "reduces the information that must be publicly disclosed" meant the plaintiff "(and others) who previously sought that information no longer have a statutory right to access it. For the purpose of standing, that's injury enough."). However, some cases describe the injury sustained by a FOIA plaintiff as the denial of a request for particular records. *Pub. Citizen*, 491 U.S. at 449 (noting that FOIA redresses the injury of those who "sought and were denied specific agency records"). This framing offers some intuitive appeal in the vast majority of FOIA cases, because the vast majority of FOIA cases arise under § 552(a)(3), the provision specifically requiring agencies to "make the records promptly available" upon request. However, FOIA's reading-room provision requires agencies to post certain categories of documents *without a request*. *See id.* § 552(a)(2); *Citizens for Responsibility & Ethics in Washington v. DOJ* ("*CREW II*"), 922 F.3d 480, 484, 488 (D.C. Cir. 2019); *Jordan v. DOJ*, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that § 552(a)(2) records must be made "automatically available for public inspection; no demand is necessary"). The "invasion of a legally protected interest," *Spokeo, Inc.*, 136 S. Ct. at 1548, occurs when the agency decides not to post records qualifying for § 552(a)(2) treatment, or when a plaintiff visits the online reading room and information required to be there is nowhere to be found.[10] *Cf. Hajro*, 811 F.3d at 1102–03 (explaining the distinction between standing for "a *specific* FOIA request claim and a *pattern or practice* claim").

[10] In any event, the record indicates that Plaintiffs did in fact make requests for the documents at issue before litigation started.

Further, APHIS's decision to remove categories of records alleged to fall under § 552(a)(2) from its online reading room has caused Plaintiffs the type of harm Congress sought to prevent by obligating agencies to post these documents. *See Spokeo, Inc.*, 136 S. Ct. at 1549 (explaining that the "judgment of Congress" is "important" to "whether an intangible harm," including informational harm, "constitutes injury in fact"). The Supreme Court has "declared that the Act was designed to create a broad right of access to 'official information.'" *Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 (quoting *Mink*, 410 U.S. at 80). FOIA is particularly concerned with records that "shed[] light on an agency's performance of its statutory duties." *Id.* at 773. Congress crafted the affirmative portion of FOIA to prevent the proliferation of "secret law" and to allow individuals "to know what their government is up to." *See id.* at 772 n.20, 773 (emphasis omitted) (quoting *Mink*, 410 U.S. at 105 (Douglas, J., dissenting)); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975). Bringing § 552(a)(2) records online and expanding the reading-room requirement to cover frequently requested documents, as accomplished by updates to FOIA, was specifically designed to reduce the need for individual requests and the corresponding lag time. *See supra* note 1. Yet the change of policy has required Plaintiffs to make requests for copies of the records previously publicly available—documents Plaintiffs allege must be posted with no request necessary. *See* 5 U.S.C. § 552(a)(2). We have no trouble concluding that Plaintiffs have suffered the kind of harm Congress sought to prevent.

That informational injuries may be redressed through public disclosure of the information—rather than merely providing copies of the information to individual

plaintiffs—is an unsurprising proposition given the traditional link between an informational injury and statutory provisions requiring publication of information. For example, the Supreme Court has found standing to seek an order requiring the DOJ to comply with the requirements of the Federal Advisory Committee Act, a law requiring public notice of advisory committee meetings and making advisory committee minutes, records and reports public. *Pub. Citizen*, 491 U.S. at 446–51. The D.C. Circuit has assumed standing under similar circumstances. *See Friends of Animals v. Jewell*, 828 F.3d 989, 995 (D.C. Cir. 2016) (explaining that plaintiffs "may well have informational standing to sue to compel the publication of the relevant data—that is, to compel compliance with [the Endangered Species Act's] *disclosure* requirement").

In sum, "[t]he doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance," *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004), and in this case, we answer yes. Plaintiffs have alleged they suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Their inability to inspect documents in virtual reading rooms harmed them in real-world ways; their injuries are different from the injuries sustained by other Americans who never regularly visited these online reading rooms. Additionally, their alleged injuries are "fairly traceable" to the agency's action, and likely to be redressed by their requested relief. *See id.* at 1547. Thus, we have satisfied our "independent obligation" to assure ourselves that Plaintiffs have standing. *Summers*, 555 U.S. at 499; *Bennett*, 520 U.S. at 168.

II.

FOIA vests in district courts the "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). This provision cloaks district courts with the authority to order an agency to post records in an online reading room. We reach this conclusion by following familiar lodestars: text, structure, and precedent.

A.

Whether federal courts may order agencies to comply with FOIA's reading-room provision depends on whether such an order fits within FOIA's jurisdictional grant. It is axiomatic that we resolve questions of statutory interpretation starting with the text.

FOIA creates "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). The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). Indeed, we have already defined the words "to enjoin" in § 552(a)(4)(B) as "[t]o legally prohibit or restrain by injunction. To prescribe, mandate, or strongly encourage." *Hajro*, 811 F.3d at 1101 (quoting *Enjoin*, Black's Law Dictionary (10th ed. 2014)). We interpret the words "to enjoin the agency from withholding agency records" to mean what they say: FOIA authorizes district courts to stop the

agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online. That the statute uses broad words to vest expansive equitable authority in district courts does not create ambiguity or vagueness.

Nor do we detect anything absurd about allowing district courts to halt violations of FOIA's clear command that agencies "shall" make certain records available for public inspection. *See* 5 U.S.C. § 552(a). To the contrary, reading the words "jurisdiction to enjoin [an] agency from withholding agency records," to mean Congress *withheld* jurisdiction to enjoin agencies from withholding agency records would directly contradict the plain text. We may not shirk our "sole function[,]" which "is to enforce [the statutory language] according to its terms." *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296 (citation omitted).[11]

Not only does the plain meaning of the phrase "jurisdiction to enjoin [an] agency from withholding agency records" allow courts to order agencies to comply with their § 552(a)(2) obligations, but surrounding words confirm our reading. "[T]he Court will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). If, as APHIS argues, Congress only authorized federal courts to "order the production" of records to a particular complainant, then the judicial-review

[11] Interpreting FOIA's "explicit" jurisdictional language, the Supreme Court has noted that the Senate Report explaining the addition of the "enjoin" phrase stated "[t]he provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18 & n.18 (1974) (quoting S. Rep. No. 88-1219, at 7 (1964)).

provision would not need the words "jurisdiction to enjoin the agency from withholding agency records"; the latter phrase would do all of the necessary work. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Bailey v. United States*, 516 U.S. 137, 146 (1995) (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense).

APHIS responds, arguing that we cannot give meaning to the "to enjoin" clause without rendering superfluous the "to order production" clause, because authority to "enjoin the . . . withholding" includes the power to "order the production" of documents improperly withheld. Not necessarily. The doctrine of *noscitur a sociis*, "which is that a word is known by the company it keeps," can work alongside the principle against rendering some words altogether meaningless. *See, e.g.*, *Gustafson*, 513 U.S. at 574–76.[12] Here, the judicial review provision uses the word "to" twice in the same sentence, providing "jurisdiction *to* enjoin . . . and *to* order." 5 U.S.C. § 552(a)(4)(B) (emphasis added). We find this significant. After all, "words are chameleons, which reflect

[12] Most often, *noscitur a sociis* applies when interpreting words in a list, and helps us resolve ambiguities by identifying a common trait among words and ruling out meanings that wouldn't make sense. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (determining a fish is not a "tangible object" for purposes of obstruction of justice statute). However, we have also used this doctrine to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words," *Gustafson*, 513 U.S. at 575, because "a word is given more precise content by the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008). Thus, in *Gustafson*, the Court determined the word "communication" means a public communication, not *any* communication, because it appeared in a list of other words referring to "wide dissemination" and a broader definition would render other words redundant. 513 U.S. at 574–576.

the color of their environment." *Yates*, 135 S. Ct. at 1083 (quoting *Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948)). Where we can breathe life into every word of a sentence without having one phrase cannibalize another, we should. Thus, if the authority "to enjoin the agency from withholding" includes the authority to order the agency to produce copies of the withheld records to a particular person, the solution is to read the broader "to enjoin" clause as excluding the power created by the more specific "to order" clause to avoid superfluity.[13]

APHIS eschews reliance on the precise wording of the provision, and argues instead that we should rely on Congress's decision to use the word "and" instead of "or" to separate the words "to enjoin" and "to order." That is, the agency believes the "and" collapses the two parts of the sentence into a single type of order, one that "enjoin[s] the . . . withholding . . . and . . . order[s] the production of any agency records improperly withheld from the complainant." *See* 5 U.S.C. § 552(a)(4)(B). However, this interpretation exaggerates rather than minimizes the superfluity problem; the word "and" finds itself between two infinitives ("to enjoin . . . and to order"), and both sides of the "and" repeat the words "agency," "records," and forms of the word

[13] Indeed, the phrase "to enjoin the agency from *withholding* agency records" may very well refer to equitable prospective relief, whereas authority "to order the production of agency records improperly *withheld*" refers to equitable retrospective relief. *See* 5 U.S.C. § 552(a)(4)(B) (emphasis added); *cf. Hajro*, 811 F.3d at 1101 ("The plain language clearly contemplates declaratory and injunctive relief, which is what Plaintiffs seek."); *DOJ v. Tax Analysts*, 492 U.S. 136, 153 n.13 (1989) ("[O]nce an agency has complied with the subsection (a)(1) and (a)(2) obligations, it can no longer be charged with 'withholding' the relevant records.").

"withhold." *See* 5 U.S.C. § 552(a)(4)(B). In any event, "the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute; if it could (with all due respect to Congress), we would interpret a great many statutes differently than we do." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).[14]

B.

FOIA's structure confirms what the text of the judicial-review provision makes plain: district judges can order agencies to comply with their obligations under § 552(a)(2). To recap, FOIA's first provisions impose three chief duties on agencies, depending on the documents involved. 5 U.S.C. § 552(a)(1)–(3). Then, FOIA creates the machinery to address violations, such as authorizing judicial review, *id.* § 552(a)(4)(B), requiring the Office of Special Counsel to investigate particularly significant violations, *id.* § 552(a)(4)(F), and implementing reporting requirements to bolster congressional oversight, *see, e.g.*, *id.* § 552(e)(1)(Q) (requiring agencies to report the number of records made available for public inspection under § 552(a)(2)).

We start from the basic proposition that FOIA expressly contemplates judicial review of § 552(a)(2) violations. *Cf.*

[14] Even if APHIS's reading were correct, the judicial-review provision contains no clear command that limits *how* a district court may order "the production of any agency records . . . withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That is, Plaintiffs here are asking the district court to determine whether agency records have been "improperly withheld" from Plaintiffs by the agency's failure to make the records available for reading-room inspection. A district court could order "the production" by ordering the agency to post records in an online reading room.

Citizens for Responsibility & Ethics in Washington v. DOJ ("*CREW I*"), 846 F.3d 1235, 1245 (D.C. Cir. 2017) ("FOIA contains an express private right of action."). To conclude otherwise would conflict with the plain text of the judicial-review provision and the statute's "duty-breach" structure. Indeed, immediately following the language creating jurisdiction "to enjoin" agencies from withholding records, FOIA expressly provides the standard for reviewing "feasibility" under § 552(a)(2)(C). 5 U.S.C. § 552(a)(4)(B).[15]

Although the parties seem to agree with this basic proposition, they disagree about what relief a district court may grant in § 552(a)(2) cases. APHIS argues that the judicial-review provision restricts courts to ordering agencies to produce copies of the records to an individual plaintiff. Yet this reading collapses an agency's affirmative responsibility to post certain records (identified in the statute by Congress) into an agency's responsibility to respond to requests for copies of documents under § 552(a)(3). However, § 552(a)(3) does not apply to "records made available under paragraphs (1) and (2) of this subsection." The idea of § 552(a)(3) annexing § 552(a)(2) for purposes of judicial review creates particular problems in the case of frequently requested documents required to be posted under § 552(a)(2)(D). APHIS's interpretation would mean FOIA deliberately brings certain § 552(a)(3) records into

[15] Additional FOIA provisions anticipate judicial review of an agency's determination under § 552(a)(2). *See, e.g.*, *id.* § 552(a)(6)(C)(i) (deeming a "person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" to "have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions"); § 552(a)(6)(A) (providing the timelines for when an agency must respond to requests "for records made under paragraph (1), (2), or (3) of this subsection").

§ 552(a)(2)—specifically to preempt § 552(a)(3) requests—yet, if an agency shrugs that congressional command, the statute forces plaintiffs right back into the requests and backlogs Congress sought to avoid in the first place.

APHIS next argues that district courts only have authority to order agencies to produce copies of § 552(a)(2) records to particular plaintiffs, because the statute authorizes district courts to refer certain cases that raise questions about the agency's conduct to the Office of Special Counsel, but only if "the court orders the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(F)(i). APHIS argues it would be illogical for Congress to include such a provision if courts did in fact have authority under the "to enjoin" clause to order agencies to post § 552(a)(2) documents in online reading rooms, because a court "must do so at the price of losing its authority to institute disciplinary proceedings." However, the provision simply allows district courts, when ordering "records improperly withheld" to be produced, to flag when "agency personnel acted arbitrarily or capriciously," because these additional written findings trigger a mandatory duty for the Office of Special Counsel to investigate.[16] *See id.*

[16] The relevant part of § 552(a)(4)(F) reads:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special

§ 552(a)(4)(F). We see nothing irrational about isolating a particular evil—bureaucrats arbitrarily denying requests for copies of documents from particular people—for mandatory investigation. Moreover, as "masters of their complaints," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013), plaintiffs are free to seek relief that would not necessarily trigger a mandatory investigation.

Finally, APHIS argues that the judicial-review provision must only apply if there is a "request for records," because the provisions laying out the process for exhaustion of administrative remedies refer specifically to "request[s] [for records] under paragraph (1), (2), or (3) of this subsection." *See* 5 U.S.C. § 552(a)(6). However, the judicial-review provision does not make a "request for records" a jurisdictional prerequisite. *See Yagman*, 868 F.3d at 1083. Although the enumerated provisions of the reading-room requirement say nothing about making a request to access records posted in an online reading room, "request[s] [for records] under paragraph . . . (2)" could refer to the undifferentiated text at the bottom of § 552(a)(2), which allows citizens to request a copy of the general index each agency must make available for public inspection. *See* 5 U.S.C. § 552(a)(2) (requiring agencies to "provide copies of such index on request at a cost not to exceed the direct cost of duplication").

Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.

C.

In addition to the text and structure of FOIA, several lines of Supreme Court and Ninth Circuit precedent support interpreting FOIA's judicial-review provision as authorizing district courts to order agencies to comply with their § 552(a)(2) obligations. First, the Supreme Court has interpreted the equitable power of district courts under FOIA broadly. *See Bannercraft Clothing Co.*, 415 U.S. at 20 ("With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."). In fact, in *Bannercraft*, the Court even went so far as to note that the "enjoining" phrase in the judicial review provision was included to make clear that district courts had this power. *Id.* at 18 n.18. Our circuit has since interpreted and applied the teaching of *Bannercraft*, stating definitively that "Congress did not intend to limit the court's exercise of its inherent equitable powers where consistent with the FOIA." *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982).[17]

In addition to broad equity powers to provide relief for FOIA violations, our circuit has recognized that courts are the

[17] We do not suggest that a district court's authority to order agencies to comply with their § 552(a)(2) obligations stems exclusively from its "inherent equitable powers." *See id.* Nor do we suggest that, just because a district court can order agencies to comply with § 552(a)(2), it has no discretion in designing this relief. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) ("[A] federal judge . . . is not mechanically obligated to grant an injunction for every violation of law."). Our point is simply that *Bannercraft* and *Long* explain the long rein district courts enjoy vis-a-vis designing the appropriate remedies for FOIA violations. *See Bannercraft Clothing Co.*, 415 U.S. at 20; *Long*, 693 F.2d at 909.

"enforcement arm" of FOIA, meaning we have "the responsibility of ensuring the fullest responsible disclosure." *See Long*, 693 F.2d at 909; *cf. Yagman*, 868 F.3d at 1080 (concluding agencies must construe FOIA requests liberally to achieve the core purpose of FOIA). To ensure district courts live up to this special obligation, we have specifically instructed district courts to consider equitable relief when necessary to bar future FOIA violations. For example, in *Long*, we considered an Internal Revenue Service ("IRS") policy of delaying the release of requested documents to force individuals to file FOIA lawsuits; upon filing, the IRS would "voluntarily" release the documents. 693 F.2d at 908. The *Long* plaintiffs requested injunctive relief to prevent these delays, which the district court denied. *Id.* On appeal, we determined that "the IRS' contention that the district court lacks authority to grant the requested injunctive relief is without merit." *Id.* at 909. "[W]here the district court finds a probability that alleged illegal conduct will recur in the future, an injunction may be framed to bar future violations that are likely to occur." *Id.*

APHIS attempts to distinguish *Long* by arguing that *Long*'s injunctive relief was not "additional" relief to which plaintiffs were not entitled, because the injunction remedied prolonged delays in responding to FOIA requests. *See id.* at 908–09. We disagree. This argument simply assumes APHIS is correct that FOIA withholds authority to order compliance with the reading-room requirement. Within its grant of authority to district courts "to enjoin the agency from withholding agency records," 5 U.S.C. § 552(a)(4)(B), FOIA authorizes district courts to craft relief that includes requiring an agency to post § 552(a)(2) documents online.

Long's legacy lives on. Recently, we explained that *Long* is an example of a "claim that an agency *policy or practice* will impair the party's lawful access to information in the future." *Hajro*, 811 F.3d at 1103 (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988)). Like Plaintiffs' § 552(a)(2) claim, policy or practice claims stem from an agency's policy of violating FOIA rather than from the results of a particular request (such as a claim the agency has withheld requested material under an inapplicable exemption). That is, an agency cannot moot a pattern or practice claim by providing the requested documents. *Id.*; *Payne Enters., Inc.*, 837 F.2d at 491; *see also Animal Legal Def. Fund* v. *USDA*, No. 18-16327, 2019 WL 3770822, at *3 (9th Cir. Aug. 12, 2019). We cannot square our precedents with the agency's position that courts have no authority beyond ordering the agency to produce a copy of a requested document to the requester.

D.

APHIS's chief argument against allowing district courts to order compliance with the reading-room provisions relies on the D.C. Circuit's decision in *CREW I*. *See* 846 F.3d at 1238–44. We appreciate our sister circuit's analysis in *CREW I*, but do not agree that FOIA so constrains judicial enforcement of the reading-room provision.

At one time, the D.C. Circuit allowed district judges to order agencies to produce records for public inspection per FOIA's reading-room requirements. *See e.g.*, *Am. Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1969) ("Thus, we conclude that the Board's April 11 ruling clearly falls within the confines of 5 U.S.C. § 552(a)(2)(A) and consequently it must be produced for public inspection."); *Merrill v. Fed.*

Open Mkt. Comm. of the Fed. Reserve Sys., 413 F. Supp. 494, 506 (D.D.C. 1976) ("Defendant's other policy actions are subject to subsection (a)(2) of the Act and in accordance with that subsection must be made available for public inspection and copying unless promptly published."), *aff'd*, 565 F.2d 778 (D.C. Cir. 1977), *vacated on other grounds*, 443 U.S. 340 (1979).

Then the D.C. Circuit considered *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). *Kennecott* analyzed whether a court could order an agency to publish a final regulation in the Federal Register, as required by 5 U.S.C. § 552(a)(1). *Id.* at 1201–02.[18] The D.C. Circuit concluded such relief did not fall within a court's authority to "order the production of any agency records improperly withheld from the complainant" under § 552(a)(4)(B). *Id.* at 1203. But it did not examine potential authority under the clause providing jurisdiction "to enjoin the agency from withholding any records." *Id.* Moreover, *Kennecott* involved a violation of § 552(a)(1)'s requirement to *publish* certain records in the Federal Register, whereas this case involves making certain records *available for public inspection* under § 552(a)(2). Making a record *available* for public inspection is synonymous with *producing* a record for public inspection. *See Gulick*, 411 F.2d at 703 (determining

[18] *Kennecott* is a midnight regulation case. Weeks before a presidential transition, the Department of the Interior ("DOI") promulgated a rule concerning certain hazardous wastes and sent it to the Office of the Federal Register for publication in the Federal Register. *Id.* With a new president in office, the DOI then withdrew the regulation before final publication. *Id.* The DOI promulgated a new rule, which Kennecott Copper challenged on procedural grounds, requesting the court to declare the earlier regulations valid and to direct the government to publish them in the Federal Register. *Id.*

a record "falls within" § 552(a)(2) and "consequently it must be produced for public inspection"). Thus *Kennecott* appeared to preserve that circuit's earlier holdings (in *Merrill* and *Gulick*) allowing district courts to order agencies to produce records for public inspection, because it explicitly distinguished *Merrill* as a case where the district court "ordered 'production' [for public inspection] of . . . records, not publication [in the Federal Register]." *Kennecott*, 88 F.3d at 1203 (citing *Merrill*, 413 F. Supp. at 507).

Next came *CREW I.* In that case, CREW filed suit under the APA to compel the DOJ's Office of Legal Counsel ("OLC") to disclose OLC opinions under FOIA's reading-room provision. *CREW I*, 846 F.3d at 1240. The D.C. Circuit affirmed the district court's dismissal of the suit, determining that CREW had not satisfied a predicate requirement for bringing suit under the APA because there was an "adequate remedy" under FOIA. *Id.* at 1244–1246; 5 U.S.C. § 704. The D.C. Circuit also determined that FOIA's "adequate remedy" extends to producing the records "only to CREW, not disclosure to the public." *CREW I*, 846 F.3d at 1244.

Thus, *CREW I* may have changed D.C. Circuit FOIA jurisprudence by relying on *Kennecott*—which concerned FOIA obligations to publish certain records in the Federal Register, 5 U.S.C. § 552(a)(1)—rather than its earlier cases, which had granted relief for violations of the reading-room provision. Moreover, *CREW I* acknowledged that *Kennecott* did not discuss the scope of the statutory language broadly authorizing injunctions against withholding of records, but concluded that *Kennecott* "implicitly" considered that language and limited the "scope of section 552(a)(4)(B) as a whole." *CREW I*, 846 F.3d at 1244. In particular, *CREW I*

relied on *Kennecott*'s statement that § 552(a)(4)(B) "is aimed at relieving the injury suffered by the individual complainant, not by the general public" because "[i]t allows district courts to order 'the production of any agency records improperly withheld *from the complainant*,' not agency records withheld from the *public*." *Id.* at 1243 (alteration and emphasis in original) (quoting *Kennecott*, 88 F.3d at 1203 (citing 5 U.S.C. § 554(a)(4)(B))).

We decline to follow our sister circuit's decision in *CREW I* for several reasons. First, *CREW I* renders the reading-room provision into precatory language, despite § 552(a)(2) imposing a mandatory duty for agencies to make certain records "available for public inspection" and § 552(a)(4)(B) granting "jurisdiction to enjoin the agency from withholding agency records." We can easily imagine the significant implications of rendering § 552(a)(2) a dead letter; an agency would have no enforceable duty to post its important staff manuals, or its interpretation of the statute it's charged with enforcing, or its final opinions in agency adjudication. *See id.* § 552(a)(2).

Second, the argument that FOIA's judicial-review provision is limited to "relieving the injury suffered by the individual complainant, not by the general public" is a red herring. *See CREW I*, 846 F.3d at 1243 (quoting *Kennecott*, 88 F.3d at 1203). The injuries complained of here *are* injuries sustained by individuals. Ordering an agency to upload records that FOIA mandates agencies will post in reading rooms would provide relief to plaintiffs, like those here, injured by the agency's failure to make those records so available.

Third, *CREW I* failed to appreciate how courts enforce other provisions of the U.S. Code that require agencies to post or publish records. *See, e.g.*, *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1099–1103 (9th Cir. 2006) ("[T]he [Endangered Species Act] . . . expressly directs the [U.S. Fish and Wildlife Service], when making a 'warranted but precluded' finding to 'publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.' As this wasn't done, we reverse for remand to the Service." (quoting 16 U.S.C. § 1533(b)(3)(B))). Just as "shall" means parts of the warranted but precluded finding "[are]n't optional," *id.* at 1103, FOIA unequivocally mandates that agencies "shall make available" certain documents in virtual reading rooms. 5 U.S.C. § 552(a)(2); *Dep't of Air Force*, 425 U.S. at 361. ("[T]he Act repeatedly states that official information shall be made available to the public, for public inspection." (quotation marks omitted)).

Finally, we cannot ignore how an even newer D.C. Circuit case, *CREW II*, creates some tension with *CREW I*. Again, CREW sought to compel the OLC to "make available all of its formal written opinions . . . under the so-called 'reading-room' provision." *CREW II*, 922 F.3d at 483. But this time, CREW sued under FOIA. *Id.* at 485. The district court dismissed the complaint for failure to state a claim, and the D.C. Circuit affirmed. *Id.* at 483. However, in so doing, the D.C. Circuit seemed to read *CREW I* narrowly, as though that earlier decision was limited to the proposition that "CREW improperly brought its claim under the [APA] instead of FOIA's judicial-review provision." *Id.* at 485 (citation

omitted).[19] Thus, D.C. Circuit law on this issue does not seem settled.

III.

APHIS urges us to affirm the district court's dismissal on an alternative ground: Plaintiffs have not exhausted their FOIA claim. However, judicial power to adjudicate a claim that an agency has violated § 552(a)(2)'s obligation to post agency records online does not turn on a request. *See Yagman*, 868 F.3d at 1083 ("[E]xhaustion cannot be considered a jurisdictional requirement."); *CREW I*, 846 F.3d at 1240 ("[A] plaintiff may bring an action under FOIA to enforce the reading-room provision, and may do so without first making a request for specific records under section 552(a)(3)."). Indeed, APHIS itself concedes that exhaustion poses no jurisdictional bar.

Moreover, the district court dismissed the case for lack of subject matter jurisdiction without addressing the exhaustion question, so the issue is not even properly before us. As an appellate court, we generally prefer to allow district courts to resolve issues first, particularly when they involve questions of fact. *See Hawkins v. Kroger Co.*, 906 F.3d 763, 773 & n.11 (9th Cir. 2018). Accordingly, we leave it to the district

[19] For example, *CREW II* does not describe either CREW's requested relief or § 552(a)(2) in terms indicating CREW was limited to seeking *copies* of the OLC opinions. *See id.* at 484 (describing how CREW "seeks to compel disclosure" of OLC opinions); *id.* at 486 (explaining that agencies "improperly" withhold records by "fail[ing] to comply with one of FOIA's 'mandatory disclosure requirements'" (quoting *Tax Analysts*, 492 U.S. at 150)). Despite the fact that courts are "not free to pretermit the question" of subject matter jurisdiction, *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009), *CREW II* does not address jurisdiction.

court on remand to decide in the first instance whether Plaintiffs have exhausted their reading-room claim, or whether such exhaustion would be futile.

IV.

The district court's order dismissing Plaintiffs' case for lack of subject matter jurisdiction also dismissed Plaintiffs' APA claims. Plaintiffs' first APA claim hinges on their allegation that, in the event we conclude there is no authority for district courts to order agencies to comply with FOIA's reading-room provision, then APHIS's failure to post categories of records previously available on the databases constitutes a "failure to act," reviewable as a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Having concluded that FOIA authorizes district courts to provide the relief Plaintiffs request, we affirm the district court's dismissal of the first APA claim.

We affirm the district court's dismissal of Plaintiffs' second APA claim for similar reasons. Plaintiffs' second APA claim alleges that the agency's decision to delete the databases constitutes final agency action reviewable under the APA's "arbitrary and capricious" standard. *Id.* § 706. Plaintiffs' allegations that FOIA's reading-room provision applies to all of the records in this case unlocked the gates for judicial review under FOIA. Because FOIA authorizes district courts to order agencies to comply with the reading-room provision and supplies the standard for reviewing such

claims, the potential for meaningful relief under FOIA displaces the APA's catch-all cause of action. *See id*. § 704.

REVERSED in part, AFFIRMED in part, and REMANDED.[20]

CALLAHAN, Circuit Judge, dissenting in part:

For the reasons set forth by the D.C. Circuit in *Citizens for Responsibility and Ethics in Washington v. Department of Justice*, 846 F.3d 1235, 1244–46 (D.C. Cir. 2017), I would hold that the Freedom of Information Act ("FOIA") provides an adequate alternate remedy and that "courts lack authority under FOIA to order agencies to 'make [records] available for public inspection.'" *Id.* at 1246 (alteration in original) (quoting 5 U.S.C. § 552(a)(2)). This holding is founded on the determination that "Section 552(a)(4)(B) . . . 'is aimed at relieving the injury suffered by the individual complainant, not by the general public' as '[i]t allows district courts to order "the production of any agency records improperly withheld *from the complainant*," not agency records withheld from the *public*.'" *Id.* at 1243 (alteration in original) (quoting *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996)).

Contrary to the majority's position that this distinction is a "red herring," this is the crux of the dispute, as stated in plaintiffs' own words: "In this case, plaintiffs have demonstrated informational injuries that can only be remedied by production of the disputed records to the *public*

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[20] Each party shall bear its own costs on appeal.

at large." (Emphasis added). Plaintiffs argue their injury is "based on the *public's* inability to access the records." This is exactly what the D.C. Circuit rejected: section 552(a)(2) allows "an injunction that would . . . require disclosure of documents . . . only to CREW, not disclosure to the public." 846 F.3d at 1244. This is also the basis for the district court's dismissal for lack of subject matter jurisdiction: "courts cannot compel agencies to make documents available to the public at large under FOIA's reading room provision" and thus "this court lacks jurisdiction to hear plaintiffs' FOIA claim." Ordering the publication of documents to the individual plaintiffs is not the same as ordering the publication of documents to the public at large. Because the latter is foreclosed by section 552(a)(4)(B), I would affirm the district court's dismissal of plaintiffs' FOIA claim for lack of subject matter jurisdiction.

Proactive Disclosures

Proactive disclosures -- where agencies make their records publicly available without waiting for specific requests from the public -- are an integral part of the Freedom of Information Act. All federal agencies are required to affirmatively and continuously disclose records proactively by subsection (a)(2) of the FOIA.[1] Although this "proactive disclosure provision" has always served a vital role in achieving an "informed citizenry" -- the central purpose of the FOIA,[2] now, proactive disclosures are in the spotlight like never before. The President and the Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."[3] (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, below.) Notably, the President has directed agencies to "take affirmative steps to make information public" without waiting for specific requests, and, to "use modern technology to inform citizens about what is known and done by their Government."[4] This directive, echoed by the Attorney General,[5] is both a reaffirmation

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

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[1] 5 U.S.C. § 552(a)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see Jordan v. DOJ, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary").

[2] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also NARA v. Favish, 541 U.S. 157, 171-72 (2004) (explaining that the FOIA is a means for "citizens to know 'what their government is up to'" (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))).

[3] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[4] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; accord Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009. pdf.

[5] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/
(continued...)

of, and an expansion upon, the long-standing proactive disclosure provision of the FOIA.[6]

That provision, subsection (a)(2) of the FOIA, requires agencies to proactively identify records falling within its scope and to make those records "available for public inspection and copying."[7] Agencies should also exercise their discretion to make a broader range of records available beyond the minimum required by the statute.[8] All proactively disclosed records should, to the extent practicable, be posted online on agency websites.[9] By doing so, agencies will ensure efficient[10] and ongoing compliance with the FOIA's proactive disclosure provision

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[5](...continued)
foia-memo-march2009.pdf.

[6] See 5 U.S.C. § 552(a)(2).

[7] Id.; see, e.g., Jordan, 591 F.2d at 756 (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

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[8] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (stating that agencies should automatically disclose information about "what is known and done by . . . Government"); Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (calling for an increase in the systematic online posting of information in advance of FOIA requests); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that making more information public is a "key area where agencies should strive for significant improvement").

[9] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing agencies to "use modern technology" in disclosing information); Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (calling on agencies to "harness new technologies" in putting information online); Attorney General Holder's FOIA Guidelines, available at http:// www.usdoj.gov/ag/foia-memo-march2009.pdf (emphasizing online availability of proactive disclosures); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (same).

[10] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting more information online reduces the need for individual information requests and may help reduce agency backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that "the more information that is made available on agency websites, the greater the potential to reduce the number of individual requests for records"); FOIA Update, Vol. XVI, No. 1, at 1-2 (discussing affirmative information disclosure as a means to meet public demand); see also (continued...)

and with the President's and the Attorney General's mandate for the expanded use of proactive disclosures to create "an unprecedented level of openness."[11]

Proactive disclosures are an efficient means to make records publicly available that otherwise might be sought through less efficient FOIA requests.[12] In some circumstances, however, it may be appropriate for agencies to "withhold" (i.e., not make available) a record, or portion of a record, which is otherwise designated for proactive disclosure if it falls within a FOIA exemption, just as is done in response to FOIA requests.[13] As with FOIA requests, agencies should consider making a discretionary release of information, which is permissable

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[10](...continued)
FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing efficiency of making records available to the public through the internet).

[11] President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685; see President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

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[12] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing that agencies "should take affirmative steps to make information public" and "should not wait for specific requests" to do so); see also President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685 (requiring agencies to "disclose information rapidly"); see, e.g., FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting "affirmative" agency disclosure practices through subsection (a)(2) access, among other means); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (emphasizing that bringing any pre-existing proactive disclosures to "FOIA requesters' attention . . . could be a basis for resolving their requests most efficiently").

[13] See, e.g., Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (applying commercial privilege to subsection (a)(1) record and recognizing that subsection (a)(2) records likewise may be protected by FOIA exemptions in determining that an (a)(2) document could still be withheld pursuant to the work-product privilege); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 n.21 (1975) (acknowledging that subsection (a)(2) records may be protected by FOIA exemptions); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (finding it unnecessary to decide whether documents were subsection (a)(2) records, because attorney work-product privilege protected them in any event); Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (applying Exemption 2 to portions of subsection (a)(2)(C) record); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at *3 n.2 (D.D.C. June 30, 2006) (recognizing that contents of subsection (a)(2)(C) documents can be withheld pursuant to FOIA exemptions), summary affirmance granted, No. 06-5427 (D.C. Cir. May 24, 2007); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *6-7 (D.D.C. Mar. 15, 1996) (applying attorney work-product privilege to subsection (a)(2)(B) records); see also FOIA Update, Vol. XIII, No. 3, at 4 (advising that "an agency may withhold any record or record portion falling within subsection (a)(2) . . . if it is of such sensitivity as to fall within a FOIA exemption").

under a number of FOIA exemptions, whenever appropriate.[14]

Subsection (a)(2): Making Records Available for Public Inspection

Subsection (a)(2) of the FOIA applies to four categories of agency records that, while not automatically published under subsection (a)(1) of the FOIA,[15] must routinely be made "available for public inspection and copying."[16] This "public inspection" requirement is satisfied by providing the public with access to the designated documents automatically and without waiting for a FOIA request.[17] The proactive disclosure provision of the FOIA imposes an affirmative disclosure obligation that requires agencies to not only maintain, but also to continuously update, the records in each of the four categories designated by subsection (a)(2) of the FOIA.[18] While agencies historically satisfied the disclosure requirements of this provision by making the four categories of records available to the public in paper-based collections known as "Reading Rooms," thereby compelling citizens to visit an agency's records collection in person, agencies now typically make these records available

[14] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (describing exemptions where discretionary release is not appropriate due to existence of other statutes which provide protection for information, and also describing those exemptions where discretionary release is possible); FOIA Update, Vol. XVIII, No. 1, at 3 (cautioning that any personal information about an individual or business information that would not be disclosed to a third-party FOIA requester, such as information protected by Privacy Act of 1974, 5 U.S.C. § 552a (2006), or Trade Secrets Act, 18 U.S.C. § 1905 (2006), would not be appropriate for automatic public disclosure under "frequently requested" records category); id. at 5 (cautioning agencies to guard against possibility that proactive disclosure of record generated by outside party might be regarded as copyright infringement by that party). See generally Doe v. U.S. Dep't of Labor, 451 F. Supp. 2d. 156, 176 (D.D.C. 2006) (finding that agency's proactive disclosure of subsection (a)(2)(A) decisions without redacting claimants' names violated Privacy Act of 1974) (vacated pursuant to settlement Mar. 22, 2007).

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[15] 5 U.S.C. § 552(a)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (providing for Federal Register publication of very basic agency information, as discussed under Introduction, above).

[16] 5 U.S.C. § 552(a)(2); see, e.g. Jordan v. DOJ, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (recognizing "automatic availability" of subsection (a)(2) records).

[17] See 5 U.S.C. § 552(a)(2); see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

[18] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); see also FOIA Update, Vol. XVII, No. 4, at 1-2 (describing proactive disclosure requirements under Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048).

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electronically by posting them on agency websites.[19] Indeed, to the extent possible, agencies should strive to provide these records entirely on their websites.[20]

In an exception to the FOIA's proactive disclosure requirement, records that are published and offered for sale by an agency, either directly or indirectly,[21] are not required to be proactively disclosed under subsection (a)(2).[22] Finally, with the exception of records that

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[19] See 5 U.S.C. § 552(a)(2) (requiring proactively disclosed records created after November 1, 1996, to be made available by "electronic means"); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing GAO report's emphasis on agency compliance with electronic availability obligations); *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (advising of growing attention being paid to agencies' electronic disclosure of records). See generally *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (citing use of "electronic Reading Rooms" in making records available by electronic means); FOIA Update, Vol. XVIII, No. 1 (addressing use of electronic and conventional "Reading Rooms" as a means of proactive disclosure).

[20] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (emphasizing role of technology in improving information dissemination); Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (same); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; (emphasizing online availability of proactive disclosures); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (same).

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[21] See, e.g., *FOIA Post*, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02) (describing operation of National Technical Information Service (commonly known as "NTIS") in governmentwide process of record dissemination); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,018 (1987) (recognizing NTIS as "statutor[il]y-based" government record distribution program).

[22] See 5 U.S.C. § 552(a)(2); Jackson v. Heckler, 580 F. Supp. 1077, 1081 (E.D. Pa. 1984) (holding that Social Security Ruling relied on by administrative law judge need not be made "available for inspection and copying" pursuant to subsection (a)(2)(B) because it was "published for sale"); see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (noting that records which are published and offered for sale are "excluded from the definition of [subsection (a)(2)] records" and need not be proactively disclosed even if doing so would otherwise be required); FOIA Update, Vol. XVII, No. 4, at 1 (noting that Reading Room obligation does not apply to any records that "are promptly published and [are] offered for sale" (quoting 5 U.S.C. § 552(a)(2))); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) 15 (noting that the exclusion of records which are published and (continued...)

are proactively disclosed because they have been frequently requested under the FOIA,[23] records required to be made publicly available under subsection (a)(2) are not required to be processed in response to regular FOIA requests.[24] If an agency receives a request for records that it posted on its website, but which do not technically fall within subsection (a)(2), though, those records should generally be provided to the requester if he or she prefers access that way, provided the records are "readily reproducible" in the format requested.[25]

Categories of Records Required to be Disclosed Proactively

As noted above, there are four categories of records that agencies are required by

[22](...continued)
offered for sale from the proactive disclosure obligation "is to afford the agency 'an alternative means of making these materials available through publication'" (quoting S. Rep. No. 89-813, at 7 (1966))).

[23] See FOIA Update, Vol. XVIII, No. 1, at 3 (advising that Congress made clear that records falling within subsection (a)(2)(D) (i.e., the "fourth" category of subsection (a)(2) records, those which are "frequently requested") are exception to general rule and are subject to regular FOIA requests as well).

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[24] See 5 U.S.C. § 552(a)(3)(A) (excluding from subsection (a)(3) those records which are "made available" under subsections (a)(1) or (a)(2)); see also DOJ v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2)."); Schwarz v. U.S. Patent & Trademark Office, 80 F.3d 558, 558 (D.C. Cir. 1996) (unpublished table decision) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. IRS, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); cf. Reeves v. United States, No. 94-1291, 1994 WL 782235, at *1-2 (E.D. Cal. Nov. 16, 1994) (dismissing lawsuit because FOIA requests sought publicly available agency regulations).

[25] 5 U.S.C. § 552(a)(3)(B) (requiring that records disclosed pursuant to FOIA requests be provided in any "readily reproducible" form or format chosen by a requester); see President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685 (directing that agency disclosures should be made "in forms that the public can readily find and use"); President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (reminding agencies that disclosures should be made in a "spirit of cooperation"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising agencies to ensure that the process of requesting records is "easy"); see also FOIA Update, Vol. XVI, No. 1, at 2 (stating that voluntary disclosure does not preclude a record from subsection (a)(3) access); FOIA Update, Vol. XII, No. 2, at 5 (advising that FOIA requesters may not be deprived of subsection (a)(3) access rights through voluntary disclosure).

statute to proactively disclose[26] -- (1) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases,[27] (2) specific agency policy statements,[28] (3) certain administrative staff manuals "that affect a member of the public,"[29] and (4) records which have

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[26] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (describing four categories of records required to be proactively disclosed under subsection (a)(2)); FOIA Update, Vol. XIII, No. 3, at 4 (same).

[27] 5 U.S.C. § 552(a)(2)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155-59 (1975) (holding that NLRB "advice and appeals" memorandum deciding not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 603 (D.C. Cir. 2001) (finding that agency report of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not "final opinion" because determination of propriety of prosecution was neither "case" nor "adjudication"); Nat'l Prison Project v. Sigler, 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were subsection (a)(2) records).

[28] 5 U.S.C. § 552(a)(2)(B); see, e.g., Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1977) (noting that Social Security Ruling providing examples of medical conditions to be treated as "per se nonsevere" fell under subsection (a)(2)(B)); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *90 (W.D. Pa. Feb. 7, 2001) (holding that HHS documents that advised regional offices of agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *3 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were "statements of policy"), aff'd on other grounds, 117 F.3d 607 (D.C. Cir. 1997); Pub. Citizen v. Office of U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that agency submissions to a trade panel containing an agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the [agency]"); see also Vietnam Veterans of Am. v. Dep't of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice -- rendered in subject areas for which those officials do not have authority to act on behalf of agency -- were not "statements of policy or interpretations adopted by" those agencies and were not required to be published or made available for public inspection).

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[29] 5 U.S.C. § 552(a)(2)(C); see, e.g., Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (finding DEA agents' manual concerning treatment of confidential informants and search warrant procedures to be subsection (a)(2)(C) record); Stokes v. Brennan, 476 F.2d 699, 701 (5th Cir. 1973) (determining that "Training Course for Compliance Safety and Health Officers," including all instructor and student manuals, training slides, films, and visual aids, must be made available for public inspection and copying); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standards, were subsection (a)(2) records); see also Stanley v. DOD, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill.

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been released under subsection (a)(3) (i.e., by way of a specific request) that "the agency determines have become, or are likely to become, the subject of subsequent requests for substantially the same records."[30]

During the first thirty years of the FOIA's implementation, only the first three of these categories (i.e., final opinions and orders, policy statements, and staff manuals) were required to be made available by agencies. The Supreme Court has observed that routine public access to such records serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies.[31] Consequently, records in these categories that have no precedential value and do not constitute the working law of the agency are not required to be made available under this part of the Act.[32] The

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[29](...continued)
June 22, 1999) (finding that administrative staff manuals pertaining to military hospital procedures did not "affect the public" and were not required to be proactively disclosed).

[30] 5 U.S.C. § 552(a)(2)(D).

[31] See Sears, 421 U.S. at 153-54 (observing that the proactive disclosure provision "represents a strong congressional aversion to 'secret [agency] law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law'" (quoting H.R. Rep. No. 89-1497, at 7 (1966))).

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[32] See Sears, 421 U.S. at 153-54; Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) ("That [proactive disclosure] requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8)); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975) (explaining that the "primary purpose of subsection (a)(2) was to compel disclosure of what has been called 'secret law,' or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases'" (quoting H.R. Rep. No. 89-1497, at 7)); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) (advising that keeping "orders available . . . [that] have no precedential value, often would be impracticable and would serve no useful purpose"); see also Smith v. NTSB, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of this "requirement is obviously to give the public notice of what the law is so that each individual can act accordingly"); Vietnam Veterans of Am., 876 F.2d at 165 (rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be proactively disclosed, because those opinions are not statements of policy that "operate as law"); Pa. Dep't of Pub. Welfare, 2001 U.S. Dist. LEXIS 3492, at *78 (holding that a FOIA subsection (a)(2) index "must include those matters that the agency considers to be of precedential value"); Stanley, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (holding that administrative staff manuals that do not have any "precedential significance" and would not assist members of the public in "tailor[ing] their behavior to the law" are not required to be made publicly available). But see Nat'l Prison Project, 390 F. Supp. at 793 (ruling otherwise prior to Supreme Court's decision in Sears, which focused on legislative history of subsection (a)(2)); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1303 (D.D.C. 1973) (same), modified & remanded on other grounds, 505 F.2d 350 (D.C. Cir. 1974). See generally Doe v. U.S. Dep't of Labor, 451 F. Supp. 2d 156, 175 (D.D.C. 2006) (finding
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proactive disclosure provision's fourth category of records -- also known as the "frequently requested" records category[33] -- was established pursuant to the Electronic Freedom of Information Act Amendments of 1996[34] which, as discussed in detail below, also introduced a requirement for the electronic availability of proactively disclosed records. The "frequently requested" records category encompasses any records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."[35] Under this provision, when records are disclosed in response to a FOIA request, an agency is required to determine whether they have been the subject of multiple FOIA requests (i.e., two or more additional ones) or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future.[36] Because public interest in the "frequently requested" records category may wane with time, agencies may exercise judgment as to the length of time that these records should be maintained on their websites.[37]

Inasmuch as this requirement by definition begins with the processing of records disclosed in response to a FOIA request, and then is met by multiple other such "requests,"[38] it is either the receipt or the anticipation of the third such request that triggers it.[39] If either

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[32](...continued)
that Employee Compensation Appeals Board decisions "form an essential corpus of administrative precedent" and are properly disclosed under subsection (a)(2) of the FOIA) (vacated pursuant to settlement Mar. 22, 2007).

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[33] See, e.g., *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); FOIA Update, Vol. XVII, No. 4, at 1 (describing obligations for "frequently requested" records); FOIA Update, Vol. XVIII, No. 1, at 3-4 (same).

[34] Pub. L. No. 104-231, 110 Stat. 3048.

[35] 5 U.S.C. § 552(a)(2)(D).

[36] See FOIA Update, Vol. XVIII, No. 1, at 3-4 (providing advice on exercise of agency judgment under fourth subsection (a)(2) category).

[37] See FOIA Update, Vol. XIX, No. 1, at 3 (advising that agencies "should use their judgment as to the length of time that records determined to fall within the new ["frequently requested" records] category should continue to be [made available]); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies may determine that records no longer fall within fourth subsection (a)(2) category after passage of time); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (advising that agencies "certainly can consider the absence of predicted FOIA requests as a factor in determining whether the continued maintenance of a record as a 'frequently requested' record is warranted").

[38] 5 U.S.C. § 552(a)(2)(D) (speaking of "requests" in plural form, above and beyond FOIA request already received).

[39] See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03)
(continued...)

is the case,[40] then those records in their FOIA-processed form must be made available to the public,[41] generally on the agency's website, so that they are readily available to all potential future FOIA requesters.[42] Ideally, this availability will satisfy much of the future public demand for those processed records in a more efficient fashion.[43] Nevertheless, any subsequent FOIA request received for such records has to be responded to in the regular way as well, if the requester so chooses.[44]

Disclosing Records Proactively to Achieve Transparency

The President has stressed that agencies should take "affirmative"[45] and "innovative"[46] steps in achieving transparency. The Attorney General likewise directed agencies to "post

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[39](...continued)
(explaining the "rule of three" that is employed to determine the applicability of the proactive disclosure obligation for "frequently requested" records); see also FOIA Update, Vol. XVII, No. 4, at 1 (describing obligations for "frequently requested" records); FOIA Update, Vol. XVIII, No. 1, at 3-4 (same).

[40] See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing proactive disclosure of records based upon the "frequently requested" records standard).

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[41] See id. (reminding that "an agency's [proactively disclosure] obligation arises with respect to any FOIA-processed record that is disclosed at least in some part").

[42] See id.; see also FOIA Update, Vol. XVII, No. 4, at 1-2 (discussing operation of proactive disclosure provision); FOIA Update, Vol. XIX, No. 1, at 3-4 (compilation of OIP policy guidance regarding subsection (a)(2) matters); cf. Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *4, 6 (D.D.C. May 1, 1998) (requiring agency to publish exceptionally large volume of FOIA-processed records on weekly basis, as they are processed, rather than all at once at conclusion of lengthy processing period).

[43] See FOIA Update, Vol. XVIII, No. 2, at 2 (citing H.R. Rep. No. 104-795, at 21 (1996)); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing underlying purpose of fourth subsection (a)(2) category); FOIA Update, Vol. XVII, No. 4, at 1 (emphasizing connection between fourth subsection (a)(2) category and electronic availability requirement in meeting public access demands).

[44] See FOIA Update, Vol. XVIII, No. 1, at 3 (advising that while ordinary rule is that records proactively disclosed under subsection (a)(2) cannot be subject of regular FOIA request, Congress made clear that such rule does not apply to "frequently requested" records (citing H.R. Rep. No. 104-795, at 21 (1996))).

[45] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum].

[46] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

information online in advance of any public request."[47] Thus, in addition to the proactive disclosure requirements mandated by the FOIA, agencies should actively seek out and identify records which, while not falling into one of the four subsection (a)(2) categories discussed above, are nonetheless of sufficient public interest to warrant automatic disclosure on an agency's website.[48] Such additional proactive disclosures are an efficient way to inform the public about the government's operations,[49] and are essential to the ongoing commitment to the principles of open government embodied in the FOIA.[50]

As a result of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines, agencies should implement systems and establish procedures by which records of interest to the public are routinely identified and systematically posted.[51] By increasing the

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[47] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[48] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

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[49] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also NARA v. Favish, 541 U.S. 157, 171-72 (2004) (explaining that the FOIA is a means for "citizens to know 'what their government is up to'" (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))); accord Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting more information online reduces the need for individual information requests and may help reduce agency backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (observing that discretionary releases have great potential to reduce the number of individual records requests agencies receive); OMB Circular A-130, "Management of Federal Information Resources" (November 28, 2000), available at http://www.whitehouse.gov/omb/assets/omb/circulars/a130/a130trans4.pdf (advising that "agencies have a responsibility to provide information to the public consistent with their missions" and directing agencies to disseminate information, in addition to that which is required to be provided under the FOIA, "as is necessary or appropriate for the proper performance of agency functions").

[50] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing agencies to automatically disclose information about "what is known and done by . . . Government"); Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (stating that "open government requires agencies to work proactively"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that making more information public is a "key area where agencies should strive for significant improvement").

[51] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (calling for an increase in the systematic online posting of
(continued...)

amount of information which is disclosed automatically, agencies will likely reduce the number of individual records requests they receive, while making great strides toward achieving greater transparency.[52]

Electronic Availability of Proactive Disclosures

In directing agencies to use "modern technology" in FOIA implementation, President Obama has recognized the critical role of the internet in enhancing information dissemination.[53] The use of technology in the proactive disclosure of information under the FOIA was first recognized in a key provision of the Electronic FOIA amendments, that required agencies to make records created on or after November 1, 1996, in all four categories of the FOIA's proactive disclosure provision, available to the public by "electronic means."[54]

Agencies often accomplish this electronic availability requirement through the use of "virtual" records collections, sometimes, but not exclusively, described as "electronic Reading

[51](...continued)
information in advance of FOIA requests); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09); see also OMB Circular A-130, section 8, available at http://www.whitehouse.gov/omb/assets/omb /circulars/a130/a130trans4.pdf (discussing federal dissemination policies for public information).

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[52] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting information proactively online may reduce number of individual requests an agency receives and may also reduce FOIA backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (observing that the more information that an agency identifies and posts online, the greater the potential to reduce the number of FOIA requests the agency will receive).

[53] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (directing agencies to "use modern technology" in disclosing information and requiring agencies to "act promptly" and to "timely" inform citizens about government operations without waiting for requests for information); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (calling on agencies to "harness new technologies" in putting information online and requiring agencies to "rapidly" disclose information that the public "can readily find and use").

[54] See 5 U.S.C. § 552(a)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (discussing electronic availability requirements for records created after November 1, 1996, and providing guidance on the treatment of paper copies of records created before that time).

Rooms," on their FOIA websites, but should first and foremost consider the needs of the community of individuals and entities that visit and use their websites in determining the most effective means by which to make these records available electronically.[55]

Indexing Proactive Disclosures

Subsection (a)(2) of the FOIA creates two separate but overlapping indexing requirements. First, agencies must index or otherwise organize the records they proactively disclose in order to facilitate the public's convenient access to them.[56] Second, agencies are specifically required by the FOIA to maintain a general index of the FOIA-processed records in the proactive disclosure provision's fourth category (i.e., "frequently requested" records) and to make that index available on their websites.[57] This indexing requirement is generally

[55] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list the records under separate links or headings on their websites); OMB Memorandum M-06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model" (Dec. 16, 2005), available at http://www.whitehouse.gov/omb/memoranda/fy_2006/m06-02.pdf (requiring agencies to organize and categorize information intended for public access, in order to "promote a more citizen-centered government"); see also OMB Memorandum M-05-04, "Policies for Federal Agency Public Websites" (Dec. 17, 2004), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2005/m05-04.pdf (directing agencies to ensure information quality); FOIA Update, Vol. XIX, No. 2, at 2 (emphasizing importance of keeping websites accurate and up-to-date); FOIA Update, Vol. XIX, No. 3, at 4 (recommending that agencies check both accuracy and viability of their FOIA websites links and text content of their FOIA websites on regular basis); FOIA Update, Vol. XIX, No. 3, at 3 (advising that "[c]larity to the website user is essential to the effectiveness of the site"); FOIA Update, Vol. XIX, No. 4, at 5 (observing that "an agency's FOIA website has become an essential means by which its FOIA obligations are satisfied," so FOIA website support "should be a primary mission of each agency's IT staff").

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[56] See 5 U.S.C. § 552(a)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Church of Scientology v. IRS, 792 F.2d 153, 159 (D.C. Cir. 1986) (noting that the FOIA requires an agency's subsection (a)(2) records to be reflected in a "current index" for public distribution); Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *82 (W.D. Pa. Feb. 7, 2001) (finding agency in violation of indexing requirement because index was incomplete and it was "nearly impossible" to distinguish precedential material from obsolete material).

[57] 5 U.S.C. § 552(a)(2)(E); see FOIA Update, Vol. XVII, No. 4, at 2 (discussing this statutory indexing requirement for "frequently requested" records).

satisfied by simply providing a distinct "link" to each document in this category.[58]

In complying with the FOIA's indexing requirements, agencies should establish an organizational system which enables a member of the public to readily locate desired materials.[59]

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[58] *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); see FOIA Update, Vol. XIX, No. 3, at 4 (recommending use of "visible links" for electronic indexing purposes).

[59] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2000) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list records under separate links or headings on their websites); OMB Memorandum M-06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model" (Dec. 16, 2005), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2006/m06-02.pdf (requiring agencies to organize and categorize information intended for public access, in order to "promote a more citizen-centered government"); OMB Circular A-130, "Management of Federal Information Resources" (November 28, 2000), available at http://www.whitehouse.gov/omb/assets/omb circulars/a130/ a130trans4.pdf (directing agencies to "help the public locate" information they disseminate to the public); OMB Memorandum M-05-04, "Policies for Federal Agency Public Websites" (Dec. 17, 2004), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2005/m05-04.pdf (requiring, for clarity, that agencies establish and enforce agency-wide policies for linking to other web pages); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies with separate websites for separate components "should ensure that [they] are linked together electronically so as to facilitate efficient user access"); see also FOIA Update, Vol. XVIII, No. 2, at 2 (advising agencies on practical treatment of written signatures on adjudicatory orders for proactive disclosure purposes).

Proactive Disclosures

Proactive disclosures – where agencies make records available to the public by posting them online – are an integral part of the Freedom of Information Act.[1] There are two distinct provisions in the FOIA requiring proactive disclosure of nonexempt records or information in one of two different ways.[2] The FOIA's nine exemptions apply as appropriate to any records that are required to be disclosed under the FOIA's proactive disclosure provisions.[3]

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[1] See 5 U.S.C. § 552(a)(1), (a)(2) (2012 & Supp. V 2017); see Jordan v. DOJ, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015, updated 1/11/2017) (emphasizing that "[p]roactive disclosures inform the public about the operations of their government, and they efficiently satisfy the demand for records of interest to multiple people").

[2] See 5 U.S.C. § 552(a)(1)-(a)(2).

[3] See 5 U.S.C. § 552(b); see also Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (applying commercial privilege to subsection (a)(1) record and recognizing that subsection (a)(2) records likewise may be protected by FOIA exemptions in determining that (a)(2) document could still be withheld pursuant to work-product privilege); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 n.21 (1975) (acknowledging that subsection (a)(2) records may be protected by FOIA exemptions); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (finding it unnecessary to decide whether documents were subsection (a)(2) records, because attorney work-product privilege protected them in any event); Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (applying Exemption 2 to portions of subsection (a)(2)(C) record); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at *3 n.2 (D.D.C. June 30, 2006) (recognizing that contents of subsection (a)(2)(C) documents can be withheld pursuant to FOIA exemptions), summary affirmance granted, No. 06-5427 (D.C. Cir. May 24, 2007); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *6-7 (D.D.C. Mar. 15, 1996) (applying attorney work-product privilege to subsection (a)(2)(B) records).

Subsection (a)(1) – Federal Register Publication

Subsection (a)(1) of the Freedom of Information Act requires agencies to "publish in the Federal Register for the guidance of the public" certain useful information about the agency and its functions, specifically:

- (A) descriptions of agency organization and the established places and methods for obtaining information;
- (B) general statements regarding the agency's methods of operation;
- (C) rules of procedure and descriptions of forms;
- (D) substantive agency rules and policies of general applicability; and
- (E) each amendment, revision, or repeal of the above four categories.[4]

Publication of these categories of information in the Federal Register is intended "to enable the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'"[5] Such publication serves as a "'guide [to] the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.'"[6]

Subsection (a)(2) – Public Inspection in an Electronic Format

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The second proactive disclosure provision requires federal agencies to "make available for public inspection in an electronic format" four specific categories of records.[7] This provision also serves "'to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies.'"[8] The four categories

[4] 5 U.S.C. § 552(a)(1)(A-E) (2012 & Supp. V 2017).

[5] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 4 (June 1967) (quoting S. Rep. No. 88-1219, at 3 (1964)).

[6] Id. at 5 (quoting S. Rep. No. 88-1219, at 11 (1964)).

[7] See 5 U.S.C. § 552(a)(2)(A-D); see also OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015, updated 1/11/2017) (describing four categories of records required to be proactively disclosed under subsection (a)(2)).

[8] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 14 (June 1967) [hereinafter 1967 Attorney General's Memorandum] (quoting S. Rep. No. 88-1219 at 12) ; see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (holding that "[t]he affirmative portion of the Act, expressly requiring indexing of 'final opinions,' 'statements of policy and interpretations which have been adopted by the agency,' and 'instructions to staff that affect a member of the public,' . . . represents a strong congressional aversion to 'secret (agency) law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'"); Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) ("That [proactive disclosure] requirement was designed to help the citizen find agency statements 'having precedential

of information required to be made available for public inspection in an electronic format consist of:

- (A) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases;[9]
- (B) specific agency policy statements;[10]

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significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8 (1966))); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975) (explaining that the "primary purpose of subsection (a)(2) was to compel disclosure of what has been called 'secret law,' or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases'" (quoting H.R. Rep. No. 89-1497, at 7)); see also Smith v. NTSB, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of this "requirement is obviously to give the public notice of what the law is so that each individual can act accordingly"); Viet. Veterans of Am. v. Dep't of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be proactively disclosed, because those opinions are not statements of policy that "operate as law"); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *78 (W.D. Pa. Feb. 7, 2001) (holding that a FOIA subsection (a)(2) index "must include those matters that the agency considers to be of precedential value"); Stanley v. DOD, No. 98-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (holding that administrative staff manuals that do not have any "precedential significance" "are akin to 'housekeeping matters' and fall outside the requirements of §552(a)(2)")).

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[9] 5 U.S.C. § 552(a)(2)(A); see, e.g., Sears, 421 U.S. at 155-59 (holding that NLRB "advice and appeals" memorandum declining not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 603 (D.C. Cir. 2001) (finding that agency report of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not "final opinion" because determination of propriety of prosecution was neither "case" nor "adjudication"); Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 669 (D.C. Cir. 2016) (holding that complaint resolution decisions for immigration judges are not "final opinions" rendered in the "adjudication of cases" because they do not reflect a final decision about the rights of outside parties); Nat'l Prison Project v. Sigler, 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were subsection (a)(2) records because they are agency orders made in adjudication of cases).

[10] 5 U.S.C. § 552(a)(2)(B); see, e.g., Pa. Dep't of Pub. Welfare, 2001 U.S. Dist. LEXIS 3492, at *90 (holding that HHS documents that advised regional offices of agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *3 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were "statements of policy"), aff'd on other grounds, 117 F.3d 607 (D.C. Cir. 1997); Pub. Citizen v. Office of U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that agency submissions to trade panel containing agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the [agency]"); see also Viet. Veterans of Am., 876 F.2d at 165

- (C) certain administrative staff manuals "that affect a member of the public;"[11] and
- (D) records which have been released in response to a request and "that because of the nature of their subject matter, the agency determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times."[12]

During the first thirty years of the FOIA's implementation, only the first three of these categories (i.e., final opinions and orders, policy statements, and staff manuals) were required to be made available for public inspection by agencies.[13] The fourth category of records required to be made available for public inspection – also known as the "frequently requested" records category[14] – was established pursuant to the Electronic

(finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice – rendered in subject areas for which those officials do not have authority to act on behalf of agency – were not "statements of policy or interpretations adopted by" those agencies and were not required to be published or made available for public inspection).

[11] 5 U.S.C. § 552(a)(2)(C); see, e.g., Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (finding DEA manual concerning treatment of confidential informants and search warrants to be subsection (a)(2)(C) record because manual only discussed DEA procedures for these law enforcement techniques and therefore was administrative in nature); Stokes v. Brennan, 476 F.2d 699, 701-02 (5th Cir. 1973) (rejecting defendant's contention that "Training Course for Compliance Safety and Health Officers," was a law enforcement manual and determining that it must be made available for public inspection and copying because it is "administrative in nature" and merely focuses on "educating new officers as to the scheme of the [law enforcement] standards as a whole"); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standards, were subsection (a)(2) records because they are "'instructions to staff that affect a member of the public'"); see also Stanley, No. 98-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (finding that administrative staff manuals pertaining to military hospital procedures did not "affect the public" and were not required to be proactively disclosed).

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[12] 5 U.S.C. § 552(a)(2)(D).

[13] See OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015, updated 1/11/2017) (explaining that requirement to proactively disclose "frequently requested" records not original to FOIA).

[14] See id. (explaining that "the obligation to post 'frequently requested' records was added to the FOIA for a more pragmatic reason [than that used for other three categories, i.e.], to help agencies achieve greater efficiencies by reducing the need to respond to numerous requests for the same records"); FOIA Update, Vol. XVII, No. 4, at 1 (describing obligations for frequently requested records).

Freedom of Information Act Amendments of 1996[15] which, as discussed below, also introduced a requirement for the electronic availability of (a)(2) records.[16]

The "frequently requested" records provision originally required agencies to proactively disclose records that had been released under the FOIA and that due to their subject matter the agency determined either were, or were likely to be, requested again.[17] The FOIA Improvement Act of 2016 further amended this provision to specify that records released in response to a request "that have been requested 3 or more times" are required to made proactively available."[18] The FOIA Improvement Act also replaced the requirement that agencies make (a)(2) records available for "public inspection and copying," with the requirement that agencies make such records available "for public inspection in an electronic format."[19]

Subsection (a)(2) requires agencies to make the specified categories of material available for public inspection in an electronic format "unless the materials are promptly published and copies offered for sale."[20] Relatedly, subsection (a)(3) of the FOIA, which affords the public the right to request access to agency records, applies "[e]xcept with respect to the records made available under paragraphs (1) and (2) of this subsection."[21]

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[15] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

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[16] Id. at 3048 (explaining that the purpose of the amendment is "to provide for public access to information in an electronic format, and for other purposes").

[17] See Electronic FOIA Amendments; OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015; updated 1/11/2017) (explaining that the Department of Justice has long used a "rule of three" where anticipated (or actual) receipt of three requests means records are "frequently requested" and so triggers posting requirement).

[18] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016); see also OIP Guidance: OIP Summary of the FOIA Improvement Act of 2016 (posted 8/17/2016) (noting that 2016 amendments codified "rule of three").

[19] FOIA Improvement Act of 2016.

[20] 5 U.S.C. § 552(a)(2); see Jackson v. Heckler, 580 F. Supp. 1077, 1081 (E.D. Pa. 1984) (holding that Social Security Ruling relied on by administrative law judge need not be made "available for inspection and copying" pursuant to subsection (a)(2)(B) because it was "published for sale"); see also 1967 Attorney General's Memorandum supra note 8, at 15 (noting that the exclusion of records which are published and offered for sale from the proactive disclosure obligation "is to afford the agency 'an alternative means of making these materials available through publication'" (quoting S. Rep. No. 89-813, at 7 (1966))).

[21] 5 U.S.C. § 552(a)(3)(A) (excluding from subsection (a)(3) those records which are "made available" under subsections (a)(1) or (a)(2)); see also DOJ v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials

Electronic Availability of Proactive Disclosures

The use of technology in the proactive disclosure of information under the FOIA was first recognized in a key provision of the Electronic FOIA amendments that required agencies to make records created on or after November 1, 1996, in all four categories of Subsection (a)(2) available to the public by "electronic means."[22] The FOIA Improvement Act of 2016 further updated subsection (a)(2) to specify that records covered by this subsection must be made available "for public inspection in an electronic format."[23] Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a "FOIA Library"[24] (previously referred to as an "electronic Reading Room").[25]

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that have already been disclosed under subsections (a)(1) and (a)(2)."); Renewal Servs. v. U.S. Patent & Trademark Office, 723 F. App'x. 491, 492 (9th Cir. 2018) ("by its own terms, § 552(a)(3) does not apply to records already made available in an electronic format by an agency pursuant to § 552(a)(2)"); Schwarz v. U.S. Patent & Trademark Office, 80 F.3d 558, 558 (D.C. Cir. 1996) (unpublished table decision) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. IRS, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); cf. Citizens for Responsibility and Ethics in Washington v. DOJ, 846 F.3d 1235, 1246 (D.C. Cir. 2017) (holding that FOIA offers adequate remedy in subsection (a)(3) for requesters seeking access to information required to be disclosed under subsection (a)(2)); Animal Legal Def. Fund v. Dep't of Agric., No. 17-00949, 2017 WL 2352009, at *1 (N.D. Cal. May 31, 2017) (holding that "there is no public remedy for violations of the reading room provision – courts may order production of documents to specific plaintiffs but cannot mandate publication to the public as a whole."); Campaign for Accountability v. DOJ, 278 F.Supp.3d 303, 316-17 (D.D.C. 2017) (while "[the] Court cannot order OLC to 'make available for public inspection and copying' all documents that are subject to the reading-room provision, . . . [the] Court *is* authorized to order that OLC produce any documents that it has improperly withheld in violation of the reading-room provision *to [plaintiff]*").

No. 17-16858 cited in ALDF v. USDA, archived on August 27, 2019

[22] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

[23] FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

[24] See FOIA.gov (providing easily accessible links to all agency FOIA libraries from a single website).

[25] See OIP Guidance: Agency FOIA Websites 2.0 (posted 11/30/2017) (explaining that agency FOIA websites including link to FOIA libraries on homepage, can be vital resources for users to find information that is already publically available without need for making request); OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015, updated 1/11/2017) (explaining that frequently requested records should be posted in agencies' FOIA

Indexing Proactive Disclosures

Subsection (a)(2) of the FOIA creates two separate but overlapping indexing requirements. First, agencies must "maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public" of subsection (a)(2) records.[26] Second, agencies are also required by the FOIA to make available for public inspection in an electronic format a "general index" of the FOIA-processed records in Subsection (a)(2)'s fourth category (i.e., "frequently requested" records).[27]

Libraries); OIP Guidance: Using Metadata in FOIA Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library (posted 2013, updated 7/16/2015) (explaining that FOIA Libraries provide a centralized location for agency FOIA disclosures while allowing flexibility for agencies in how they post records); OIP Guidance: Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements (posted 2008, updated 8/22/2014) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list the records under separate links or headings on their websites); see also FOIA Update, Vol. XIX, No. 2, at 2 (emphasizing importance of keeping websites accurate and up-to-date); FOIA Update, Vol. XIX, No. 3, at 4 (recommending that agencies check both accuracy and viability of their FOIA websites links and text content of their FOIA websites on regular basis); FOIA Update, Vol. XIX, No. 3, at 3 (advising that "[c]larity to the website user is essential to the effectiveness of the site"); FOIA Update, Vol. XIX, No. 4, at 5 (observing that "an agency's FOIA website has become an essential means by which its FOIA obligations are satisfied," so FOIA website support "should be a primary mission of each agency's IT staff").

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

[26] 5 U.S.C. § 552(a)(2) (2012 & Supp. V 2017); see OIP Guidance: Agency FOIA Websites 2.0 (posted 11/30/2017) (explaining that agency FOIA websites should be designed to help users easily find information of interest that might obviate need to make request); see also Church of Scientology v. IRS, 792 F.2d 153, 159 (D.C. Cir. 1986) (noting that the FOIA requires an agency's subsection (a)(2) records to be reflected in a "current index" for public distribution); Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); see also Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *82 (W.D. Pa. Feb. 7, 2001) (finding agency in violation of indexing requirement because index was incomplete and it was "nearly impossible" to distinguish precedential material from obsolete material).

[27] 5 U.S.C. § 552(a)(2)(E); see OIP Guidance: Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request (posted 2015, updated 1/11/2017) (encouraging agencies to review their FOIA Libraries to ensure that they are organized and user-friendly); OIP Guidance: Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements (posted 2008, updated 8/22/2014) (indexing requirement is generally satisfied by simply providing distinct "link" to each document in this category); OIP Guidance: Using Metadata in FOIA

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Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library (posted 2013, updated 7/16/2015) (explaining that using metadata when posting records can improve access to information on agency websites).

FOIA UPDATE: CONGRESS ENACTS FOIA AMENDMENTS

January 1, 1996

FOIA Update
Vol. XVII, No. 4
1996

CONGRESS ENACTS FOIA AMENDMENTS

In an action that culminates several years of legislative and administrative consideration of electronic record FOIA issues, Congress has enacted amendments to the Freedom of Information Act that address those issues and other procedural aspects of FOIA administration.

On September 17 and 18, respectively, the House of Representatives and the Senate passed H.R. 3802, a slightly modified version of a bill that was developed by the House Subcommittee on Government Management, Information, and Technology, chaired by Rep. Stephen Horn (R. Cal.). The bill received bipartisan support both in the House and in the Senate, where its principal sponsor was Sen. Patrick Leahy (D. Vt.).

Entitled the "Electronic Freedom of Information Act Amendments of 1996," the bill was signed into law by President Clinton on October 2, with the observation that it "reforges an important link between the United States Government and the American people." (See page 9 of this issue of *FOIA Update* for the text of President Clinton's signing statement.)

The amendments made to the Act by this new law address the subject of electronic records for the first time ever in the text of the statute. They also address the subject area of time limits and agency backlogs of FOIA requests, among other procedural provisions.

cited in ALDF v. USDA,
No. 17-16858 archived on August 27, 2019

Many of the amendments will take effect after a 180-day period, but the time limit and backlog-related provisions will take effect after one year, and some other provisions have specific other effective dates for implementation. (See chart at the end of this section.) For purposes of agency implementation, the amendments can be considered within several distinct subject areas.

Electronic Reading Rooms

A major change made by the FOIA amendments involves the maintenance of agency reading rooms under subsection (a)(2) of the Act. Under that part of the FOIA, agencies are required to make three categories of records -- final opinions rendered in the adjudication of administrative cases, specific agency policy statements, and administrative staff manuals that affect the public -- routinely available for public inspection and copying. *See FOIA Update*, Summer 1992, at 4. (This obligation does not apply to any records that "are promptly published and [are] offered for sale." 5 U.S.C. § 552(a)(2).) The new amendments both add to those categories of reading room records and establish a requirement for electronic availability of reading room records, most efficiently through on-line access, in what can be regarded as "electronic reading rooms."

First, the amendments create a new category of records that will be required to receive "reading room" treatment -- a category consisting of any records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D) (as amended, effective Mar. 31, 1997). Under this provision, when records are disclosed in response to a FOIA request, an agency will be required to determine if they have already become the subject of subsequent FOIA requests or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future. If either is the case, then those records in their FOIA-processed form (but not, of course, any information about a first-party requester that would not be disclosed to any other FOIA requester) will become "reading room" records to be made automatically available to potential FOIA requesters. Ideally, that availability will satisfy much of the future public demand for those processed records, in a more efficient fashion, but any FOIA request received for the records will have to be responded to in a regular fashion as well.

Second, the amendments will require agencies to use electronic information technology to enhance the availability of their reading room records. They specify that for any newly created reading room records (i.e., "records created on or after November 1, 1996"), an agency must make them available to the public by "electronic means." 5 U.S.C. § 552(a)(2). The amendments embody a strong statutory preference that this new electronic availability be provided by agencies in the form of on-line access, which can be most efficient for both agencies and the public alike, and they allow until November 1, 1997 for it to be provided. To meet this new requirement through on-line access, agencies should have Internet or World Wide Web sites prepared to serve this "electronic reading room" function by no later than that date.

This means that as of mid-1997, agencies will begin to maintain both conventional reading rooms and "electronic reading rooms" in order to meet their FOIA subsection (a)(2) responsibilities. As of March 31, the basic effective date of the amendments, they must begin to place in their reading rooms copies of any FOIA-processed records determined to fall within the new fourth subsection (a)(2) category, just as they regularly place their other subsection (a)(2) records there. Additionally, they must identify any of their reading room records that were created on or after the November 1, 1996 cut-off date and then make those records available (by no later than the November 1, 1997 electronic access deadline) through their electronic sites as well.

For traditional subsection (a)(2) records such as administrative staff manuals, for example, virtually everything that an agency places in its reading room, in time, will be newly created and therefore will be required to be made available electronically also. (Where only part of a manual is updated, it would be advisable for the agency to place the entire manual on its electronic site, in order to avoid confusion.) In the case of FOIA-processed records, on the other hand, a very large proportion of those records will have been created prior to the 1996 cut-off date, at least as of the outset of the new law's implementation, and therefore will not be subject to the electronic availability requirement.

Accordingly, agencies will have to make it clear to the users of their electronic reading rooms that while all of their subsection (a)(2) records are available in their conventional reading rooms, only the newly created ones are available through their electronic sites. Agencies should utilize indices to facilitate use of both types of reading rooms. They are required by the amendments to maintain an index of their FOIA-processed records and to make it available on-line by December 31, 1999.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

Electronic Records

The amendments contain several provisions that pertain to the processing of FOIA requests for records in electronic form. First, they define the term "record" simply as including "any information that would be an agency record subject to the requirements of [the FOIA] when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2) (as amended, effective Mar. 31, 1997). This definition appears to confirm existing general practices of treating information maintained in electronic forms as subject to the FOIA and, while it references no particular electronic item such as computer software, seems to broadly encompass information maintained in electronic form.

Second, they address the form or format in which a requested record is disclosed under the FOIA, requiring that "an agency shall provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B) (as amended, effective Mar. 31, 1997). Additionally, this new subsection of the Act provides that an agency "shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of the [FOIA]." *Id.* Taken together, these two provisions will require agencies to honor a requester's specified choice among existing forms of a requested record (assuming no exceptional difficulty in reproducing an existing record form) and to make "reasonable efforts" to disclose a record in a different form or format when that is requested and the record is "readily reproducible" in that new form or format.

The first of these two aspects is relatively straightforward. The requester, not the agency, ordinarily will be entitled to choose the form of disclosure when multiple forms of a record already exist; the amendments thus overrule any precedent such as *Dismukes v. Department of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984), which holds to the contrary. Any further request for a record to be disclosed in a new form or format will have to be considered by an agency, on a case-by-case basis, to determine whether the records are "readily reproducible" in that form or format with "reasonable efforts" on the part of the agency. Under a separate provision of the amendments, an agency's determination regarding "reproducibility" is entitled to special deference if challenged in court. 5 U.S.C. § 552(a)(4)(B) (as amended, effective Mar. 31, 1997).

The amendments likewise apply a general "reasonable efforts" standard to the matter of an agency's search obligation in connection with electronic records. They provide that "an agency shall make reasonable efforts to search for [such]

records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C) (as amended, effective Mar. 31, 1997). This provision promotes electronic database searches and encourages agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests. It will necessarily require an agency to determine, in any case in which a requested database search would involve new programming and database-retrieval efforts, whether those efforts are "reasonable" under the particular circumstances involved. Additionally, this amendment provides that an agency would not be required to undertake any such efforts in any exceptional case in which the implementation of a data-retrieval program for a requested FOIA search would "significantly interfere" with its computer systems' operations.

Time Limits and Backlogs

The amendments contain several different provisions pertaining to the timing of agency responses to FOIA requests, all of which take effect after one year. First, they increase the Act's basic time limit for agency responses to FOIA requests, lengthening it from ten to twenty working days. For agencies that can regularly act on their FOIA requests within the existing ten-day time limit, this change should not affect their administration of the Act.

Second, the amendments encourage agencies that experience difficulties in meeting the Act's time limits to promulgate regulations providing for "multitrack processing" of their FOIA requests, "based on the amount of work or time (or both)" that is involved in processing them. 5 U.S.C. § 552(a)(6)(D) (as amended, effective Oct. 2, 1997). An agency or component of an agency that maintains two or more processing tracks must handle its requests on a first-in, first-out basis within each track, but will have the flexibility to respond to relatively simple FOIA requests more quickly through its multitrack system. It also can provide requesters with an opportunity limit their requests in order to obtain faster processing. Agencies that handle their FOIA requests on a decentralized basis through separate agency components should allow multitrack processing systems to be maintained according to the individual circumstances of each component.

Third, a closely related amendment supplements the provision in the Act by which an agency may take additional time for responding to a request based upon "unusual circumstances" involved in the request -- such as the volume of records sought. 5 U.S.C. § 552(a)(6)(B) (as amended, effective Oct. 2, 1997). Under existing law, an agency may take only an additional ten working days based upon such "unusual circumstances." Under the amendments, however, an agency notifying a requester of "unusual circumstances" may specify that additional time is required and offer the requester the opportunity "to limit the scope of the request" and/or "to arrange with the agency an alternative time frame for processing the request or a modified request." 5 U.S.C. § 552(a)(6)(B)(i), (ii). This provides a basis for agencies and FOIA requesters to reach agreement on the timing of agency responses in cases in which the circumstances of the particular request, rather than a more general agency backlog, cause difficulty in meeting the Act's time limits.

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Fourth, the amendments address the subject of general agency backlogs by limiting the conditions under which the Act's "exceptional circumstances" provision may apply. They specify that such circumstances will "not include a delay that results from a predictable agency workload of [FOIA requests], unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." 5 U.S.C. § 552(a)(6)(C)(ii) (as amended, effective Oct. 2, 1997). This amendment will limit the ability of an agency with a heavy FOIA backlog to obtain a stay of judicial proceedings on the basis of that backlog, under the precedent of *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), if a delayed FOIA request proceeds to litigation. Such a stay may be granted when an agency can demonstrate "reasonable progress" in its backlog-reduction efforts. It also could be granted where a requester refuses "to reasonably modify the scope of a request or arrange an alternative time frame for processing" it; two separate amendment provisions specify that this "shall be considered as a factor in determining whether exceptional circumstances exist." 5 U.S.C. § 552(a)(6)(B)(ii), (a)(6)(C)(iii) (as amended, effective Oct. 2, 1997).

A fifth time limit-related amendment addresses requests for "expedited processing" under the Act. The amendments require all agencies to promulgate regulations under which they will consider such requests and grant them whenever a "compelling need" is shown. The term "compelling need" is defined as (1) involving "an imminent threat to the life or physical safety of an individual," or (2) in the case of a request made by "a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E) (as amended, effective Oct. 2, 1997).

Under this provision, a FOIA requester may make a request for expedited processing with a certification of "compelling need." 5 U.S.C. § 552(a)(6)(E)(vi). Then "within 10 days after the date of the request" (which as a practical matter may be determined by a postmark in some cases), the agency will be required to decide whether to grant expedited processing

and to notify the requester of its decision. 5 U.S.C. § 552(a)(6)(E)(ii)(I). If expedited processing is granted, the agency must give priority to that FOIA requester and process the requested records for disclosure "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). If expedited processing is not granted, the agency must likewise give "expeditious consideration" to any administrative appeal of that denial. 5 U.S.C. § 552(a)(6)(E)(ii)(II). Any judicial review of a denial of expedited processing will be based on the administrative record of the correspondence between the requester and the agency. 5 U.S.C. § 552(a)(6)(E)(iii).

Denial Specification

The amendments contain two provisions that deal with an agency's obligation to specify to a FOIA requester information that is denied in response to a request. First, in the situation in which information is deleted from a record that is disclosed in part, the amendments require that "[t]he amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the [applicable] exemption." 5 U.S.C. § 552(b) (as amended, effective Mar. 31, 1997). This provision was enacted under a bill section entitled "Computer Redaction," and accordingly it further provides that "[i]f technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made." *Id.* However, its terms are not limited to information maintained in electronic form, so it also codifies the sound administrative practice of marking records to show all deletions when records are disclosed in conventional paper form.

A second such provision deals with the situation in which entire records, or entire pages of them, are withheld. This amendment requires an agency to "make a reasonable effort to estimate the volume" of what is withheld and "to provide any such estimate to the person making the request." 5 U.S.C. § 552(a)(6)(F) (as amended, effective Oct. 2, 1997). Ordinarily, agencies will meet this requirement by specifying in their denial letters the volume of what is withheld in numbers of entire pages, documents, or some other applicable form of measurement. Like the deletion provision above, this provision does not apply in the exceptional situation (e.g., a "neither confirm nor deny" case) in which disclosing the volume of records withheld would be harmful. This amendment carries the same effective date as the time limit and backlog-related amendments because it was contained in the same section of the bill.

No. 17-16858 archived on August 27, 2019
cited in ALDF v. USDA

Annual Reports and Reference Guides

The amendments also address the process by which agencies provide information about their administration of the FOIA, both through their annual reports to Congress and in the basic reference information that they make available to the public. First, the amendments make extensive revisions to the annual report subsection of the Act, subsection (e), modifying the content, timetable, and procedure for the filing of those reports. The statistics to be contained in annual reports under this new system will include the number of requests received, the number of requests processed, the number of requests pending as of the end of the reporting year, and the median number of days that those requests were pending. Agencies also will be required to specify the resources devoted by them to the processing of their requests, in terms of both dollars and full-time staff, and to include information about the Exemption 3 statutes upon which they rely to withhold information.

Under the amendments, the annual reporting period will change from a calendar year to a fiscal year, as of the beginning of fiscal year 1998 on October 1, 1997. Prior to that date, the Department of Justice will develop annual report guidelines for all agencies, in consultation with the Office of Management and Budget, for the compilation of fiscal year 1998 statistics and the preparation of a uniform new type of annual report. (This timetable conversion will leave a nine-month reporting period for calendar year 1997 reports to be filed under the current system.) The new annual reports will be due to be completed by February 1 of each year, in electronic form, and will be submitted to the Attorney General so that they can be made available to the public through a single World Wide Web site. Each agency also should make its annual report available for public reference in its reading room as well as through its own electronic site.

Additionally, the amendments require each agency to maintain "reference material or a guide for requesting records or information from the agency," which an agency should make publicly available in its reading room and through an electronic site, as well as upon any request. 5 U.S.C. § 552(g) (as amended, effective Mar. 31, 1997). Under new subsection (g) of the Act, this reference guide for potential FOIA requesters must include "an index of all major information systems of the agency" (except in any instance in which such system identification would cause exemption harm), "a description of [its] major information and record locator systems," and "a handbook for obtaining various types and categories of public information from the agency" both through FOIA requests and through non-FOIA means. *Id.*

This reference guide should aid potential requesters in making specific requests for agency records or in learning about records and information that is readily available from the agency without the necessity of a FOIA request, including

through electronic access. It should give a clear picture of the types of records maintained by the agency; the process by which FOIA requests are handled by it (including references to its FOIA regulations and any forms required to be submitted by requesters); the FOIA requester's rights to administrative appeal and judicial review; the types of FOIA litigation cases brought against the agency; and the availability of agency information through means other than the FOIA. In preparing these guides, agencies should also consult the House Report accompanying the legislation, H.R. Rep. No. 795, 104th Cong., 2d Sess. (1996).

Effective Dates and Timetable for FOIA Amendments

March 31, 1997 . General effective date for many amendment provisions. October 1, 1997 Due date for Justice Department annual reporting guidelines; statistical compilation for new form of annual report begins. October 2, 1997 Effective date for provisions regarding time limits, multitrack processing, unusual circumstances, exceptional circumstances, expedited processing, and volume estimation. November 1, 1997 Deadline for making available electronically all reading room records created on or after November 1, 1996. February 1, 1999 Due date for first annual report using new form and new fiscal year timetable (report for fiscal year 1998). December 31, 1999 Deadline for making available on-line agency's index of selected FOIA-disclosed records.

The Center pages of this isuue of *FOIA Update* contain the text of the Freedom of Information Act in its amended form.

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FOIA UPDATE: OIP GUIDANCE: ELECTRONIC FOIA AMENDMENTS IMPLEMENTATION GUIDANCE OUTLINE

January 1, 1998

FOIA Update
Vol. XIX, No. 1
1998

OIP Guidance

ELECTRONIC FOIA AMENDMENTS IMPLEMENTATION GUIDANCE OUTLINE

The following is an outline of implementation guidance provided by the Department of Justice to date on various issues pertaining to the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048:

Reading Rooms
Statutory references: Subsection (a)(2) of the Freedom of Information Act, 5 U.S.C. § 552(a)(2),*as amended by* Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552(a)(2) (West Supp. 1997) (including new subsections (a)(2)(D) and (a)(2)(E)).

` The Electronic FOIA amendments establish a new fourth category of "reading room" records: FOIA-processed records that the agency determines are likely to be the subject of subsequent requests for substantially the same records. *See FOIA Update*, Fall 1996, at 1.

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` Agency personnel should determine which FOIA-processed records fall within this new reading room category based upon their familiarity with the records' subject matter, their knowledge of FOIA requests received in the past, and their best judgment of the types of requests likely to be received by their agency in the future. *See FOIA Update*, Winter 1997, at 4; *FOIA Update*, Fall 1996, at 1.

` Agencies should place in their reading rooms all records determined to fall within this new category, regardless of their form or format. *See FOIA Update*, Winter 1997, at 4.

` Agencies must process any FOIA request received for such records even after placing those records in their reading rooms, if the requester so chooses. *See FOIA Update*, Winter 1997, at 3 (citing House Report); *FOIA Update*, Fall 1996, at 1.

` In some cases involving "first-party" requests, agencies must delete any information the disclosure of which would violate the Privacy Act or the Trade Secrets Act before placing FOIA-processed records in their reading rooms. *See FOIA Update*, Winter 1997, at 3; *FOIA Update*, Fall 1996, at 1.

` Agencies do not have to make available in their reading rooms any records that are promptly published and offered for sale. *See FOIA Update*, Winter 1997, at 4; *FOIA Update*, Fall 1996, at 1.

` Larger agencies with multiple components and decentralized FOIA operations may have separate reading rooms for each agency component. *See FOIA Update*, Winter 1997, at 4.

` In making determinations as to whether records fall into the new reading room category, agencies should keep in mind that its purpose is to reduce the number of future requests for the same information -- so if certain records are of interest to only a finite group of requesters who have already made a "flurry" of requests, there should be no need to make those records available in an agency's reading room. *See FOIA Update*, Spring 1997, at 2 (citing House Report).

` Agency personnel should use their judgment as to the length of time that records determined to fall within the new reading room category should continue to be maintained in a reading room. *See FOIA Update*, Winter 1997, at 4.

 Additionally, agencies are required, as of November 1, 1997, to make all reading room records created by them on or after November 1, 1996, available electronically. *See FOIA Update*, Spring 1997, at 1; *FOIA Update*, Fall 1996, at 1-2.

 In order to meet this requirement most efficiently, all agencies should have established World Wide Web sites, as of November 1, 1997, for this purpose. *See FOIA Update*, Winter 1997, at 4; *FOIA Update*, Fall 1996, at 1; *see*, *e.g.*, *FOIA Update*, Winter 1998, at 2; *FOIA Update*, Summer 1997, at 1-2.

` The electronic availability obligation applies not only to records in the new fourth reading room category, but also to more "traditional" reading room records such as administrative staff manuals as they are updated to replace those created prior to November 1, 1996. *See, Fall 1996, at 2.*

` *If only part of a reading room record such as a manual is updated, an agency should try to make the entire manual available electronically in order to avoid confusion. See FOIA Update, Fall 1996, at 2.*

` *An agency must maintain a record in its conventional "paper" reading room even if that record is placed in its "electronic reading room." See FOIA Update, Winter 1997, at 3 (citing House Report); FOIA Update, Fall 1996, at 2.*

` *As an alternative, agencies may use computer terminals placed in their conventional reading rooms to provide access to records maintained in their "electronic reading rooms," instead of maintaining those records in paper form --so long as any reading room user is able to obtain a copy of any record sought. See FOIA Update, Winter 1997, at 3.*

` *Once an agency has established "computer telecommunications means" (i.e., an Internet capability and World Wide Web site that can be used for FOIA purposes), all of its components and field offices must use the agency's "electronic reading room" means of satisfying their electronic availability requirements with respect to their newly created reading room records. See FOIA Update, Winter 1998, at 6.*

` *For decentralized agencies, each agency component's "electronic reading room" should be linked together through the agency's main FOIA "home page." See FOIA Update, Winter 1997, at 4; see also FOIA Update, Summer 1997, at 1-2.*

` *A record created prior to November 1, 1996, but processed for disclosure with deletions after November 1, 1996, is not subject to the electronic availability requirement. See FOIA Update, Winter 1997, at 5.*

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` *Only records created by the agency are subject to the electronic availability requirement. See FOIA Update, Winter 1997, at 4-5.*

` *If an agency chooses as a matter of administrative discretion to make records available electronically that were created by an outside party, it must guard against the possibility that such dissemination might be regarded as copyright infringement. See FOIA Update, Winter 1997, at 5; see also FOIA Update, Winter 1985, at 3-4; FOIA Update, Fall 1983, at 4-5.*

` *Agencies should not have to "image" any written signatures appearing on adjudicatory decisions that are made available in "electronic reading rooms." See FOIA Update, Spring 1997, at 2.*

` *Agencies should maintain and make available a copy of a current subject-matter index of all reading room records, which should be updated at least quarterly. See FOIA Update, Summer 1992, at 4.*

` *Agencies should create an index of the FOIA-processed records in the new reading room category, to be made available electronically by no later than December 31, 1999. See FOIA Update, Winter 1997, at 3; FOIA Update, Fall 1996, at 2.*

` *Agencies should make it clear that generally only records created after November 1, 1996, are available electronically. See FOIA Update, Fall 1996, at 2.*

` *Agencies should try to make clear to their reading room users exactly which of their records are available in which form. See FOIA Update, Winter 1997, at 3; FOIA Update, Fall 1996, at 2.*

Form or Format of Disclosure
Statutory reference: New subsection (a)(3)(B) of the Act, 5 U.S.C.A. § 552(a)(3)(B) (West 1996 & Supp. 1997).

` *The Electronic FOIA amendments address form or format issues in two basic situations: (1) the situation in which records already exist in more than one form or format; and (2) the situation in which FOIA requesters ask for disclosure in a new form or format. See FOIA Update, Fall 1996, at 2.*

` In the first situation, a requester's choice among existing forms or formats must be honored, as a new general rule, unless there would be exceptional practical difficulty in doing so. See FOIA Update, Winter 1997, at 5; FOIA Update, Fall 1996, at 2; cf. Chamberlain v. United States Dep't of Justice, 957 F. Supp. 292, 296 (D.D.C. 1997) (involving "visicorder charts" too fragile to be photocopied without damage).

` If a requester asks to have records disclosed in more than one existing form or format (e.g., in paper form as well as in an electronic form), an agency is not obligated to comply but should consider doing so as a matter of administrative discretion. See FOIA Update, Winter 1998, at 6.

` In the second situation, an agency must make "reasonable efforts" to produce records in the new form or format requested by the requester when the information is "readily reproducible" in that new form or format. See FOIA Update, Winter 1997, at 5; FOIA Update, Fall 1996, at 2.

` Agencies should consider all circumstances involved, including the nature of the existing record form or format and the extent of any conversion effort required, before determining whether to comply with a request to produce records in a particular new form or format. See FOIA Update, Winter 1997, at 5.

` The Electronic FOIA amendments do not require agencies to change their records-maintenance or records-disposition practices. See FOIA Update, Winter 1997, at 5-6 (citing House Report).

Electronic Searches

Statutory references: New subsections (a)(3)(C) and (a)(3)(D) of the Act, 5 U.S.C.A. § 552(a)(3)(C), (a)(3)(D) (West 1996 & Supp. 1997).

` The Electronic FOIA amendments codify existing agency practice by specifying that the Act applies to information maintained in electronic form. See FOIA Update, Fall 1996, at 2.

` The term "search" now expressly includes the electronic review of agency records in order to respond to a FOIA request. See FOIA Update, Fall 1996, at 2.

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` Agencies must make "reasonable efforts" to conduct searches for information maintained in electronic form, except when doing so would "significantly interfere" with the agency's automated system. See FOIA Update, Fall 1996, at 2.

Such determinations must be made on a case-by-case basis.` See FOIA Update, Winter 1997, at 6; FOIA Update, Fall 1996, at 2.

` Electronic searches for records or information are not regarded as involving the creation of new records under the Act. See FOIA Update, Winter 1997, at 6 (citing House Report).

Deletion/Withholding of Information

Statutory references: New subsection (a)(6)(F) of the Act, 5 U.S.C.A. § 552(a)(6)(F) (West 1996 & Supp. 1997), and new provisions at the conclusion of subsection (b) of the Act, 5 U.S.C.A. § 552(b) (concluding sentences) (West 1996 & Supp. 1997).

` Agencies should indicate the amount of information deleted at the point in the record where the deletion is made, whenever it is "technically feasible" to do so given the nature and complexity of the record involved. See FOIA Update, Winter 1997, at 6; FOIA Update, Fall 1996, at 10.

` The "deletion specification" requirement applies to paper records as well as to electronic ones, and it essentially codifies the sound administrative practice of using markings to inform requesters of both what and where information is being withheld. See FOIA Update, Fall 1996, at 10.

` Agencies should use electronic markings, equivalent to deletion markings on paper records, to meet this requirement for information disclosed in electronic form. See FOIA Update, Winter 1997, at 6.

` Agencies also now must advise requesters of the estimated volume of what is being withheld when entire documents or document pages are withheld by them--by providing exact page counts in relatively small-volume cases, page-count estimates in large-volume cases, or estimates in some other applicable form of measurement (e.g., boxes, linear feet, kilobytes, or an electronic "word count"). See FOIA Update, Spring 1997, at 2; FOIA Update, Fall 1996, at 10-11.

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` *In any exceptional case in which indicating either a deletion or the volume of information withheld would harm an interest protected by a FOIA exemption, it is not required. See FOIA Update, Fall 1996, at 10, 11.*

Annual FOIA Reports
Statutory reference: Revised subsection (e) of the Act, 5 U.S.C.A. § 552(e) (West 1996 & Supp. 1997).

The Act's new annual report format and timetable take effect as of the` annual report for fiscal year 1998, due on February 1, 1999 -- leaving a nine-month transition period for the 1997 annual report under the old format and procedural requirements. See FOIA Update, Winter 1997, at 6; FOIA Update, Fall 1996, at 11.

` *Agencies should follow the Justice Department's guidelines for the preparation and submission of annual FOIA reports, beginning with the report for fiscal year 1998. See FOIA Update, Summer 1997, at 3-7.*

` *When compiling annual FOIA report statistics showing such data as the median numbers of days that requests were pending as of the date of completion or as of the end of a fiscal year, agencies should simply use calendar days in their time calculations. See FOIA Update, Winter 1998, at 6; FOIA Update, Summer 1997, at 6.*

` *As of February 1, 1999, all agencies should make their annual reports publicly available through their individual World Wide Web sites; the Justice Department will provide additional electronic access to all agencies' annual reports through a single World Wide Web site linked to individual agency sites. See FOIA Update, Summer 1997, at 7.*

Miscellaneous
Larger agencies with decentralized FOIA operations should allow individual components to maintain multitrack processing systems according to their individual circumstances. See FOIA Update, Winter 1997, at 6; FOIA Update, Fall 1996, at 10.

` *Although there is no requirement in the Electronic FOIA amendments that they do so, agencies should explore their capability to receive FOIA requests electronically through the Internet and their World Wide Web sites. See FOIA Update, Winter 1998, at 6; cf. FOIA Update, Summer 1997, at 1-2; FOIA Update, Summer 1989, at 5.*

` *The effective dates of the Electronic FOIA amendments' various provisions range from March 31, 1997, to December 31, 1999. See FOIA Update, Fall 1996, at 11 (chart).*

` *Until an agency has its regulations in place, it should nonetheless apply all effective statutory provisions -- without any disadvantage to FOIA requesters. Cf. FOIA Update, Winter/Spring 1987, at 2 (advising agencies to follow comparable rule during implementation of 1986 FOIA amendments).*

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Primary Reference Materials
` *Department of Justice Guidelines for Agency Preparation and Submission of Annual FOIA Reports, published in FOIA Update, Summer 1997, at 3-7.*

` *Office of Management and Budget Guidance on Developing a Handbook for Individuals Seeking Access to Public Information (Apr. 7, 1997).*

` *Department of Justice Freedom of Information Act Reference Guide (Aug. 1997; updated Feb. 1998).*

 Freedom of Information Act Guide & Privacy Act Overview (Sept. 1997 ed.) (containing "Justice Department Guide to the Freedom of Information Act," including new "FOIA Reading Room" section).

` *Revised Department of Justice Freedom of Information Act Regulations, 62 Fed. Reg. 45,184 (to be codified at 28 C.F.R. pt. 16) (proposed Aug. 26, 1997).*

 Text of Freedom of Information Act, 5 U.S.C. § 552 (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West 1996 & Supp. 1997), reprinted in FOIA Update, Fall 1996, at 3-9 (interlineated to show all statutory modifications).

 Text of statement issued by President Clinton upon signing Electronic Freedom of Information Act Amendments of 1996 into law on Oct. 2, 1996, reprinted in FOIA Update, Fall 1996, at 9.

 H.R. Rep. No. 104-795 (1996).

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Updated August 13, 2014

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United States Department of Agriculture

Animal and Plant Health Inspection Service

Washington, DC 20250

JUN 19 2009

Dear AMT and PLG,

It's telling that one of President Obama's first actions on the job was to issue a message to the heads of all Federal Departments committing his Administration will be the most open and transparent in the history of our country. This goes hand-in-hand with the President's commitment to increase the American public's trust in the Government that serves and represents them.

These are tall orders but we think we here in APHIS have already seen the President's commitment in action, from the listening sessions Secretary Vilsack has convened to collect feedback and solutions for the National Animal Identification System, to the Secretary's and Deputy Secretary's remarks at the recent public meeting on our biotechnology regulations indicating they want to hear from and engage with stakeholders who hold different perspectives and interests as part of their approach to the development of new regulations.

We take very seriously this charge to APHIS to operate in an exceedingly open, transparent, and accessible way for all the customers and stakeholders we serve. We know you do too, and we are very pleased that over the last several years we have seen real results stemming from this collective commitment to openness and transparency. Chief among these we think is the progress we have made in reducing the number of Freedom of Information Act (FOIA) cases in backlog with our Agency. This has been an Agency operating plan goal for several years now, and we believe our efforts have started to pay off. While we still have much work ahead of us, we want to share with you the results we have achieved. With the help of program employees on detail, the FOIA office is on pace to close 400 more cases than last year. And by October 1, the FOIA office will have cut the total number of cases that were in backlog at the start of the fiscal year in half.

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To continue this good progress, we must make use of every tool available to help us achieve our goal of eliminating the FOIA backlog. The President's memo also addressed Federal Agencies' approach to FOIA. In no uncertain terms, the President said Agencies need not only comply with FOIA, but should work to share information proactively on policies and decisions so that members of the public don't have to use the FOIA to obtain information held by their Government.

Again, this is another tall order, and APHIS has already risen to the challenge. Last month, for instance, Animal Care began making facility inspection reports available to the public on the APHIS Web site. These were the most frequently requested APHIS records under the FOIA and making them available on our 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.

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We know other programs are currently evaluating with the FOIA office placing inspection reports online in the future. We strongly encourage ***all*** APHIS programs to look internally at records, inspection reports, closed investigative files, decision memos, and policy statements that, in the spirit of the President's call for public engagement and openness and transparency, should be made available online even before we receive a single FOIA request for them.

We have asked Legislative and Public Affairs, led by the FOIA office, to take the lead in working with each of you to ensure that the APHIS FOIA reading room on our Agency's Web site is populated with the kinds of records and documents that our stakeholders are interested in and help to explain to the public all the work that goes into APHIS' mission of protecting American agriculture and natural resources. We have also asked LPA to develop a standard process for each of your programs to determine what records need to be placed in the FOIA reading room and, prior to doing so, informing the Office of the Administrator of the significant policy documents that will be placed there.

And, finally, for these efforts to have their intended results, we must regularly communicate with our stakeholders to share with them the context of the documents and information being made available online. This is another job we have tasked LPA to lead.

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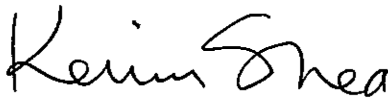
Enclosed please find more background information prepared by the FOIA office on the President's call for openness and transparency, as well as the requirements set forth under the Electronic Freedom of Information Act. We appreciate your support of these important initiatives to meet the President's and Secretary's objectives and further APHIS' mission.

Enclosure



Kevin Shea
Acting Administrator

Bill Clay
Acting Associate Administrator

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President Barack Obama's Message on Openness and Transparency

On his first day in office, President Barack Obama issued a memorandum on the Freedom of Information Act (FOIA) and his commitment to openness in Government. The Attorney General also issued a guidance memorandum reiterating our nation's fundamental commitment to open Government. This guidance emphasizes 1) the use of modern technology to inform the public about U.S. Government operations and 2) affirmative steps to readily and systematically post information online in "advance" of a FOIA request.

To meet the initiatives set forth by the President, APHIS will continue to increase its compliance with the Electronic Freedom of Information Act (E-FOIA) and post current documents to the APHIS E-FOIA Reading Room.

Agency Requirements under the E-FOIA

Under the E-FOIA, agencies are required to make documents available to the public for inspection and copying. As an enhancement to this requirement, the E-FOIA further requires that "electronic versions" of Agency records be made available through the World Wide Web in an electronic reading room. There are four types of documents that APHIS should maintain in the E-FOIA Reading Room. These include:

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1. Final Agency opinions and decision documents;
2. Agency policies and policy interpretations;
3. Administrative staff manuals; and
4. Agency "hot topic" and frequently requested documents that are of high interest to the public.

Access to documents in the APHIS E-FOIA Reading Room will not only aid increased understanding of APHIS, but will decrease the number of FOIA requests, give the public convenient, instant access to pertinent records, and create informed citizens. The goal of E-FOIA is to make information publicly available online so that FOIA requests become an avenue of last resort.

Implementation of the E-FOIA

In a year-long effort, APHIS has developed an improved E-FOIA Reading Room and increased the number of documents posted to the APHIS website. These documents are important to our various stakeholders and provide greater accessibility to and understanding of current Agency actions. Continuing this trend, APHIS must continue to make disclosures of records to the E-FOIA Reading Room. Outlined below are steps that APHIS program offices and the FOIA office can take to further comply with the E-FOIA:

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1. In coordination with the FOIA office, each program office will review its individual portion of the E-FOIA reading room to identify broken links, remove outdated records, and replace superseded records.

2. Program offices will identify and post APHIS manuals, decision documents and policy documents. These types of documents are considered releasable and should be made available to the public.

3. The FOIA office will work with APHIS program offices to identify records that are frequently requested and/or that APHIS anticipates will generate increased interest from the public and work to make these records available online.

4. Press releases issued by LPA will link to pertinent records placed in the FOIA reading room.

5. Finally, starting in FY10, the FOIA office will post records in the FOIA reading room prepared in response to FOIA requests.

Complying with the E-FOIA and posting current documents to the APHIS FOIA reading room are Agency responsibilities. LPA will be reaching out to leadership with each of APHIS' programs to discuss the steps above and other efforts to comply with the President's direction and requirements under the E-FOIA. The APHIS FOIA Reading Room can be accessed at the following website:
http://www.aphis.usda.gov/footer_items/foia_reading_room.shtml

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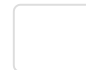
United States Department of Agriculture
Animal and Plant Health Inspection Service



Animal Care Information System Website Review Chart

Information APHIS previously posted proactively through its Animal Care Information System public search tool and its website, and information APHIS is now proactively posting as it works to complete the comprehensive website review.

Type of Record	Information Previously Posted	What will be Posted
Static Lists of Licensees Registrants **Certified Horse Industry Organizations** **Licensed Designated Qualified Persons**	Static list (not in the database, posted separately) including names of licensees and registrants, names of certified horse industry organizations, and names of licensed designated qualified persons under the Horse Protection Act.	No change; APHIS will continue to post names of licensees and registrants, names of certified horse industry organizations, and names of licensed designated qualified persons under the Horse Protection Act.
Animal Welfare Act Annual Reports of Research Facilities	All annual reports posted with redactions of confidential business information or to protect privacy interests of individuals (e.g. signatures), if any. Commercial business information includes trade secrets and other proprietary business information (e.g. research techniques or financial information) which, if disclosed, could result in competitive harm.	No change; APHIS will continue to post annual reports with redactions of confidential business information and to protect privacy interests of individuals, as appropriate.

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Warning Letters, Stipulations, Pre-litigation settlement agreements, and Administrative Complaints in which culpability is not assessed.	Posted unredacted	APHIS will post statistical summaries each calendar quarter.
Decisions and Orders issued by Administrative Law Judges	All decisions and orders were posted.	APHIS will post a link to the Office of Administrative Law Judge website.
Inspection Reports	All inspection reports were posted with limited redactions based on privacy interests.	APHIS will post inspection reports involving non-residential business entities with appropriate redactions to protect privacy interests of individuals (e.g. signatures), if any. APHIS will post inspection reports for individuals or businesses that are co-located with personal residences (homestead) with identifying information redacted to protect privacy interests.

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U.S. Department of Agriculture

Office of Inspector General

Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers

cited in ALDF v. USDA,
No. 17-16858 archived on August 27, 2019

Audit Report 33002-4-SF
May 2010

U.S. Department of Agriculture
Office of Inspector General
Washington, D.C. 20250

DATE: May 14, 2010

REPLY TO
ATTN OF: 33002-4-SF

TO: Cindy J. Smith
Administrator
Animal and Plant Health Inspection Service

ATTN: Joanne Munno
Acting Deputy Administrator
Marketing and Regulatory Programs Business Services

FROM: Gil H. Harden /s/
Assistant Inspector General
for Audit

SUBJECT: APHIS Animal Care Program – Inspections of Problematic Dealers

cited in ALDF v. USDA,
No. 17-16858 archived on August 27, 2019

This report presents the results of the subject review. Your written response to the official draft report is included at the end of the report. Excerpts from the response and the Office of Inspector General's (OIG) position are incorporated into the relevant sections of the report. Based on the information in your written response, we have accepted your management decision on Recommendations 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14. Please follow your internal agency procedures in forwarding final action correspondence to the Office of the Chief Financial Officer.

Based on your written response, management decision has not been reached on Recommendations 4 and 11. The information needed to reach management decision on these recommendations is set forth in the OIG Position section after each recommendation. In accordance with Departmental Regulation 1720-1, please furnish a reply within 60 days providing the information requested in the OIG Position section. Please note that the regulation requires a management decision to be reached on all findings and recommendations within a maximum of 6 months from report issuance, and final action to be taken within 1 year of each management decision.

We appreciate the courtesies and cooperation extended to us by members of your staff during the review.

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Animal Care Program – Inspections of Problematic Dealers

Executive Summary

In the last 2 years, there has been significant media coverage concerning large-scale dog dealers (i.e., breeders and brokers)[1] that failed to provide humane treatment for the animals under their care. The breeders, negatively referred to as "puppy mills," have stirred the interest of the public, Congress, animal rights groups, and others. Accordingly, we conducted an audit of the Animal and Plant Health Inspection Service's (APHIS) Animal Care (AC) unit, which is responsible for enforcing the Animal Welfare Act (AWA). The audit focused on AC's inspections of problematic dealers. It is the latest in a series of audits related to AWA.[2]

In our last audit on animals in research facilities,[3] we found that the agency was not aggressively pursuing enforcement actions against violators of AWA and that it assessed minimal monetary penalties against them.[4] APHIS agreed to take corrective action by incorporating more specific guidance in its operating manual to address deficiencies in enforcement actions. It also agreed to revise its penalty worksheet to generate higher and more appropriate penalties.

In this audit, one objective was to review AC's enforcement process against dealers that violated AWA. Accordingly, we focused on dealers with a history of violations in the past 3 years.[5] Another objective was to review the impact of recent changes the agency made to the penalty assessment process. We identified the following major deficiencies with APHIS' administration of AWA:

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- *AC's Enforcement Process Was Ineffective Against Problematic Dealers*. AC's enforcement process was ineffective in achieving dealer compliance with AWA and regulations, which are intended to ensure the humane care and treatment of animals. The agency believed that compliance achieved through education[6] and cooperation would result in long-term dealer compliance and, accordingly, it chose to take little or no enforcement action against most violators.

  However, the agency's education efforts have not always been successful in deterring problematic dealers from violating AWA. During FYs 2006-2008, at the re-inspection of 4,250 violators, inspectors found that 2,416 repeatedly violated AWA, including some that ignored minimum care standards. Therefore, relying heavily on education for serious or repeat violators—without an appropriate level of enforcement—weakened the agency's ability to protect the animals.

- *AC Inspectors Did Not Cite or Document Violations Properly To Support Enforcement Actions*. Many inspectors were highly committed, conducting timely and thorough

---

[1] Breeders are those that breed and raise animals on the premises; brokers negotiate or arrange for the purchase, sale, or transport of animals in commerce.
[2] Refer to the Background section for more information on related prior audits.
[3] Audit No. 33002-3-SF, "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).
[4] AWA refers to monetary penalties as civil penalties.
[5] APHIS synonymously used the terms violations, alleged violations, and noncompliant items in its documents. For simplicity, we used the term violations in this report.
[6] Education was generally provided through the inspectors' interaction with dealers during routine inspections as well as periodic seminars.

inspections and making significant efforts to improve the humane treatment of covered animals. However, we noted that 6 of 19 inspectors[7] did not correctly report all repeat or direct violations (those that are generally more serious and affect the animals' health). Consequently, some problematic dealers were inspected less frequently.

In addition, some inspectors did not always adequately describe violations in their inspection reports or support violations with photos. Between 2000 and 2009, this lack of documentary evidence weakened AC's case in 7 of the 16 administrative hearings involving dealers.[8] In discussing these problems with regional management, they explained that some inspectors appeared to need additional training in identifying violations and collecting evidence.

- *APHIS' New Penalty Worksheet Calculated Minimal Penalties*. Although APHIS previously agreed to revise its penalty worksheet to produce "significantly higher" penalties for violators of AWA, the agency continued to assess minimal penalties that did not deter violators. This occurred because the new worksheet allowed reductions up to 145 percent of the maximum penalty. While we are not advocating that APHIS assess the maximum penalty, we found that at a time when Congress tripled the authorized maximum penalty to "strengthen fines for violations," the actual penalties were 20 percent less using the new worksheet as compared to the worksheet APHIS previously used.

- *APHIS Misused Guidelines to Lower Penalties for AWA Violators*. In completing penalty worksheets, APHIS misused its guidelines in 32 of the 94 cases we reviewed to lower the penalties for AWA violators. Specifically, it (1) inconsistently counted violations; (2) applied "good faith" reductions without merit; (3) allowed a "no history of violations" reduction when the violators had a prior history; and (4) arbitrarily changed the gravity of some violations and the business size. AC told us that it assessed lower penalties as an incentive to encourage violators to pay a stipulated amount rather than exercise their right to a hearing.

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- *Some Large Breeders Circumvented AWA by Selling Animals Over the Internet*. Large breeders that sell AWA-covered animals over the Internet are exempt from AC's inspection and licensing requirements due to a loophole in AWA. As a result, an increasing number of these unlicensed breeders are not monitored for their animals' overall health and humane treatment.

Recommendation Summary

To ensure dealer compliance with AWA, AC should modify its *Dealer Inspection Guide* (Guide) to require enforcement action for direct and serious violations. We also recommend that "no action" be deleted as an enforcement action in the Guide.

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[7] In 2008, AC employed 99 inspectors. We accompanied 19 on their inspections of dealer facilities.
[8] During this period, administrative law judges or the Department's Judicial Officer rendered decisions in 16 cases involving dealers. We reviewed all 16.

To increase the effectiveness of inspections, AC should provide more comprehensive training and detailed guidance to its inspectors and supervisors on direct and repeat violations, enforcement procedures, and evidentiary requirements (e.g., adequately describing violations).

To calculate more reasonable penalties, APHIS should limit total reductions on its penalty worksheet to less than 100 percent. We also recommend that the agency ensure its penalty guidelines are consistently followed and that it include instructions to count each animal as a separate violation in cases involving animal deaths and unlicensed wholesale activities.

To prevent large breeders from circumventing AWA requirements, APHIS should propose that the Secretary seek legislative change to exclude these breeders from the definition of "retail pet store," and require that all applicable breeders that sell through the Internet be regulated under AWA.

Agency Response

In its written response, dated April 23, 2010, APHIS concurred with the reported findings and recommendations. APHIS' response is included at the end of this report.

OIG Position

We accept APHIS' management decision on Recommendations 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14. The actions needed to reach management decision on Recommendations 4 and 11 are provided in the OIG Position section after these recommendations.

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Background & Objectives

Background

In 1966, Congress passed Public Law 89-544, known as the Laboratory Animal Welfare Act, to regulate the humane care and handling of dogs, cats, and other laboratory animals. The law was amended in 1970 (Public Law 91-579), changing the name to AWA. This amendment also authorized the Secretary of Agriculture to regulate other warm-blooded animals when used in research, exhibition, or the wholesale pet trade. Additional amendments to the law were passed in 1976, 1985, 1990, 2002, and 2008—each adding new regulated activities for warm-blooded animals.

APHIS' AC unit enforces AWA based on the policies established by the Secretary. AC is headquartered in Riverdale, Maryland and has regional offices in Raleigh, North Carolina and Fort Collins, Colorado. The agency employs 99 inspectors,[9] who are dispersed throughout the country, to conduct inspections of all licensed and registered facilities covered under AWA and to follow up on complaints of abuse and noncompliance. In FY 2008, the inspectors conducted 15,722 inspections on licensed and registered facilities. In FY 2008, APHIS received an appropriation of $874 million; AC's portion was $21 million, as specified in the Consolidated Appropriations Act.

In the wholesale pet trade, there are two types of licensed dealers: breeders (those that breed and raise animals on the premises) and brokers (those that negotiate or arrange for the purchase, sale, or transport of animals in commerce). In FY 2008, there were 4,604 licensed breeders and 1,116 licensed brokers.

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Before AC issues a license, it conducts a pre-licensing inspection because by law applicants must be in full compliance with AWA and regulations. After a license is issued, AC inspectors perform unannounced inspections at least biennially to ensure the facilities remain in compliance with AWA. If an inspector finds AWA violations, the dealer is given anywhere from a day to a year to fix the problems depending on their severity. During our site visits, the inspectors gave the dealers an average of 16 days to correct their violations.

After inspectors are hired, they receive 5-6 weeks initial training on animal care standards and inspections. Thereafter, they receive annual training in the form of national or regional conferences as well as meetings with their supervisors. To ensure the inspectors consistently apply their training, APHIS also developed field standards, i.e., the *Dealer Inspection Guide*. See table 1 for the number of inspections AC conducted during FYs 2006-2008.

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[9] In FY 2008.

Table 1: Inspections Conducted in FYs 2006-2008

	2006	2007	2008
No. of Inspectors	99	101	99
No. of Inspections*	17,978	16,542	15,722
Average Inspections Per Inspector	182	164	159

* These numbers include inspections on all licensees (i.e., dealers and exhibitors) and registrants (i.e., research facilities) under AWA.

Since 1994, AC tracked the inspections through its Licensing and Registration Information System (LARIS). LARIS included a risk-based inspection system, which calculated the minimum number of inspections that were needed annually based on a continual risk assessment of each facility's violation history. However, both our 1995 and 2005 audits found that LARIS generated unreliable and inaccurate information.[10] AC agreed with our conclusions and hired a contractor to develop a new system—Online Animal Care Information System (OACIS). Later, AC determined that the OACIS contractor was not meeting the program's requirements and terminated the contract. APHIS then contracted with another system developer to build the Animal Care Information System, which was implemented in March 2009.

ENFORCEMENT PROCESS

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When a violation is identified during an inspection of a dealer's facility, AWA authorizes AC to take remedial action against the violator by assessing a fine, suspending or revoking the license, or pursuing criminal penalties.[11] Before taking these actions, AC also considers other enforcement options: no action, a letter of information (an informal warning letter), an official warning letter, and an investigation.[12]

Investigations are conducted by APHIS' Investigative and Enforcement Services unit, which carries out enforcement activities and provides support to all APHIS programs. An investigation may result in a stipulation, suspension or revocation of license, or confiscation of animals. A stipulation is an agreement between APHIS and the violator, where the violator can pay a reduced penalty by giving up his right to a formal administrative hearing. APHIS' Financial Management Division in Minneapolis is responsible for collecting the stipulations and monetary penalties.

Cases that warrant formal administrative action undergo Office of the General Counsel review for legal sufficiency prior to issuance of a formal administrative complaint before the U.S. Department of Agriculture's (Department) administrative law judges. If the case is appealed, a final decision is made by the Department's Judicial Officer. Formal actions may result in license suspensions or revocations, cease-and-desist orders, monetary penalties, or combinations of these penalties.

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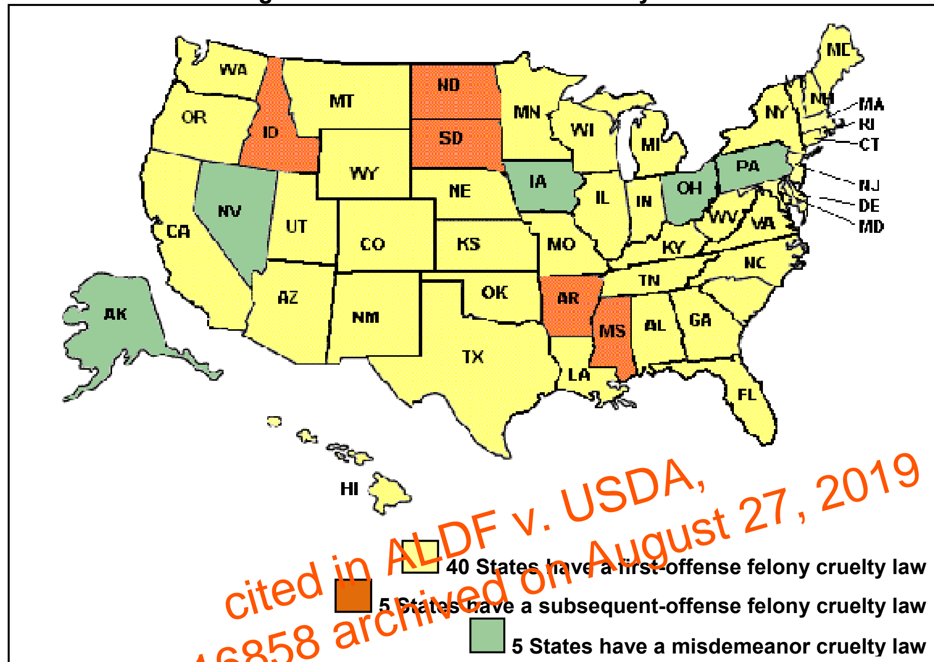
[10] OIG Audit No. 33600-1-Ch, "Enforcement of the Animal Welfare Act" (January 1995) and Audit No. 33002-3-SF, "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).
[11] 7 *United States Code* (U.S.C.) §2149 (January 3, 2007).
[12] *Dealer Inspection Guide*, ch. 9.3 (May 2002). In 2007, AC discontinued "letter of information" as an enforcement option.

AWA authorizes APHIS to cooperate with the States,[13] all of which have animal cruelty laws. However, although AC established memoranda of understanding with a few States, it did not establish internal procedures to forward animal cruelty and abuse cases to the State officials. Generally, AC regional management relies on the inspectors' discretion to notify State and local officials because the inspectors may have established relationships with these officials. Figure 1 shows which States have first-offense, subsequent-offense, or misdemeanor cruelty laws.

Figure 1: States With Animal Cruelty Laws



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RELATED PRIOR AUDITS

This audit is the latest in a series of audits related to AC's administration and enforcement of AWA. Three of these audits focused on dealers and research facilities:

In 1992, OIG conducted an audit on animal care and concluded that APHIS could not ensure the humane care and treatment of animals at all dealer facilities as required by AWA.[14] APHIS did not inspect dealer facilities with reliable frequency, and it did not enforce timely correction of violations found during inspections. Moreover, APHIS did not timely penalize facilities found to be in violation of AWA.

In 1995, OIG conducted a follow-up audit and reported that APHIS did not fully address problems disclosed in the prior report.[15] APHIS needed to take stronger enforcement actions to correct serious or repeat violations of AWA. Dealers and other facilities had little incentive to comply with AWA because monetary penalties were, in some cases, arbitrarily reduced and were often so low that violators regarded them as a cost of business.

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[13] 7 U.S.C. §2145(b) (January 3, 2007).
[14] Audit No. 33002-1-Ch, "APHIS Implementation of the Animal Welfare Act" (March 1992).
[15] Audit No. 33600-1-Ch, "APHIS Enforcement of the Animal Welfare Act" (January 1995).

In 2005, OIG conducted an audit on animals in research facilities and found that the agency was not aggressively pursuing enforcement actions against violators of AWA and that it assessed minimal monetary penalties against them.[16] Inspectors believed the lack of enforcement action undermined their credibility and authority to enforce AWA. In addition to giving an automatic 75-percent "discount," APHIS offered other concessions making the fines basically meaningless. Violators considered the monetary stipulation as a normal cost of business rather than a deterrent for violating the law.

Objectives

Our audit objectives were to (1) evaluate the adequacy of APHIS' controls to ensure dealer compliance with AWA, (2) review the impact of recent changes to the penalty assessment process, and (3) evaluate AC's new mission critical information system for reliability and integrity. Due to unexpected delays in implementing the new system, we were unable to complete the third objective.

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[16] Audit No. 33002-3-SF, "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).

Section 1: Enforcement

Finding 1: AC's Enforcement Process Was Ineffective Against Problematic Dealers

During FYs 2006-2008, Animal Care's (AC) enforcement process was ineffective in achieving dealer compliance with the Animal Welfare Act (AWA) and regulations. This occurred because the agency believed that compliance achieved through education and cooperation would result in long-term dealer compliance. Accordingly, the agency chose to take little or no enforcement actions against violators. However, taking this position against serious or repeat violators weakened the agency's ability to protect the animals. As a result, 2,416 of 4,250 violators repeatedly violated AWA, including some that ignored minimum care standards, which are intended to ensure the humane care and treatment of animals.

AWA authorizes APHIS to take remedial action against AWA violators by assessing monetary penalties, suspending or revoking licenses, or pursuing criminal penalties.[17] The *Dealer Inspection Guide* (Guide), AC's field standards, further elaborates on these enforcement actions.

AC administers AWA through the licensing and inspection of dealers (i.e., breeders and brokers). The enforcement process begins when violations[18] are identified during an inspection of a dealer's facility. If AC decides to take enforcement action, it may refer the case to APHIS' Investigative and Enforcement Services (IES) unit. The resulting investigation can lead to a stipulation (an agreement between APHIS and the violator, where the violator can pay a reduced penalty by giving up his right to a formal administrative hearing), suspension or revocation of license, or confiscation of animals. However, AC may elect to take no action or a lesser action, such as a letter of information or an official warning.[19]

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During the 3-year period, AC inspected 8,289 licensed dealers and found that 5,261 violated AWA (see exhibit C for the number and types of violations that occurred). At the re-inspection of 4,250 violators,[20] inspectors found that 2,416 repeatedly violated AWA, including 863 that continued to violate the same subsections.

To evaluate the adequacy of AC's controls over dealer compliance with AWA, we reviewed guidelines, management policies, the inspectors' practices, and enforcement actions against AWA violators. We identified four practices that demonstrate AC's leniency towards dealers that violate AWA:

- No Enforcement Action for First-time Violators. Typically, AC does not take enforcement action against first-time violators, even if the inspector identifies a direct violation (i.e., one that has a high potential for adversely affecting the health of an animal). The Guide states that inspectors "**may** recommend an enforcement action" for violations that are direct or serious, although the Guide does not define serious.[21] Based

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[17] 7 U.S.C. §2149 (January 3, 2007).
[18] APHIS synonymously used the terms violations, alleged violations, and noncompliant items in its documents. For simplicity, we used the term violations in this report.
[19] *Dealer Inspection Guide*, ch. 9.3 (May 2002). In 2007, AC discontinued "letter of information" as an enforcement option.
[20] AC did not re-inspect 1,011 violators because some were not scheduled for re-inspection until FY 2009, while others were no longer licensed.
[21] *Dealer Inspection Guide*, ch. 9.3 (May 2002).

on our observations and analysis, since inspectors were given the choice of not recommending an action, generally they did not.

- Inadequate Enforcement for Repeat Violators. The Guide states that inspectors "**must** recommend an enforcement action" for repeat violators; however, one of the choices is to take no action,[22] which is what the inspectors did in 52 percent of the repeat violations we reviewed.

  Also, AC narrowly defines a repeat violator as one that consecutively violates the same subsection of the animal welfare regulations. This means that on successive inspections a dealer can violate different sections of the regulations without being labeled a repeat violator and, therefore, the inspector is not required to recommend an enforcement action.

- Written Instructions Not Always Followed. In 2007, the national office provided instructions entitled, "Animal Care Enforcement Action Guidance for Inspection Reports," to aid its inspectors in selecting enforcement actions. These instructions were never incorporated in AC's Guide and, therefore, supervisors and regional management did not always ensure that the inspectors followed them. When instructions specified a stronger action, such as a stipulation or litigation, the inspectors were allowed to recommend a more lenient option.

- Delayed Confiscation. AWA allows APHIS to confiscate any animal found to be suffering as a result of a failure to comply with AWA.[23] APHIS added a provision requiring that the violator be given a final opportunity to take corrective action before confiscation can occur,[24] even in extreme cases where animals are dying or suffering.[25]

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To evaluate the effect of these practices, we selected 8 States and visited 50 breeders and 18 brokers (68 in total) that had been cited for at least one violation in their previous 3-year inspection history.[26] AC generally took little or no enforcement actions against these facilities during the period (see chart 1).

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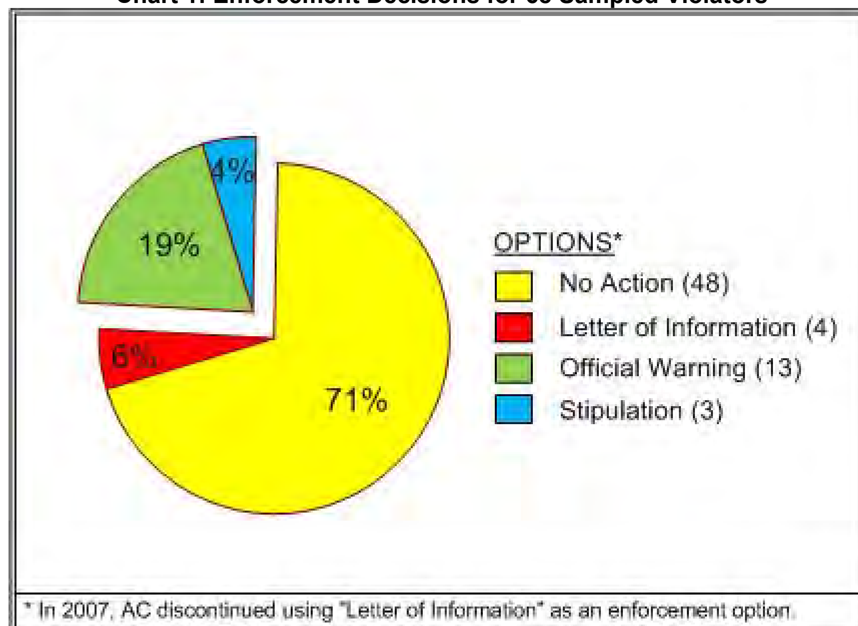
[22] *Dealer Inspection Guide*, ch. 9.3 (May 2002).
[23] 7 U.S.C. § 2146(a) (January 3, 2007).
[24] 9 *Code of Federal Regulations* (CFR) §2.129(a) (January 1, 2005) and *Dealer Inspection Guide*, ch. 8.6.1 (April 2000).
[25] AC defines suffering as "any condition that causes pain or distress . . . Examples [include]: animals with serious medical problems that are not receiving adequate veterinary care; animals without adequate food or water; animals exposed to temperature extremes without adequate shelter or bedding; and animals held in enclosures that are filthy. Animals do not need to be in jeopardy of dying to be in a state of suffering." AC Policy No. 8 (May 8, 2001).
[26] We visited a total of 81 dealers in 8 States but 13 had no history of violations and, therefore, were not part of our sample for determining the effectiveness of AC's enforcement process.

Chart 1: Enforcement Decisions for 68 Sampled Violators



The agency believed that compliance achieved through education and cooperation would result in long-term dealer compliance. Education was generally provided through the inspectors' interaction with dealers during routine inspections as well as periodic seminars. While we agree that teaching dealers the skills to properly care for their animals should improve the animals' health and wellbeing, the quality of the education depends on the inspectors' experience and skills. Also, the seminars were not mandated but attended voluntarily. One inspector told us the dealers that attended the canine care classes were often not the ones that needed them.

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Expecting that the dealers would improve their standards of care, the agency chose to take little or no enforcement actions against most violators. However, education efforts have not always been successful in deterring problematic dealers from violating AWA. Although AC might decide on little or no actions when circumstances warrant, taking this position against serious or repeat violators weakened the agency's ability to ensure compliance with AWA.

During our visits, AC cited 20 of the 68 dealers for repeat violations (nearly 30 percent). The following examples demonstrate the agency's leniency towards violators, the ineffectiveness of its enforcement process, and the harmful effect they had on the animals. All of the examples below involve dealers that had a history of violations over at least three inspections before our visit. However, the agency took little or no enforcement actions against them. During our visit, we found 12 dealers (18 percent) with violations that had escalated to the serious or grave levels, which directly affected the animals' health. If AC had taken action earlier, it may have prevented the situation from worsening.

Example 1: At a facility in Oklahoma with 83 adult dogs, AC cited the breeder for a total of 20 violations (including 1 repeat and 1 direct) during 5 inspections from April 2006 to December 2007. The direct violation concerned the lack of adequate veterinary care for three dogs with

hair loss over their entire bodies and raw, irritated spots on their skin.[27] Despite the continuing violations, AC did not take enforcement actions due to its lenient practices against repeat violators.

During our visit to the facility in July 2008, AC cited the breeder for another 11 violations (including 1 repeat and 3 directs). One of the direct violations involved a dog that had been bitten by another dog. The first dog was left untreated for at least 7 days, which resulted in the flesh around the wound rotting away to the bone (see figure 2).

Figure 2: Live Dog With Mutilated Leg

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The breeder admitted the dog had been in this condition for at least 7 days. The inspector correctly required the dog to be taken to a local veterinarian who immediately euthanized it.

AC did refer the case to IES for investigation, but only after another direct violation was documented in a subsequent inspection after our visit. Based on the results of the investigation, AC recommended a stipulation. However, as of early June 2009—11 months after our visit—the violator had not yet been fined.[28]

Also, although AWA states that "the Secretary is authorized to cooperate with the officials of the various States . . . in carrying out the purpose of [AWA],"[29] AC did not establish procedures to forward animal cruelty cases to these officials. In this case, AC did not notify the State of Oklahoma (which has first-offense felony laws for animal cruelty) of the inhumane treatment the dog received.

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[27] After the direct violation was cited in December 2007, the inspector re-inspected the facility in January 2008 and found that the attending veterinarian prescribed treatment for the dogs.
[28] For stipulation cases closed between October 2006 and April 2008, it took IES an average of 10 months to issue a stipulation.
[29] 7 U.S.C. §2145(b) (January 3, 2007).

Example 2: At another facility in Oklahoma with 96 adult dogs, AC cited the breeder for 23 violations (including 12 repeats) during 4 inspections from August 2005 to September 2007. Although national office instructions state, "if compliance [is] not attained quickly, proceed to other enforcement steps," AC could not explain why it took no enforcement action.[30]

During our visit to the facility in July 2008, AC cited the breeder for another 11 violations (including 1 repeat). We found numerous dogs infested with ticks. In one case, the ticks completely covered the dog's body (see figure 3). The dog appeared extremely tired and stressed and did not move, even when we approached it.

Figure 3: Dog with Excessive Ticks

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The inspector required the breeder to take only eight of the numerous infested dogs to a veterinarian.[31] However, since the inspector did not identify the dogs in the inspection report, it is uncertain if this dog was treated.

Although the inspector was concerned that the dogs might be anemic, she cited the ticks as an indirect violation (i.e., not affecting the animal's health).[32] AC referred the case to IES for investigation. As of early June 2009—11 months after our visit—the case was still under investigation.

Example 3: At a facility in Ohio with 88 adult dogs, AC cited the breeder for 23 violations (including 7 repeats) during 3 inspections from August 2005 to January 2008. In July 2007, AC sent an official warning to correct the identified care and cleanliness violations or face a "more severe penalty." In January 2008, AC found the same violations but, instead of imposing a more severe penalty, sent another official warning.

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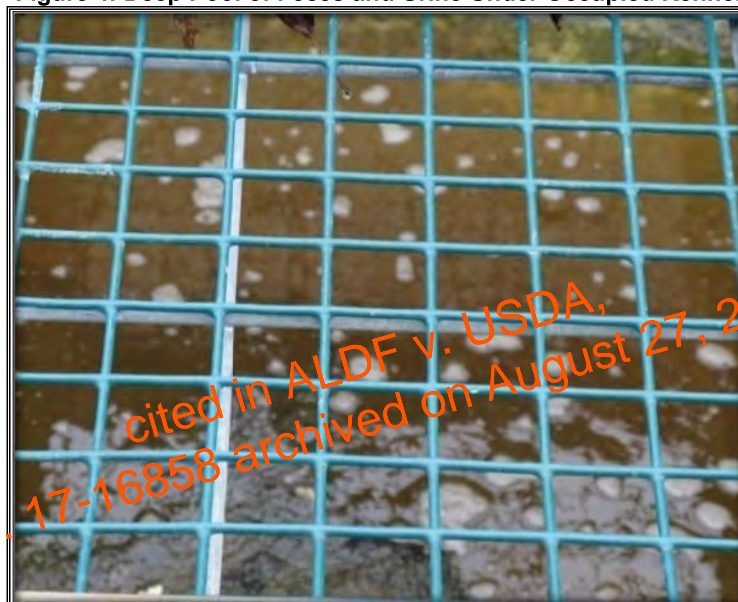
[30] *Animal Care Enforcement Action Guidance for Inspection Reports* distributed to AC staff in 2007.
[31] According to APHIS, the inspector documented and photographed the violation for enforcement action. However, we did not observe her taking any photos when we were there, and afterwards she could not produce them.
[32] See Finding 2 for additional information about indirect and direct violations.

National instructions state that an official warning can be sent if no other enforcement action was taken against the violator in the previous 3 years.[33] In this case, the violator had received an official warning 7 months before so a more serious action was warranted. When we asked AC why a more serious action was not taken, regional management told us that the breeder was making progress. Consequently, national instructions were not followed in order to give the breeder "a reasonable opportunity" to comply with AWA.

Four months later, during our visit to the facility in June 2008, AC cited the breeder for another 9 violations (including 4 repeats). For example, a large amount of feces and urine was pooled under the kennels producing an overpowering odor (see figure 4). The inspector recommended no enforcement action.

Figure 4: Deep Pool of Feces and Urine Under Occupied Kennel



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The breeder was cited for cleaning and sanitation violations during this inspection.

Four months later, the breeder was re-inspected and cited for 4 more violations (including 3 repeats). Again, AC took no enforcement action because the violator was "making credible progress," as noted in AC's "Enforcement Action Option Worksheet."

<u>Example 4</u>: At a facility in Oklahoma with 219 adult dogs, AC cited the breeder for 29 violations (including 9 repeats) during 3 inspections from February 2006 to January 2007.[34] AC requested an IES investigation in May 2007. However, before the investigation resulted in any enforcement action, the inspector conducted another inspection in November 2007 and found five dead dogs and other starving dogs that had resorted to cannibalism. Despite these conditions, AC did not immediately confiscate the surviving dogs and, as a result, 22 additional dogs died before the breeder's license was revoked.

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[33] *Animal Care Enforcement Action Guidance for Inspection Reports* distributed to AC staff in 2007.
[34] The facility was on our original sample list. However, we did not visit it because its license was revoked before our fieldwork. We performed a file review instead.

AWA states, "the Secretary shall promulgate . . . regulations . . . to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of the [AWA]."[35] We asked why the dogs were not confiscated when the inspector first found the dead and starving dogs. AC responded that its regulations require that the violator be given an opportunity to correct the condition before any confiscation can occur.[36]

In the end, the breeder's license was revoked and the surviving dogs were placed in new homes within a year. However, our concern was that AC should have confiscated the dogs instead of giving the breeder another opportunity to correct the condition. If AC had the regulatory authority to immediately confiscate any animals in extreme cases such as this, some of the 22 additional dogs may have survived.

In summary, according to AC's Guide, the goal of the agency's enforcement is to gain dealer compliance with AWA. However, some of AC's practices weaken its ability to accomplish this. Specifically, AC generally does not take enforcement action until a dealer is cited for repeat violations, which are narrowly defined. The Guide also lists "no action" as an enforcement action, which it is not. While taking no action may be reasonable at times, national guidance does require stronger enforcement actions in more serious situations. However, AC staff did not always follow the guidance and, consequently, many dealers were undeterred from continuing to violate AWA. See exhibit D for more examples of dealer noncompliance with AWA.

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To ensure that animals covered by AWA receive humane care and treatment, the agency should require an enforcement action for direct and serious violations; remove "no action" as an enforcement action; and establish controls to ensure inspectors and their supervisors follow national enforcement action guidance in selecting the appropriate option. Also, the agency should modify its regulations to allow immediate confiscation of suffering animals. Last, in States that have felony laws for animal cruelty, the agency should establish procedures to refer such cases to State government.

Recommendation 1

Modify the *Dealer Inspection Guide* to require an enforcement action for direct and serious violations. Also, define a serious violation in the Guide.

Agency Response

APHIS agrees with this Recommendation. We will provide AC employees with guidance regarding all enforcement action options including direct and serious Non-Compliant Items (NCIs)[37] drawn from OIG recommendations, Office of the General Counsel guidance, and legal decisions. APHIS will incorporate the requirements in a new document entitled "Inspection Requirements." This document will be distributed to and discussed with AC employees during the AC National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements"

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[35] 7 U.S.C. § 2146(a) (January 3, 2007).
[36] 9 CFR §2.129(a) (January 1, 2005).
[37] i.e., violations.

document and consolidate it with the *Research Facility Inspection Guide* and the *Exhibitor Inspection Guide* into one comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 2

Remove "no action" as an enforcement action in the *Dealer Inspection Guide*.

Agency Response

APHIS agrees with this Recommendation. We changed the title of the "Enforcement Action Worksheet" to "Enforcement Action Option Worksheet" and changed the flow chart title to read "Enforcement Actions (EA) Guidance for Inspection Reports." We modified these to clarify that: (1) inspectors will forward to AC management a recommended EA (they believe will be most effective in attaining compliance) for all repeats and directs and any facility with inspection results that cause it to go from a lower frequency to High Inspection Frequency; and (2) taking no immediate action requires Regional Director approval and a 90-day reinspection to determine if compliance was achieved or if EA is necessary. Copies of the modified worksheet and flow chart are attached. AC will retain copies of all EA sheets in the facility files in accordance with records retention guidelines. AC's supervisors verbally directed their employees to utilize the modified EA worksheet beginning on December 1, 2009. In addition, this will be reemphasized at the National Meeting.

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OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 3

Incorporate instructions provided in the "Animal Care Enforcement Actions Guidance for Inspection Reports" into the *Dealer Inspection Guide* to ensure inspectors and their supervisors follow them in selecting the appropriate enforcement.

Agency Response

APHIS agrees with this Recommendation. We will provide AC employees with guidance regarding all EA options to recommend to AC management drawn from OIG recommendations, OGC guidance, and legal decisions. AC will incorporate the requirements in a new document entitled "Inspection Requirements." This document will be distributed and covered for AC employees during AC's National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements" document and consolidate it with the *Research Facility Inspection Guide* and the *Exhibitor Inspection Guide* into one comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 4

Modify regulations to allow immediate confiscation where animals are dying or seriously suffering.

Agency Response

APHIS agrees with the intent of this Recommendation, but believes that current regulations are sufficient to allow immediate confiscation. We believe that we can effect the intent of the Recommendation by reviewing and clarifying the confiscation processes so that confiscations can be accomplished with maximum speed and effectiveness. We will distribute the clarified guidance to employees during AC's National Meeting, April 19-22, 2010.

OIG Position

We agree with APHIS' corrective action. However, since APHIS' planned action differs from OIG's recommendation, to achieve management decision APHIS needs to provide us with a copy of the clarified guidance on confiscation processes to demonstrate how it will effect the intent of the recommendation.

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Recommendation 5

Establish written procedures to refer animal cruelty cases to the States that have such felony laws.

Agency Response

APHIS agrees with this Recommendation. While AWA does not give APHIS the authority to determine if State or local animal cruelty laws have been violated, we do believe that we should work with State and local authorities in our shared goal of eliminating animal cruelty. APHIS will refer issues of mutual interest to appropriate local authorities who enforce State laws and share inspection reports and EAs with several States that have State-level enforcement capability (e.g., Colorado, Iowa, Kansas, Missouri, and Pennsylvania). AC has modified the regional "Enforcement Action Option Worksheet" to include a check box for inspectors to indicate whether or not they contacted local or State authorities. A copy of the modified worksheet is attached. We will reemphasize with inspectors the need to notify appropriate authorities who enforce State humane laws during AC's National Meeting, April 19-22, 2010. APHIS will develop a Standard Operating Procedure to refer suspected animal cruelty incidents to appropriate authorities that have felony laws for animal cruelty. This document will be completed by September 30, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

Finding 2: AC Inspectors Did Not Cite or Document Violations Properly To Support Enforcement Actions

During their inspections of dealers, 6 of 19 inspectors did not correctly report all direct or repeat violations, which are generally more serious and require more frequent inspections. In addition, they did not always adequately describe violations in their inspection reports or support violations with photos. Although inspectors are allowed to use their judgment when the Guide does not give detailed instructions, some inspectors made poor decisions. In these cases, AC regional management told us that the inspectors may need additional training in identifying violations and collecting evidence. As a result, problematic dealers were re-inspected less frequently, which placed their animals at a higher risk for neglect or ill-treatment.[38] Also, between 2000 and 2009, the lack of documentary evidence weakened AC's case in 7 of the 16 administrative hearings decided during the period.

AC's Guide states that its purpose is to "provide APHIS Animal Care personnel with a clear, concise, user-friendly reference for inspecting the facilities of USDA licensed animal dealers. By facilitating the inspection process, the Guide will serve as a useful tool to improve the quality and uniformity of inspections, documentation, and enforcement of the Animal Care Program." However, the Guide does allow inspectors to use their judgment in the decision-making process.[39]

We accompanied 19 of the 99 inspectors to observe their inspections of dealer facilities. While many inspectors are highly committed, conducting timely and thorough inspections and making significant efforts to improve the humane treatment of covered animals, we noted that six inspectors did not correctly report direct or repeat violations. Also, the inspectors did not always document violations with sufficient evidence.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

DIRECT VIOLATIONS WERE NOT REPORTED CORRECTLY

The Guide defines a direct violation as one that "has a high potential to adversely affect the health and well-being of the animal."[40] These include: "infestation with large numbers of ticks, fleas, or other parasites" and "excessive accumulations of fecal or other waste material to the point where odors, disease hazards, or pest control problems exist." In such cases, the inspector must re-inspect the facility within 45 days to ensure that the violator has taken timely actions to treat the suffering animals.

In contrast, an indirect violation is one that "does not have a high potential to adversely affect the health and well-being of the animal."[41] These minor violations include: "inadequate records" and "surfaces not [resistant] to moisture." In such cases, a re-inspection may not occur for up to a year.

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[38] AC uses a risk-based inspection system to determine frequency of inspections. If a dealer is not cited for direct or repeat violations, it decreases the frequency of his inspections.
[39] *Dealer Inspection Guide*, ch. 1.2.1 (March 1999).
[40] *Dealer Inspection Guide*, ch. 7.6.1 (April 2000).
[41] *Dealer Inspection Guide*, ch. 7.6.1 (April 2000).

We found that 4 of the 19 inspectors incorrectly reported at least one direct violation as an indirect. After reviewing some of the examples, AC regional management responded that the inspectors may need additional training in identifying violations. Examples follow:

Example 1: At a breeder facility in Oklahoma with 96 adult dogs, we observed numerous dogs infested with ticks. One dog's face was covered with ticks (see figure 5).[42]

Figure 5: Dog Covered with Feeding Ticks

cited in ALDF v. USDA,
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The inspector required the breeder to take only eight of the infested dogs to a veterinarian. However, she did not identify the dogs in the inspection report or require documentation of the treatment. Therefore, we were not able to determine what happened to this dog.

The inspector reported the ticks as an indirect violation, even though excessive ticks are classified as a direct violation in AC's Guide.[43] The inspector told us that "without doing a physical exam on the dogs, it would be hard to tell exactly how detrimental the ticks were." Even so, she reported that some of the dogs "have enough ticks to be concerned about their hematocrit [a red blood cell ratio indicating anemic conditions]."

When we showed figure 5 to a senior veterinarian at AC's national office and the western regional director, they disagreed with the inspector's judgment of the violation. Both stated that it should have been reported as a direct violation in the inspection report.

Several months later, we asked for the treatment records to determine if the tick-infested dogs had received appropriate care, since AC's policy states that "every facility is expected to have a system of health records sufficiently comprehensive to demonstrate the delivery of adequate

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[42] See figure 3 in finding 1 for another dog in this facility with ticks completely covering the dog's body.
[43] *Dealer Inspection Guide*, ch. 7.6.1 (April 2000).

health care . . . [including] dates and other details of all treatments."[44] The inspector told us she could not require the records because AC "cannot enforce policy" and current regulations do not require breeders to keep them.

We found that although AWA and AC regulations are silent on treatment records, they do require adequate veterinary care;[45] without these records, the inspector cannot determine if a violator corrected the problem. We also noted that this inspector had required such records at other facilities, as did other inspectors we travelled with.

Last, the inspector did not identify the specific animals in her inspection report. According to APHIS, the inspector documented and photographed the violation for enforcement action. However, we did not observe her taking any photos when we were there and she could not subsequently produce them. Without the documentation, it would be impossible to identify the animals during re-inspection to determine if they were treated or just disposed of.

Example 2: At a broker facility in Oklahoma with 525 adult dogs, we observed and the inspector reported "an excessive number of insects/ cockroaches" crawling on walls, the floor, and the ceiling. Food bowls were also infested with dead and live cockroaches (see figure 6).

Figure 6: Cockroach-Infested Food

cited in ALDF v. USDA,
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The inspector required the broker to correct the contaminated food within 5 days. However, by not designating this as a direct violation, the inspector will not know if the correction occurred since she will not return for a re-inspection for a year.

The inspector cited the violation as an indirect, even though contaminated feed and heavy vermin infestation in storage or feeding area are classified as direct violations in the Guide.[46] She told us that "cockroaches in the feed [do not necessarily pose] immediate health concerns . . . animals

[44] AC Policy No. 3 (July 17, 2007).
[45] 7 U.S.C §2143(a) (January 3, 2007) and 9 CFR §2.40 (January 1, 2005).
[46] *Dealer Inspection Guide*, ch. 7.6.1 (April 2000).

can eat cockroaches and other bugs with no harm observed to their health." The inspector's supervisor supported the inspector's assessment.

We contacted the directors of the Shelter Medicine Programs at three veterinary schools in California, Massachusetts, and New York to determine if the above situation constituted a direct violation.[47] All three directors disagreed with AC's conclusion. The director of the Shelter Medicine Program at the University of California at Davis told us that "cockroaches have been linked to transmission of [parvovirus and] Salmonella and could be a physical . . . carrier of the disease. While it might not be harmful for the animals to eat a bug on occasion, having such a number of cockroaches in a food container (and in the environment generally) would potentially spread serious diseases . . . constituting a threat not only for animals but also for humans."

The AC supervisor told us that if several inspectors evaluated the same situation, some would document the violation as a direct and others would not. This demonstrates AC's lack of standardization on how animals and violators are treated. To ensure that inspectors cite direct violations consistently, AC should provide more detailed guidance on direct violations and provide more training to the inspectors in identifying them.

Example 3: At a breeder facility in Arkansas with about 100 adult dogs, we observed an excessive accumulation of fecal or other waste material in the drainage between two animal enclosures with overpowering odor (see figure 7).

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The inspector did not cite this as a violation—either direct or indirect—even though excessive accumulations of fecal or other waste material are classified as a direct violation in the Guide.[48] He told us that the build-up of waste was outdoors and "although the build-up in the drain was unsightly and odorous, there was no evidence that it was affecting the animals adversely." The inspector's supervisor agreed with the citation.

The director of the Shelter Medicine Program at the University of California at Davis told us that "dogs' feces carry bacteria, protozoa and parasites that can constitute a threat to dogs and humans. This is especially true if the feces are allowed to remain in the environment for greater than 12-24 hours, allowing harmful infectious agents to mature to the point that they can be spread (e.g., coccidia, which can cause severe disease in puppies)." The director also stated that it could be worse outdoors because "diseases are more likely to be spread through insects in an outdoor environment."

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[47] Shelter Medicine Programs advise and educate animal shelters, which are similar to kennels since they care for large numbers of animals in an enclosure, on the proper handling and care of the animals.
[48] *Dealer Inspection Guide*, ch. 7.6.1 (April 2000).

Figure 7: Excessive Accumulation of Feces and Urine

cited in ALDF v. USDA,
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The inspector cited the breeder for failure to clean and sanitize the kennel, although this area was not included in the citation. Because the breeder was not cited for any direct violations, the inspector will not return for a re-inspection for a year.

In conclusion, by incorrectly reporting direct violations as indirects, AC re-inspected the violators less frequently, leaving the animals at a higher risk for neglect, illness, and ill-treatment.

REPEAT VIOLATIONS WERE NOT REPORTED CORRECTLY

The Guide defines a repeat violation as "a noncompliance cited on the previous inspection or previous consecutive inspections, which has not been corrected, and/or a new noncompliance of the same . . . subsection cited [in] the previous inspection."[49] We found that 4 of the 19 inspectors did not follow the Guide in reporting repeat violations.[50]

Example 4: At a facility in Oklahoma with 55 adult dogs, an inspector cited the breeder for 21 violations during 4 inspections from October 2005 to June 2008. One inspection identified a

[49] *Dealer Inspection Guide,* ch.7.3 (April 2000).
[50] Two of the inspectors were among the four that did not correctly cite direct violations.

violation involving broken wires in pens that needed repair. The next inspection identified sagging wire flooring that needed repair. While both violations fell under the same regulatory subsection[51]—unsafe structures in primary enclosures—the inspector did not report the second as a repeat because the violations were not exactly the same.

We asked the regional directors to comment on what constitutes a repeat violation. The western regional director confirmed that violations with the same citation should be considered repeats. He also stated if the inspectors do not properly identify repeat violations, then they may need more training. The eastern regional director added that in some cases the inspectors need to use their judgment because some subsections are very broad and require interpretation. In this example, however, we believe the citations were very similar and did not require interpretation.

AC requires that enforcement actions be taken against repeat violators. By failing to correctly report a repeat violation, enforcement action may be delayed and future inspections may be less frequent.

VIOLATIONS WERE NOT SUFFICIENTLY DOCUMENTED

In our evaluation of the enforcement process, we reviewed all administrative hearings related to licensed dealers between 2000 and 2009. We found that in 7 of the 16 decisions, the administrative law judges (ALJ) or the Department's Judicial Officer (JO) dismissed part of the violations because of insufficient evidence, including inadequate description of the violation, lack of photo evidence, etc. In one case, the ALJ stated that APHIS "failed to prove the significant majority of the violations." As a result, the ALJ reduced the violator's fine from $25,000 to $2,500.[52] (See finding 3 for additional discussion on this case and others.)

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We reviewed the inspection reports for our sampled facilities and found that the 19 inspectors did not always document their inspections with sufficient evidence, as discussed below.

<u>Example 5</u>: We found that photos were not always taken when necessary, even though APHIS issues digital cameras to the inspectors as part of their field equipment. The Guide states that photos should be taken when a violation may result in an enforcement action (or case).[53] Therefore, the inspectors only took photos, although not always, when their inspections identified a repeat or direct violation since it is these violations that may result in an immediate enforcement action.

However, even first violations may eventually be used to support an enforcement action and should be supported with photos, whenever possible. For example, if a direct violation results in an ALJ case, AWA allows that all prior violations (including non-repeat and indirect) be considered in the calculation of a penalty. Most likely, these non-repeat or indirect violations were not photographed and may not be sufficiently supported to be included in the case. In an

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[51] 9 CFR §3.6 titled "Primary enclosures, General requirements" (January 1, 2005).
[52] *Karen Schmidt*, AWA Docket No. 03-0024.
[53] The Guide does not require photos to be taken for *all* violations. This lack of evidence may weaken APHIS' cases in future hearings.

ALJ decision dated March 7, 2006, the ALJ dismissed six violations in part because there was a lack of photo evidence.[54]

Example 6: We found some inspectors did not adequately describe some violations in inspection reports. At one facility in Oklahoma, the inspector cited the breeder for inadequate floor space. Although her report stated "several dogs are kept in kennels that are not large enough to satisfy their space requirements," the inspector provided no further details. This lack of documentation may impact future litigation. In a prior ALJ case, when the Department similarly charged another breeder, the ALJ ruled in favor of the breeder stating "without any documentation as to the size of the shelters in the pen, a determination as to their adequacy cannot be made."[55]

In summary, the issues and examples discussed above seriously impacted APHIS' ability to enforce AWA. Using their own judgment, some inspectors did not always report direct or repeat violations correctly according to the Guide and did not always document violations with sufficient evidence. When we discussed this issue with the agency, both the deputy administrator and the western regional director generally agreed that the inspectors should be provided more training. In particular, the deputy administrator suggested additional training in shelter medicine and animal abuse.

To correct these deficiencies, we agree that APHIS should provide more comprehensive training and detailed guidance to its inspectors and supervisors on direct and repeat violations, enforcement procedures, evidentiary requirements (e.g., adequately describing violations), shelter medicine, and animal abuse. Also, the agency should revise the Guide to require photos for all violations that can be documented in this manner.

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Recommendation 6

Provide more comprehensive training and detailed guidance to the inspectors and supervisors on direct and repeat violations, enforcement procedures, evidentiary requirements (e.g., adequately describing violations), shelter medicine, and animal abuse.

Agency Response

APHIS agrees with this Recommendation. We have provided training for all inspectors on identifying direct and repeat NCIs and adequately describing NCIs, during fall 2009 meetings between supervisors and their inspector teams. We will provide additional training and guidance (i.e., the "Inspection Requirements" document) to AC's inspectors and supervisors on identifying direct and repeat NCIs, adequately describing NCIs, enforcement procedures, and common medical conditions seen at commercial kennels during AC's National Meeting, April 19-22, 2010. In addition, we will provide a training session on shelter medicine at the National Meeting. We will develop a comprehensive technical training plan through the Center for Animal Welfare by November 30, 2010.

[54] *Karen Schmidt*, AWA Docket No. 03-0024.
[55] *Karen Schmidt*, AWA Docket No. 03-0024.

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OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 7

Revise the *Dealer Inspection Guide* to require photos for all violations that can be documented in this manner.

Agency Response

APHIS agrees with this Recommendation. Our current guidance calls for photographs of: direct NCIs; repeat NCIs; NCIs that may result in EA or an investigation; NCIs that are additional information for ongoing investigations; and transportation violations. In addition, our guidance states that inspectors may choose to take photographs in other circumstances. We will modify our guidance to add NCIs documented on the third prelicense inspection and NCIs documented on inspections that may be appealed. We will reemphasize with inspectors when to take photographs. We will incorporate this information in the new "Inspection Requirements" document, and distribute it to employees during the AC National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements" document and consolidate it with the *Research Facility Inspection Guide* and the *Exhibitor Inspection Guide* into one comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

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OIG Position

We accept APHIS' management decision on this recommendation.

Finding 3: APHIS' New Penalty Worksheet Calculated Minimal Penalties

Although APHIS previously agreed to revise its penalty worksheet to produce "significantly higher" penalties for violators of AWA, the agency continued to assess minimal penalties for the majority of its stipulation cases. This occurred because the new worksheet allowed reductions up to 145 percent of the maximum penalty. As a result, APHIS continued to assess monetary penalties that were inadequate to deter violators. For the 94 stipulation cases we reviewed, APHIS imposed penalties totaling $348,994, nearly 20 percent less than the $434,078 calculated using the old worksheet.

Congress authorized APHIS to enforce AWA and assess monetary penalties to "any dealer, exhibitor, research facility . . . that violates any provision of this chapter, or any rule, regulation or standard promulgated by the Secretary."[56] For our sample cases, the maximum penalty ranged from $2,750 to $3,750.

IES, in conjunction with AC, developed a worksheet to calculate penalties for violators. The overall goal for this worksheet was "to discourage dealers [and others] from violating the Act."[57] In our prior audit report, we found that IES reduced the amount of the penalties for several factors (e.g., gravity of violations, size of business, etc.) authorized by AWA.[58] After making these adjustments, IES further reduced the penalties by 75 percent, an automatic reduction applied universally to all penalties, as an incentive for violators to pay the stipulation and thereby forego a hearing. However, this lowered penalties to such an extent that violators considered them a normal cost of business. We concluded that the resulting penalties were ineffective deterrents and APHIS agreed to develop a new penalty worksheet.

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In April 2006, APHIS implemented a revised worksheet with two significant changes: adding a "good faith" factor[59] and changing the automatic reduction from 75 to 50 percent, as shown in figure 8.

During the management decision process,[60] APHIS officials explained that "the new [worksheet] results in significantly higher stipulations than have previously been issued for similar violations. This has not only been seen in current cases, but also in a number of previous cases that the team used to Beta-test the new penalty [worksheet]."[61] They provided two sample cases, which corroborated their explanation.[62]

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[56] 7 U.S.C. §2149(a) and 2149(b) (January 1, 2007).
[57] "Determining Penalties under the Animal Welfare Act," pg. 2 (April 2006).
[58] OIG Audit No. 33002-3-SF, "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).
[59] Authorized by 7 U.S.C. §2149(b) (January 1, 2007). AC defines good faith as "compliance with standards of decency and honesty" and "sincere integrity in profession and performance." For purposes of AWA, a person who shows good faith "may be: willing to comply and correct violations; have animals that are in good health that do not suffer as a result of the violations, and; cooperative with IES and AC."
[60] Management decision is the agency's evaluation of the findings, recommendations, and monetary results in an audit report and its issuance of a proposed decision in response to such findings and recommendations, including any corrective actions determined to be necessary.
[61] Memorandum dated September 21, 2006.
[62] During this audit, we asked APHIS for the entire sample. The agency was unable to provide this information.

Figure 8: New Worksheet with Good Faith and Automatic 50-percent Penalty Reduction

Animal Care Penalty Worksheet					
For Violations that *Occurred After* June 1, 2005					
Maximum Penalty			Total Violations		Maximum Penalty Violations
$3,750			8		$30,000
Gravity of Violations					
Minor (50%)		Significant (35%)	Serious (20%)	Grave (0%)	
0		8	0	0	
0		$10,500	0	0	$10,500
Size of Business					
	Small (20%)	Medium (10%)	Large (0%)		
	$6,000	$3,000	0		$3,000
Prior History of Violations					
(Letter of Warning, Stipulation, Consent Decision, Admin. Decision)					
	No (25%)		Yes (0%)		
	$7,500		0		7,500
Good Faith					
	Good Faith (50%)	No Evidence (25%)	Lack of Good Faith (0%)		
	$15,000	$7,500	0		$7,500
Total Penalty Amount					
		Agency Recommendation to OGC:			$1,500
(No less than $200)		Agency Stipulation Recommendation:			$750

NEW WORKSHEET REDUCED PENALTIES

To review the impact of APHIS' changes to the penalty assessment process since our last audit, we compared the penalties using both the old and the new worksheets for all 94 stipulation cases closed between October 2006 and April 2008.[63] We found:

- In 53 cases, the penalties were lower using the new worksheet than they would have been using the old worksheet (see chart 2); in 6 other cases, the penalties were the same.

- In 12 of the 53 cases, the reductions decreased the penalties to such an extent (up to 145 percent of the maximum penalty) that they initially resulted in a *negative* number. In these cases, APHIS arbitrarily changed and inconsistently applied minimum penalties.

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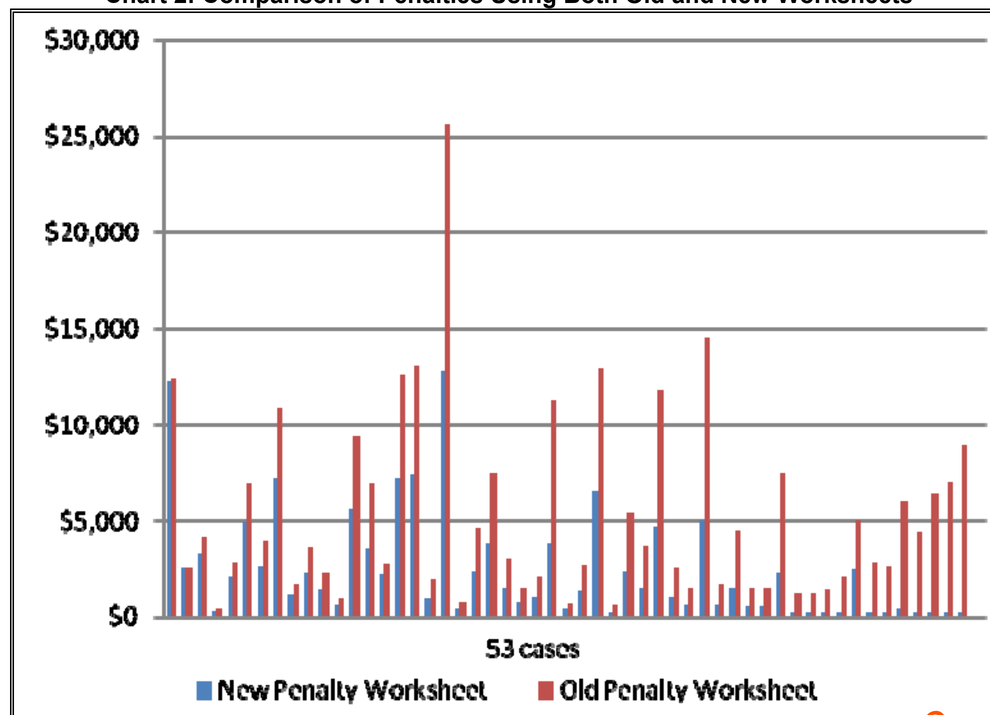
The stipulations assessed by APHIS between October 2006 and April 2008 totaled $348,994. We recalculated the penalties with the old worksheet and found that the stipulations would have been $434,078. Instead of assessing "significantly higher stipulations," APHIS *lowered* the violators' penalties by $85,084—a 20-percent decrease.

For one breeder, APHIS imposed a penalty for numerous violations including inadequate veterinary care, feeding, watering, and cleanliness. Due to excessive reductions allowed by the new worksheet, the breeder's penalty was 97 percent lower than if calculated using the old worksheet. Moreover, the reductions were so excessive that in 12 of 94 cases (13 percent), the worksheet generated a negative stipulation. When this occurred, the agency issued a minimum stipulation.

[63] To determine the impact of recent changes to the penalty worksheet, we continued to review stipulations because they were the focus of our last audit. Since APHIS issued its new worksheet and revised penalty guidelines in April 2006, we selected cases after FY 2006 to give the agency time to implement the changes.

Chart 2: Comparison of Penalties Using Both Old and New Worksheets



During a 14-month period, IES lacked controls over the minimum stipulation amount in that it changed four times, as shown in table 2.

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Table 2: Penalties Calculated with the New Penalty Worksheet

Case No.	Stipulation date	No. of Violations	Maximum Penalties[a]	Stipulation Recommendation[b]	Minimum Stipulation Issued
1	8/25/06	9	$25,750	($231)	$250
2	10/4/06	16	$55,000	($325)	$200
3	10/13/06	14	$46,500	($1,163)	$200
4	11/8/06	44	$165,000	($24,469)	$250
5	11/22/06	7	$26,250	($937)	$250
6	2/8/07	7	$26,250	($2,906)	$250
7	8/3/07	1	$3,750	($281)	$275
8	8/6/07	31	$97,500	($11,344)	$250
9	8/30/07	2	$5,500	($412)	$250
10	9/28/07	5	$18,750	($469)	$250
11	10/2/07	15	$56,250	($1,406)	$250
12	10/19/07	2	$7,500	($188)	$250

a. These amounts were calculated by multiplying the number of violations by the maximum penalty authorized.
b. These amounts were calculated by applying so many reductions that the stipulations became a negative number.

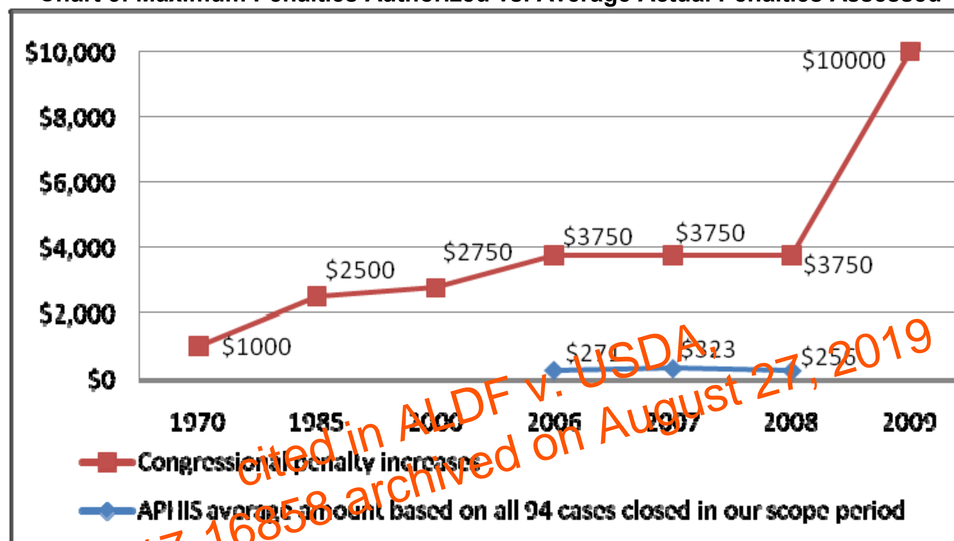
We inquired why IES used different minimums. In March 2009, IES' chief of Enforcement and Operations Branch stated, "it is not possible to glean from the email exchanges between the enforcement specialist and the program official why [this occurred]." Other IES officials also had no explanation about how the different minimums were calculated for the cases.

Based on the discussion above, we concluded that APHIS should limit total penalty reductions on its new worksheet to less than 100 percent and establish a minimum stipulation amount to be consistently applied.

CONGRESS INCREASED MAXIMUM PENALTIES

Since 1970, Congress and the Department have steadily increased the maximum penalty amount for AWA violations (see chart 3).[64] The most recent increase was an unprecedented $10,000 per violation, as implemented by the 2008 Farm Bill.[65] The House Committee on Agriculture stated that this increase was to "strengthen fines for violations of the Animal Welfare Act."[66]

Chart 3: Maximum Penalties Authorized vs. Average Actual Penalties Assessed



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While Congress and the Department continued to increase the maximum penalty, the average penalties actually assessed by APHIS represented less than 10 percent of the maximum.[67] Lower penalties could be an indication that the violations were all minor or insignificant; however, we found that this was not the case. Serious violations (e.g., those that compromise animal health) and grave violations (e.g., those that directly harm animals) made up nearly 60 percent of all violations from October 2006 to April 2008.

APHIS CONTENDS THAT ASSESSED PENALTIES ARE APPROPRIATE

We inquired why the new worksheet did not produce the higher penalties that the agency previously told us it would. APHIS officials responded that there is no requirement to impose the statutory maximum penalty for violations. We agree and we are not advocating that APHIS assess the maximum penalty. However, as previously stated, we do recommend that APHIS issue more reasonable stipulations by limiting total penalty reductions on its new worksheet to less than 100 percent.

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[64] From 1970 to 2009, USDA approved two increases to account for inflation; Congress authorized two significant increases that totaled two and a half times the previous maximum amount.
[65] Public Law 110-246, Sec. 14214 (June 18, 2008). The increased maximum penalty did not apply to the cases we analyzed.
[66] The Fact Sheet for the Conference Report—2008 Farm Bill Miscellaneous Title.
[67] For 2006, we used actual data from IES' annual report. For 2007 and 2008, we averaged the actual stipulation amounts from the 94 cases.

In addition, APHIS stated that stipulations increased using the new worksheet. To support this, the agency compared the average stipulation before our 2005 audit report to the average stipulation after our 2005 audit report. However, the agency did not consider factors that affected the average stipulation, such as the gravity of violations, size of business, violation history, and increases in the authorized maximum penalty.

To determine the impact of these factors, we reviewed stipulation cases collected for our 2005 audit[68] and found: (1) the violations after 2005 were more serious than those in earlier years;[69] (2) the size of business of the violators after 2005 was larger;[70] (3) more violators after 2005 had a violation history;[71] and (4) the maximum penalty increased since our last audit.[72] Since the above factors increased stipulations, we disagree that stipulations increased because of the new worksheet.

Finally, APHIS stated that OIG recommended it produce higher penalties without regard to penalty precedent established by the courts, which is binding on APHIS. It also stated that the JO routinely imposes a fraction of the statutory maximum penalty even for the most egregious violations.

APHIS' legal proceedings were not the focus of our audit. However, to validate APHIS' statement, we reviewed the seven cases the agency provided. We found:

- In three cases, the JO imposed the same or almost the same penalty that APHIS asked for.[73]
- In three other cases, the JO reduced the civil penalty because APHIS either did not provide sufficient evidence or used the wrong maximum penalty amount.[74]
- In the last case, the JO did not impose a penalty because he found that AWA and the regulations were ambiguous on the issue.[75]

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In 1995 and again in 2005, we reported that the monetary penalties were often so low that violators regarded them as a cost of business and that APHIS reduced the stipulations making them basically meaningless. In our current audit, we found that this problem has not yet been corrected. APHIS continues to impose negligible stipulations by applying excessive reductions (up to 145 percent) to the maximum penalties. To correct this on-going problem, the agency needs to issue stipulations that will serve as a better deterrent for encouraging violators to comply with the law.

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[68] We reviewed 77 of 197 cases closed from 2002 to 2004, the sample selected during our last audit.
[69] Serious and grave violations made up nearly 60 percent of all violations in our sample after 2005, whereas serious and grave violations only accounted for 11 percent of cases before 2005.
[70] Large businesses made up 30 percent of all violators in our sample after 2005, whereas large businesses only accounted for 13 percent of cases before 2005.
[71] Over 38 percent of the violators had a violation history in our sample after 2005, whereas only 26 percent of the violators had a violation history of cases before 2005.
[72] The maximum penalty increased from $2,750 to $3,750 in 2005, a 37 percent increase.
[73] *Marilyn Shepherd*, AWA Docket No. 05-0005, *Lorenza Pearson*, AWA Docket Nos. 02-0020 and D-06-0002, and *Jewel Bond*, AWA Docket No. 04-0024.
[74] *Martin Colette*, AWA Docket No. 03-0024, *Jerome Schmidt*, AWA Docket No. 05-0019, and *Karen Schmidt*, AWA Docket No. 03-0024.
[75] *Daniel Hill,* AWA Docket No. 06-0006

Recommendation 8

Limit total penalty reductions on the new worksheet to less than 100 percent.

Agency Response

APHIS agrees with this Recommendation. We will develop and implement a new worksheet which limits total penalty reductions to less than 100 percent by September 30, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 9

Establish a methodology to determine a minimum stipulation amount and consistently apply that amount, when appropriate.

Agency Response

APHIS agrees with this Recommendation. We will formally document the "minimum stipulation amount" in the "Determining Penalties Under the Animal Welfare Act" document by September 30, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

Finding 4: APHIS Misused Guidelines to Lower Penalties for AWA Violators

In completing penalty worksheets, APHIS misused guidelines in 32 of the 94 cases we reviewed to lower the penalties for AWA violators. Specifically, it (1) inconsistently counted violations; (2) applied "good faith" reductions without merit; (3) allowed a "no history of violations" reduction when the violators had a prior history; and (4) arbitrarily changed the gravity of some violations and the business size. APHIS assessed lower penalties as an incentive to encourage violators to pay a stipulated amount rather than exercise their right to a hearing. As a result, APHIS did not consistently assess penalties among violators, which led to some violators not receiving their full penalty according to APHIS' guidelines.

Under AWA, "each violation and each day during which a violation continues shall be a separate offense." However, APHIS "shall give due consideration to the appropriateness of the penalty with respect to the size of the business, . . . the gravity of the violation, the person's good faith, and the history of previous violations."[76] Based on prior ALJ and JO decisions, APHIS'

[76] 7 U.S.C. §2149(b) (January 1, 2007).

Monetary Penalty Action Team established guidelines in 2006 that elaborated on the use and amount of penalty reductions.[77]

After AC completes an inspection and considers enforcement action against a violator, it may request an IES investigation generally depending on the severity of the violations. If the investigation confirms the violations, AC may request that a stipulated (i.e., compromised) penalty be offered to the violator, who in return gives up his right to a hearing. IES, in coordination with AC, calculates the penalties while allowing reductions consistent with those listed in AWA.

In 32 of the 94 stipulation cases closed from October 2006 to April 2008, we found that APHIS misused guidelines in completing the penalty worksheet. (Since some individual cases contained multiple errors, the following add up to more than 32 cases.)

- In 18 cases involving animal deaths or unlicensed wholesale activities, APHIS used a smaller number of violations than the actual number.
- In 13 cases, APHIS applied a 50-percent or 25-percent good faith penalty reduction without supporting evidence or with contradictory evidence.
- In 22 cases, APHIS applied a penalty reduction, established for violators with no prior violation history, to violators that had a prior history.
- In 1 case, APHIS arbitrarily reduced the gravity of some violations and the size of the business from what was originally reported on the penalty worksheet.

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We concluded that APHIS applied these penalty reductions without merit for the purpose of lowering penalties. AC regional management told us that they wanted to assess penalties that the violators would agree to pay rather than exercise their right to a hearing.

VIOLATIONS INCONSISTENTLY COUNTED

In our prior audit report, we recommended that APHIS calculate penalties on a per animal basis, as appropriate.[78] In September 2006, APHIS' prior Administrator agreed stating, "the criteria for total number of violations is calculated on a 'per animal, per day' basis."[79] Our review of the 94 cases disclosed that APHIS used this criterion only in cases involving animal deaths or unlicensed wholesales. However, because APHIS did not include the "per animal" part in its guidelines, this practice was not consistently followed, as discussed below.

In five cases involving animal deaths, APHIS calculated penalties based on one violation even though multiple animals died in each case. For example, in 2006 an airline company transported eight puppies from Europe to New York. Five puppies died because they were not adequately fed or hydrated. APHIS cited the violator for one grave violation for the deaths of the five

[77] "Determining Penalties Under the Animal Welfare Act" (April 2006).
[78] OIG Audit No. 33002-3-SF "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).
[79] Memorandum from the Administrator to the Assistant Inspector General (September 21, 2006).

puppies. However, considering previous ALJ and JO decisions, APHIS should have counted each dead animal as a grave violation.[80]

In 13 cases involving unlicensed wholesales,[81] APHIS calculated penalties for unlicensed breeders based on the day the violation occurred even though multiple animals were sold each day. For example, an unlicensed breeder in Indiana sold a total of 19 puppies on 2 separate dates to a pet store. APHIS cited the violator for two violations, one for each date of occurrence instead of one for each animal.

Further, the penalties for wholesaling without a license were so low that in some cases, there was no incentive to be licensed. The penalties represented only a fraction of the amount that the violator would have paid in license fees. As a result, in addition to avoiding inspections, the violator had a financial advantage by not being licensed. For example, an unlicensed breeder in South Dakota was caught wholesaling 24 puppies from 2004 to 2006. APHIS imposed a stipulation of $200. The license fee for the 3-year period would have been $695—more than three times the amount of the stipulation.

We also found many cases where IES calculated the penalty two ways—one on a "per animal" basis and the other on "date of occurrence"—allowing AC regional management to choose the one that they believed the violators would pay. However, guidelines should sufficiently detail exactly how penalties are to be calculated. Given a set of circumstances, the worksheet should generate only one penalty amount, regardless of the violators' willingness to pay.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

GOOD FAITH PENALTY REDUCTION

As discussed in the previous finding, APHIS revised the penalty worksheet by adding a good faith factor. Good faith is defined in the guidelines as "a person who shows good faith may be willing to comply and correct violations; have animals that are in good health that do not suffer as a result of the violations. . . . In contrast, [a person who] lacks good faith may: have repeat violations . . . engage in regulated activity after having surrendered their license or after being notified of the Act's licensing requirements."[82]

If the violator demonstrates good faith, APHIS reduces the statutory maximum on the penalty worksheet by 50 percent. If the violator demonstrates a lack of good faith, a penalty reduction is not applied. However, APHIS established a third penalty reduction—25 percent—which it gives to the majority of violators that are unable to show either evidence of good faith or a lack of it—no evidence either way.

We found 13 cases where the agency applied a 50-percent or 25-percent good faith penalty reduction without merit. Two examples are:

- At a facility in Tennessee, AC cited 22 violations, some of which caused animal deaths. When AC re-inspected the facility 5 months later, the inspector cited 12 more violations,

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[80] "Consistent with established Department policy, when a regulated entity fails to comply with the Act, the regulations, or the standards, there is a separate violation for each animal consequently harmed or placed in danger." (Delta Airlines, Inc. 53 Agric. Dec. 1076 (1994)).
[81] AWA requires wholesale pet breeders to be licensed (7 U.S.C. §2133, January 1, 2007).
[82] "Determining Penalties Under the Animal Welfare Act," pg. 4 (April 2006).

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4 of which were repeats that caused additional deaths.[83] In a letter dated July 3, 2007, the regional director stated that "we have no evidence of good faith." Nonetheless, when APHIS calculated the penalty for all 34 violations, the violator received a 50-percent good faith penalty reduction. We concluded that the violator had actually displayed a lack of good faith by not correcting previous violations that caused the additional deaths.

- One licensed breeder in Ohio, with no veterinary qualifications, operated on a pregnant dog without anesthesia; the breeder delayed calling a veterinarian and the dog bled to death. The inspector also found that 40 percent of the dogs in the kennel were blind due to an outbreak of Leptospirosis.[84] The inspector determined that the facility's water was contaminated and had caused the outbreak.

  Guidelines state that "a person who shows 'good faith' . . . [has] animals that are in good health that do not suffer as a result of the violations . . ."[85] Despite the lack of good faith demonstrated by the breeder, APHIS applied a 25-percent good faith penalty reduction to lower the penalty. Four months later, a subsequent inspection continued to document violations at the facility. The inspector reported that "this is a veterinary care issue that continues to be a serious problem—failure to provide adequate veterinary care for over 200 adult dogs."

HISTORY OF VIOLATIONS

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A history of violations is defined as a previous violation of AWA or a "pattern of ongoing violations."[86] When there is no prior history of violations, the guidelines allow a 25-percent penalty reduction.

We found that in 22 cases, APHIS allowed a 25-percent reduction of the maximum penalty amounts for "no prior history of violations," even though the violators had a prior history of violations, as shown in the IES tracking system or through our review of the case files. Two examples are:

- A breeder in Ohio with about 62 adult dogs was cited for 1 minor, 16 significant, and 12 serious violations during 5 inspections between 2005 and 2006. The violations included the breeder's failure to inform his attending veterinarian that some of his dogs delivered dead puppies, which is important if the puppies died of a disease like Brucellosis.[87] The breeder was also cited for administering medications to his dogs without his attending veterinarian's knowledge. Although the breeder was issued an official warning in 2005 for numerous violations including inadequate veterinary care, APHIS gave him a 25-percent penalty reduction in 2007 for "no prior history of violations."

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[83] The agency incorrectly used 32 violations on the worksheet when the settlement agreement, which was sent to the breeder, showed 34.
[84] This is a bacterial disease that affects animals as well as humans and causes damage to the inner lining of blood vessels. The liver, kidneys, heart, lungs, central nervous system, and eyes may be affected.
[85] "Determining Penalties Under the Animal Welfare Act," pg. 4 (April 2006).
[86] "Determining Penalties Under the Animal Welfare Act," pg. 5 (April 2006).
[87] This is an infectious bacterial disease, which is spread through contact with aborted fetuses and discharges from the uterus of infected bitches, during mating, through maternal milk, and possibly through airborne transmission in some cases. The bacteria enter the body through mucous membranes and spreads from there to lymph nodes and the spleen. It also spreads to the uterus, placenta, and prostate gland as well as other internal organs at times.

- An unlicensed breeder in Indiana with 200 adult dogs received an official warning in 2002 for wholesaling to pet stores. In 2006, the breeder (still unlicensed) was found wholesaling puppies to a pet store in Florida. When calculating the penalty for this violation, APHIS gave the breeder a 25-percent "no history of violations" penalty reduction, even though the breeder had received an official warning in 2002.

GRAVITY OF VIOLATIONS AND SIZE OF BUSINESS

AWA also allows APHIS to consider the gravity of violations and size of a business when determining a penalty. However, we found one case where APHIS arbitrarily reduced the gravity of the violations and the size of the business in order to lower the violator's penalty. A broker in North Carolina knowingly purchased puppies from an unlicensed breeder and failed to ensure that the puppies were at least 8 weeks old at the time of purchase. Both are considered serious violations according to guidelines. The violator should have been considered a large business because he purchased and sold over 500 animals a year.[88]

Originally, APHIS assessed the broker a stipulation of $4,500. After receiving an eight-page letter from the broker claiming hardship in paying the penalty, AC regional management altered the gravity of the violations from serious to both significant and minor to allow an additional 15-percent penalty reduction. It also altered the size of the business from medium to small to allow another 10-percent penalty reduction. As a result, the penalty was reduced from $4,500 to $1,687.

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Guidelines state that "some factors . . . are not relevant to determining monetary penalties, including, among other things: inability to pay, disability, infirmity, need for income, effect on business or family."[89] The regional manager, who participated as a team member in establishing these guidelines, told us that the broker's letter addressed mitigating factors. However, after reviewing the letter, we saw no evidence to justify the changes made to the penalty.

As these conditions demonstrate, when the worksheet yielded penalties that regional managers considered excessive, they misused guidelines to lower the penalties. This resulted in some violators not receiving their full penalty and penalties not being consistently applied among violators. Therefore, we recommend that APHIS designate a responsible party to ensure that the guidelines established by its Monetary Penalty Action Team are consistently followed. Also, APHIS should include instructions in the guidelines to count each animal as a separate violation in cases involving animal deaths or unlicensed wholesale activities.

Recommendation 10

Designate a responsible party to ensure that "Determining Penalties Under the Animal Welfare Act" (April 2006) is consistently followed by AC and IES and that penalties are properly calculated.

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[88] The guidelines state "dealers [that] purchased, sold, or transported 405 animals during a two-year period" should be considered large-sized.
[89] "Determining Penalties Under the Animal Welfare Act," pg. 5 (April 2006).

Agency Response

APHIS agrees with this Recommendation. We recently reorganized the enforcement component of our Investigative and Enforcement Services (IES) to establish two branches: the Animal Health and Welfare Enforcement Branch (AHWEB) and the Plant Health and Border Protection Enforcement Branch. A GS-14 Chief will supervise each branch with full supervisory authority for branch staff. The Chief of AHWEB and his/her subordinate staff are responsible for EAs involving only AC and the APHIS Veterinary Services programs, greatly increasing the level of staff specialization afforded to these programs when compared to that in place during the audit. The Chief of AHWEB will assume responsibility for ensuring that AWA penalty calculations are consistent and in accordance with the instructions included in "Determining Penalties Under the Animal Welfare Act." In an instance where the AWHEB Branch Chief is unavailable or the position is vacant, the IES Deputy Director will assume this responsibility.

OIG Position

We accept APHIS' management decision on this recommendation.

Recommendation 11

Include instructions in "Determining Penalties Under the Animal Welfare Act" to count each animal as a separate violation in cases involving animal deaths and unlicensed wholesale activities.

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Agency Response

APHIS partially agrees with this Recommendation. The Recommendation is not always practical for unlicensed wholesale activities. We will request an opinion from Office of the General Counsel about a penalty structure for unlicensed wholesale activities by September 30, 2010. However, we will count each animal as a separate violation when an animal death results from NCIs. Specifically, AC will clarify the penalty guidelines by September 30, 2010, to count each animal as a separate violation when an animal death resulting from NCIs is involved.

OIG Position

We agree with APHIS' corrective action. However, our concern remains whether APHIS will count the violations for unlicensed wholesale activities consistently. To achieve management decision, APHIS needs to provide us with a copy of the Office of the General Counsel's opinion.

Section 3: Internet

Finding 5: Some Large Breeders Circumvented AWA by Selling Animals Over the Internet

Large breeders that sell AWA-covered animals over the Internet (hereafter referred to as Internet breeders) are exempt from AC's inspection and licensing requirements. This occurred because the AWA section that excludes retail pet stores (i.e., stores that sell directly to the public) from its provisions pre-dates the Internet and creates a loophole for these breeders to circumvent AWA. As a result, an increasing number of Internet breeders are not monitored for their animals' overall health and humane treatment.

AWA requires that "animals intended for use . . . as pets are provided humane care and treatment" and that breeders of such animals be licensed and inspected. AWA exempts small businesses and retail pet stores from its provisions, although it did not define the term "retail pet stores."[90]

AWA was originally passed in 1966, long before the widespread use of the Internet. With the explosion of the Internet in the 1990s, it became possible for large breeders to circumvent AWA by selling directly to the public without an APHIS license and regular inspections. However, these retail breeders should not be categorized as retail pet stores or small businesses and, therefore, should not be exempted from AWA requirements for the reasons discussed below.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

- Retail Pet Store Exemption. In 1971, APHIS defined the term retail pet store as "any retail outlet where animals are sold only as pets at retail."[91] At that time, retail pet stores generally sold to local consumers. With the arrival of the Internet, the definition was broadly interpreted to include Internet breeders because they also sell directly to consumers. However, these breeders are no longer limited to local consumers but can sell and transport animals nationwide.

  Also, the former Secretary stated that "retail [outlets] are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes."[92] However, for Internet breeders, there is no degree of self-regulation and oversight because consumers do not have access to their facilities. Without consumer oversight or APHIS inspections, there is no assurance that the animals are monitored for their overall health and humane treatment.

- Small Business Exemption. A small business is one that "derive[s] less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat."[93] The Secretary determined that "any person who maintains a total of three or fewer breeding female dogs . . . which were born and raised on his or her premises, for pets or exhibition" or "any

[90] 7 U.S.C. §2131, §2133, and §2134 (January 3, 2007).
[91] 9 CFR §1.1 (December 23, 1971).
[92] Doris Day Animal League v. Veneman (August 2003).
[93] 7 U.S.C. §2133 (January 3, 2007).

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person who sells fewer than 25 dogs and/or cats per year, which were born and raised on his or her premises . . . to any research facility" is exempted.[94]

However, many Internet breeders do not fall in the small business category because they have more than three breeding females. Some are very large breeders that derive a substantial income from the breeding of dogs. For example, one Internet breeder we visited in Iowa had over 140 breeding dogs and generated sales of $160,000 in 2007.

In April 2009, APHIS publicly acknowledged that not requiring Internet breeders to be licensed and inspected is "a massive loophole."[95] To quantify the loophole, we used two search engines to identify how many of these breeders were licensed in two of our eight sampled States. We identified 138 breeders that had more than 3 breeding females or handled more than 25 dogs a year. We found 112 of the 138 (81 percent) were not licensed by APHIS. If these breeders had sold their dogs wholesale (i.e., not retail through the Internet), they would have needed a license.

Without a license, these breeders are not monitored or inspected for their animals' overall health and humane treatment. With the dramatic increase in online sales, consumers who purchased dogs in this manner sometimes found health problems with their dogs. Examples of some consumer complaints are listed below:

"This one pound puppy was very sick when she arrived . . . my vet informed me that she was suffering from severe hypoglycemia and massive infestations of Giardia, Threadworm, Roundworm and Coccidia. She also had two groin hernias. Her blood glucose level was dangerously low so she was immediately put on an IV."—source: an OIG Hotline Complaint.

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"The [puppies] were mutts with poor body conformation, crooked teeth and were completely unsocialized. No health records came with the dogs and the information on the website was completely false."—source: a Better Business Bureau sponsored website.

"After suffering from numerous health issues that cost . . . thousands of dollars in vet bills, [the puppy] died when he was just eight months old."—source: San Francisco Chronicle.

"A breeder with a criminal record for animal cruelty was selling hundreds of puppies on the Internet."—source: USA Today.

To ensure that large Internet sellers are inspected, APHIS should propose that the Secretary seek legislative change to cover these sellers under AWA. Specifically, the agency should propose that the Secretary recommend to Congress that it exclude Internet sellers from the definition of "retail pet store," thereby ensuring that large breeders that sell through the Internet are regulated under AWA.

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[94] 9 CFR §2.1 (January 1, 2005)
[95] "A (Designer) Dog's Life," *Newsweek (*April 13, 2009)

Recommendation 12

Propose that the Secretary seek legislative change to exclude Internet breeders from the definition of "retail pet store," and require that all applicable breeders that sell through the Internet be regulated under AWA.

Agency Response

APHIS agrees with this Recommendation. APHIS is currently providing information (including potential options) to Congress as requested regarding the proposed Puppy Uniform Protection and Safety Act (PUPS). This bill would place dogs sold directly to the public via the Internet, telephone, and catalogue sales within the jurisdiction of the AWA. In addition, APHIS will concurrently draft a legislative proposal for the Secretary by May 31, 2010.

OIG Position

We accept APHIS' management decision on this recommendation.

cited in ALDF v. USDA,
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Section 4: Information System

Finding 6: Security Controls Need to Be Addressed for AC's New Information System

AC started using the Animal Care Information System (ACIS), its new mission critical system,[96] before the Department's Cyber Security Office gave its concurrence to operate it. This occurred because APHIS' Chief Information Officer (CIO) believed that the majority of the new system's security controls were operating as intended and recommended that it be implemented. The Cyber Security Office disagreed with the CIO's assessment and identified issues in the concurrency review checklist. As a result, there is no assurance that the new system has the security controls mandated by the Department.

Departmental Manual 3555-001 states, "all USDA IT systems require certification and accreditation prior to the system becoming operational. . . . Certified systems will undergo an independent concurrence review by the ACIO-CS [Associate Chief Information Officer for Cyber Security] prior to submission to the DAA [Designated Accrediting Authority]."[97] APHIS' condensed guide also states, "the concurrence of ACIO-CS with the [Certifying Official] is mandatory prior to submission to the DAA."[98]

Since 1994, AC has used LARIS (Licensing and Registration Information System) to record licensing and registration of all breeders, exhibitors, and other facilities and to document their inspection and violation histories. After reviewing LARIS in our last audit,[99] we determined that this mission critical information system lacked certain key features that prevented it from effectively tracking violations and prioritizing inspection activities. Also, it generated unreliable and inaccurate information, limiting its usefulness to AC inspectors and supervisors. APHIS agreed with our recommendation for a new system. However, due to contractor failure, APHIS did not start to develop ACIS (LARIS' replacement) until September 2007.

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AC closed down LARIS on September 30, 2008, expecting that ACIS would be certified and accredited the next month. However, the certification and accreditation did not occur the next month; in fact, AC did not have an operating information system for 5 months before launching the new system. Throughout this period, inspectors worked without a system, manually tracking reports and calculating future inspection dates.[100]

By January 2009, APHIS' CIO believed that the majority of ACIS' security controls were in place and operating as intended. The CIO recommended that ACIS be authorized for use, disregarding the required departmental concurrence review. Based on the CIO's recommendation, the DAA (in this case, APHIS' deputy administrator) issued the authority to operate ACIS, and AC inspectors started using the new system. Once the system became operational in March 2009, inspectors then had to enter the 5 months of accumulated data into the new system.

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[96] Any system whose failure or disruption in normal business hours will result in the failure of business operations.
[97] *Departmental Manual* 3555-001, ch. 11, pt. 1 (October 18, 2005).
[98] *Certification and Accreditation Condensed Guide*, pg. 7 (April 24, 2007).
[99] Audit No. 33002-3-SF, "APHIS Animal Care Program Inspection and Enforcement Activities" (September 2005).
[100] LARIS and ACIS could not be run simultaneously on the inspectors' computers due to compatibility issues. LARIS had to be removed before ACIS could be loaded.

However, the Department's Cyber Security Office did not concur with the CIO about the security controls and stated, "the documentation is [not] sufficient to support an accreditation decision and [it] will not issue an interim authority to operate . . . the issues we identified [in the checklists relate to the] system security plan, security controls compliance, contingency concurrency, and risk assessment."[101] To comply with departmental policy, APHIS should address ACIS' security issues identified by USDA's Cyber Security Office during its concurrency review. Controls should also be established regarding the closing down or launching of mission critical systems.

Recommendation 13

Correct all security issues pertaining to ACIS that were identified by USDA's Cyber Security Office during its concurrency review.

Agency Response

APHIS agrees with this Recommendation. We have already corrected all security issues pertaining to ACIS. Our corrective actions are documented in the attached memorandum entitled "Approval for Interim Authority to Operate for Animal and Plant Health Inspection Service Animal Care Information System (ACIS)," dated October 21, 2009.

OIG Position

We accept APHIS' management decision on this recommendation.

cited in ALDF v. USDA,
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[101] Memorandum to APHIS dated February 11, 2009.

Section 5: Debt Management

Finding 7: IES Did Not Adequately Establish Payment Plans for Stipulations

IES did not adequately establish the payment plans for AWA violators that had stipulation agreements. This occurred because IES did not follow the payment plan process that was presented by the Financial Management Division (FMD) during a meeting in 2004. Further, FMD did not provide sufficient oversight or follow up of IES' debt management activities. As a result, 20 payment plans totaling $92,896 were (1) established without verifying the violators' ability to pay, (2) not legally enforceable, and (3) not always established as accounts receivable.

Overall, FMD provides debt management services for APHIS and other agencies within the Department. According to APHIS' Budget and Accounting Manual, "FMD is responsible for developing and implementing an effective debt management program for the Agency . . . and providing oversight of Agency debt management activities."[102]

To accomplish this, FMD partners with IES, which negotiates payment plans for violators that claim they are unable to pay the full amount of an agreed-upon stipulation. In March 2004, FMD representatives met with IES to discuss the payment plan process and the responsibilities that IES would be expected to assume. FMD did not provide further oversight.

cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

We reviewed all 20 payment plans for stipulation agreements closed from October 2006 to April 2008. In assuming debt management responsibilities, IES did not comply with several regulatory requirements involving all 20 plans—most having overlapping errors. Specifically, we found that IES:

- Did not collect financial information when the violators claimed inability to pay. After IES and a violator agree to a stipulation, the violator may either pay in full or if he is unable to do so, then negotiate a payment plan. For all 20 plans, IES did not verify violators' eligibility to qualify for the plans. Regulations require that plans must be based on debtor's inability to pay in a reasonable time, which should be supported by financial information, such as tax returns and credit reports.[103] IES told us it was not aware of this requirement.

- Did not obtain legally enforceable written agreements (payment plans) from the violators. After IES and the violator mutually agree to a payment plan, IES signs the document before sending it to the violator. However, for 19 plans, IES did not require the violators to sign.[104] Regulations require that debtors provide "a legally enforceable written

[102] APHIS' *Budget and Accounting Manual,* ch. 12 p. 2 (October 1, 2002).
[103] 31 CFR §902.2 (July 1, 2006).
[104] For one case, IES did not require the violator to sign the original payment plan. After accepting its terms, the violator asked IES to renegotiate the fine to a lower amount, and IES agreed to do so but required the violator to sign the second payment plan that was generated based on the renegotiated amount.

agreement."[105] To ensure this, APHIS' debt management policies require that the plans be signed by the debtor.[106] IES was not aware of this requirement.

- Did not forward documents to FMD to establish accounts receivable. For 7 payment plans, IES did not forward the required documents (i.e., settlement agreement, which includes the stipulation amount and plan) to FMD in order to establish accounts receivable. Although IES' procedures require plans to be forwarded to FMD, IES could not provide a reasonable explanation why these plans were not. Without establishing accounts receivable for the plans, FMD cannot track and collect the debt.

As these conditions demonstrate, IES did not adequately establish 20 payment plans in accordance with requirements. Therefore, we recommend that FMD ensure that IES follows the payment plan process by conducting additional training and periodic reviews or reassume responsibility for establishing violators' payment plans.

Recommendation 14

Require FMD to ensure that IES follows the payment plan process by conducting additional training and periodic reviews, or require FMD to reassume its responsibility for establishing payment plans for stipulations.

Agency Response

cited in ALDF v. USDA,
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APHIS agrees with this Recommendation. IES will follow the applicable federal regulations and FMD Guidelines for Establishing Payment Plans when establishing payment plans. Consistent with these authorities, in September 2009, IES and FMD developed the attached Memorandum of Agreement (MOA) for persons who request a payment plan. IES has implemented the MOA in its International Organization for Standardization (ISO) Payment Plan process. In addition, IES and FMD have developed a method to jointly review and reconcile payment plans, stipulations, and orders assessing penalties on a monthly basis. IES' Chief, Document Control Branch, will train the IES personnel who handle payment plans, in accordance with FMD's Guidelines for Establishing Payment Plans and IES' ISO Payment Plan process.

OIG Position

We accept APHIS' management decision on this recommendation.

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[105] 31 CFR §901.8 (July 1, 2006).
[106] "Guidelines for Establishing Payment Plans" (February 12, 2009).

Scope and Methodology

We conducted a nationwide review of AC's inspections of dealers and its enforcement of AWA during FYs 2006 through 2008. We performed fieldwork at the AC and IES national offices in Riverdale, Maryland; the two regional offices in Raleigh, North Carolina, and Fort Collins, Colorado; the FMD Financial Services Branch in Minneapolis, Minnesota; and 81 dealer facilities in 8 States (see exhibit B for a complete list of audit sites). We performed site visits from April 2008 through March 2009.

With data exported from the LARIS database,[107] we judgmentally selected eight States—Arkansas, Iowa, Minnesota, Missouri, Ohio, Oklahoma, Pennsylvania, and Texas—based on the number of licensed dealers operating in the States. We also considered the type of animal welfare laws or inspection programs that had been adopted by the States.

To accomplish our audit, we:

- *Reviewed Criteria*. We reviewed the pertinent laws and regulations governing the AC program and the current policies and procedures AC established as guidance for inspections and enforcement.

- *Interviewed APHIS Personnel*. We interviewed AC and IES national and regional office officials as well as 19 of the 99 inspectors to gain an understanding about the AC program, its inspections, and investigation procedures. We also interviewed FMD personnel to gain an understanding of the penalty collection process.

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- *Visited 81 Dealer Facilities*. Using Audit Command Language software, we judgmentally selected 81 of 3,954 licensed dealers in our sampled States (33 in the Eastern Region and 48 in the Western Region). Generally, we selected the dealers based on the largest number of violations or repeat violations cited during our scope, the size of the facility, elapsed time since the last inspection, availability of its regular inspector, and proximity to other dealers in our sample.

  We accompanied 19 inspectors on their inspections of these dealers to (1) determine if the dealers were in compliance with AWA and related regulations and (2) evaluate the effectiveness of AC's enforcement actions. Of the 81 dealers we selected, 68 had been cited for violations since FY 2006.

- *Reviewed AC Inspection Reports and Files*. For the 81 dealers we visited, we reviewed inspection reports and other documentation in AC's files to determine if violations had been adequately addressed by the violators at re-inspections and, if not, whether appropriate enforcement action had been taken by AC.

- *Analyzed Total Violations Cited During Inspections*. We obtained nationwide data from LARIS of the violations cited during inspections in FYs 2006-2008. We then used Audit Command Language software to determine if the violators achieved compliance during

[107] The data was exported in April 2008.

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re-inspections by comparing the total number of violators that were re-inspected during the period and the total number of those that continued to violate AWA.

- *Interviewed Veterinary Schools*. We interviewed the directors of the Shelter Medicine Programs at three veterinary schools in California, Massachusetts, and New York to determine if some of the situations we encountered during our site visits constituted direct violations.

- *Reviewed Stipulations*. At IES' national office, we reviewed all 94 stipulation cases that were closed from October 2006 to April 2008 to determine if (1) reductions offered by APHIS were appropriate and (2) penalties were calculated correctly.[108] We then calculated the stipulation amounts using the old penalty worksheet for comparison.

  In addition, we compared the 94 cases in the current audit to the 77 stipulation cases from the 2005 audit to determine the factors that increased the average stipulation amount.[109]

- *Reviewed ALJ and JO Decisions*. We reviewed all 16 AWA cases litigated by the Department where a decision was rendered on a licensed dealer from 2000 to 2009 to determine if AC supported its cases with sufficient evidence.

  In addition, we reviewed seven AWA cases (cited by APHIS) to determine the basis for the JO's decision.

No. 17-16858 archived on August 27, 2019 cited in ALDF v. USDA,

- *Searched for Breeders Selling Puppies Over the Internet*. We used two websites[110] to identify breeders that sold AWA-covered animals over the Internet. We focused our search on two States—Missouri and Pennsylvania—based on the large number of breeders operating in these States. We identified 138 breeders that had more than 3 breeding females or handled more than 25 dogs a year. We compared information of these breeders to APHIS' active licensed breeder list to identify those not licensed by APHIS. We also collected examples of consumer complaints related to Internet breeders.

- *Reviewed Outstanding AC Receivables*. At FMD, we reviewed all outstanding AC receivables as of August 26, 2008, to determine if delinquent receivables were handled properly. We also reviewed all 20 payment plans from the sampled IES stipulation cases to determine if the plans were processed according to requirements.

- *Conducted a Limited Review of ACIS*. We did not verify the accuracy of AC's information system—ACIS—and make no representation of the adequacy of information generated from it.[111] We did review the new system's certification and accreditation process, and the timeliness of its implementation.

[108] The stipulation cases included all facilities covered by AWA, such as dealers, research facilities and transporters.
[109] We excluded four stipulation cases from our 2005 sample because we had not obtained the worksheet, which showed the three factors.
[110] http://www.puppysites.com and http://puppydogweb.com.
[111] APHIS implemented the new system near the end of the audit. Therefore, we did not verify its accuracy.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

cited in ALDF v. USDA,
No. 17-16858 archived on August 27, 2019

Abbreviations

AC .... Animal Care
ACIO-CS.................... Associate Chief Information Officer for Cyber Security
ACIS .... Animal Care Information System
ALJ............................. Administrative Law Judge
APHIS .... Animal and Plant Health Inspection Service
AWA .... Animal Welfare Act
CFR .... Code of Federal Regulations
CIO............................. Chief Information Officer
DAA .... Designated Accrediting Authority
FMD .... Financial Management Division
FY .... Fiscal Year (Federal)
IES.............................. Investigative and Enforcement Services
JO .... Judicial Officer
LARIS .... Licensing and Registration Information System
OACIS........................ On-line Animal Care Information System
OIG .... Office of Inspector General
U.S.C.......................... United States Code

cited in ALDF v. USDA,
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Exhibit A: Summary of Monetary Results

FINDING NUMBER	RECOMMENDATION NUMBER	DESCRIPTION	AMOUNT	CATEGORY
3	8	Although APHIS previously agreed to revise its penalty worksheet to produce "significantly higher" penalties for violators of AWA, the agency imposed penalties totaling $348,994, nearly 20 percent less than the $434,078 calculated using the old worksheet for the 94 stipulation cases we reviewed.	$85,084	FTBPTBU* – Management or Operating Improvements/ Savings
7	14	IES did not adequately establish payment plans for stipulations, totaling $92,896.	$92,896	FTBPTBU – Improper Accounting
TOTAL MONETARY RESULTS			$177,980	
*Funds to be put to better use				

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Exhibit B: Audit Sites Visited

ORGANIZATION	LOCATION
APHIS National Office	
Animal Care	Riverdale, MD
Investigative and Enforcement Services	Riverdale, MD
APHIS Eastern Regional Office	
Animal Care	Raleigh, NC
Investigative and Enforcement Services	Raleigh, NC
Dealer Facilities:	
1	Goodville, PA
2	Ephrata, PA
3	East Earl, PA
4	Lititz, PA
5	Ephrata, PA
6	Ronks, PA
7	Shippensburg, PA
8	Newburg, PA
9	Belleville, PA
10	Mill Creek, PA
11	Belleville, PA
12	Sugarcreek, OH
13	Sugarcreek, OH
14	Fresno, OH
15	Dundee, OH
16	Millersburg, OH
17	Millersburg, OH
18	Millersburg, OH
19	Millersburg, OH
20	Millersburg, OH
21	Mt. Sterling, OH
22	Columbus, OH
23	Fredericktown, OH
24	Brook Park, MN
25	Remer, MN
26	Nevis, MN

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ORGANIZATION	LOCATION
27	Brewster, MN
28	Walnut Grove, MN
29	Luverne, MN
30	Ruthton, MN
31	Reading, MN
32	Walnut Grove, MN
33	Avoca, MN
APHIS Western Regional Office	
Animal Care	Fort Collins, CO
Investigative and Enforcement Services	Fort Collins, CO
Dealer Facilities:	
34	Dardanelle, AR
35	Pleasant Plains, AR
36	Booneville, AR
37	Booneville, AR
38	Everton, AR
39	Green Forest, AR
40	Harriet, AR
41	Mountainburg, AR
42	Hindsville, AR
43	Ozark, AR
44	Agra, OK
45	Jones, OK
46	Jones, OK
47	Atoka, OK
48	Coalgate, OK
49	Lane, OK
50	Tishomingo, OK
51	Atoka, OK
52	Duncan, OK
53	Duncan, OK
54	Lebanon, MO
55	Edgar Springs, MO
56	Edgar Springs, MO
57	Huggins, MO
58	Houston, MO

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ORGANIZATION	LOCATION
59	Edwards, MO
60	Warsaw, MO
61	Dixon, MO
62	Dixon, MO
63	Cumberland, IA
64	Massena, IA
65	Audubon, IA
66	Thayer, IA
67	Bedford, IA
68	Allerton, IA
69	Humeston, IA
70	Leon, IA
71	Centerville, IA
72	Altoona, IA
73	Whitewright, TX
74	Tom Bean, TX
75	Wills Point, TX
76	Midlothian, TX
77	Wills Point, TX
78	Scroggins, TX
79	Simms, TX
80	De Kalb, TX
81	Simms, TX
APHIS Financial Management Division	Minneapolis, MN

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Exhibit C: Violations Cited at Dealer Facilities in FYs 2006-2008

VIOLATION	COUNT
Housing Facilities, General	4,744
Attending Veterinarian and Adequate Veterinary Care	3,537
Cleaning, Sanitization, Housekeeping, and Pest Control	3,504
Primary Enclosures	3,170
Access and Inspection of Records and Property	2,900
Outdoor Housing Facilities	2,678
Records: Dealers and Exhibitors	1,601
Time and Method of Identification	1,260
Sheltered Housing Facilities	731
Sanitation	651
Indoor Housing Facilities	576
Feeding	546
Watering	459
Facilities, General	428
Exercise for Dogs	254
Facilities, Indoor	237
Facilities, Outdoor	165
Notification of Change of Name, Address, Control	124
Procurement of Random Source Dogs and Cats, Dealer	82
Environment Enhancement To Promote Psychological Welfare	71
Employees	69
Minimum Age Requirements	69
Requirements and Application	68
Compatible Grouping	60
Records: Operators of Auction Sales and Brokers	55
Handling of Animals	52
Others (e.g., Health Certification, Space Requirements, Care in Transit, etc.)	352
TOTAL	**28,443**

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Exhibit D: Additional Photos Taken During Site Reviews

Missouri breeder violated AWA: This dog had an injured leg; raw flesh and bones exposed. The inspector correctly cited the breeder for lack of adequate veterinary care (9 CFR §2.40). The dog was eventually treated by a veterinarian.

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Texas breeder violated AWA: This dog had an oozing sore on its head. The inspector correctly cited the breeder for lack of adequate veterinary care (9 CFR §2.40), and required the breeder to take the dog to a veterinarian.

Ohio breeder violated AWA: This was an unsuitable kennel for puppies because their paws slipped through the wires, allowing regular contact with feces. The inspector correctly cited the breeder for failure to protect the dogs' feet from injury (9 CFR §3.6).

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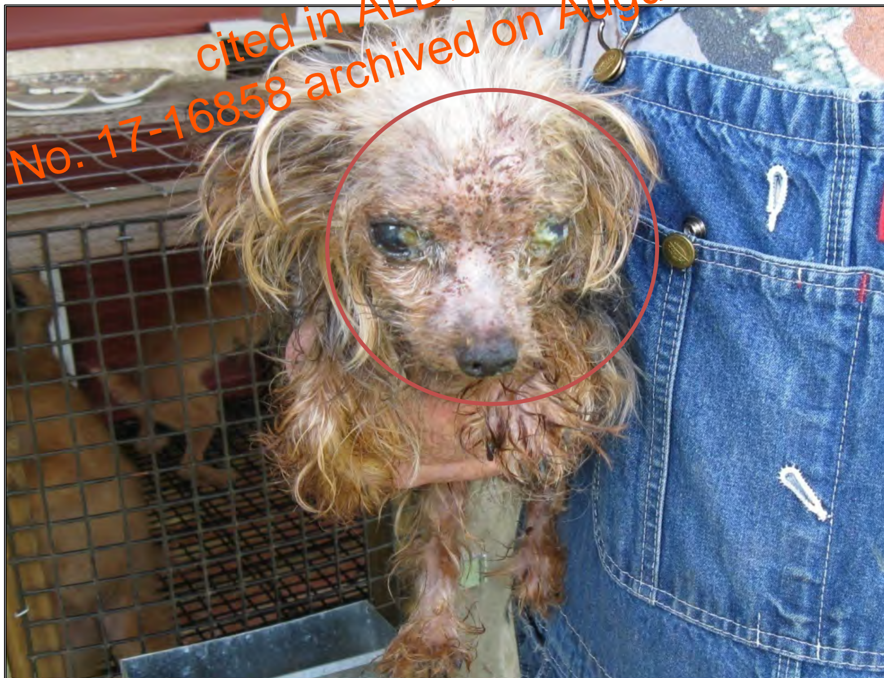

Texas breeder violated AWA: This dog had cloudy eyes covered with a heavy discharge, matted hair, and skin irritations. The inspector cited the breeder for lack of adequate veterinary care (9 CFR §2.40) and required the breeder to take the dog to a veterinarian for treatment. The inspector did not consider this a direct violation.

Texas breeder violated AWA: Dogs had drinking water that contained algae and feces. The water receptacle was also chewed and unclean. This is in violation of 9 CFR §3.10 for failure to provide clean and sanitized water to dogs and §3.11 for failure to keep water receptacles clean and sanitized. The inspector verbally told the breeder to clean the water receptacle but did not cite these violations.

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Arkansas breeder violated AWA: This dog had a torn ear. The inspector correctly cited the breeder for lack of adequate veterinary care (9 CFR §2.40) and required the dog be taken to a veterinarian.

USDA'S

ANIMAL AND PLANT HEALTH INSPECTION SERVICE

cited in ALDF v. USDA,
No. 17-16858 archived on August 27, 2019

RESPONSE TO AUDIT REPORT

United States Department of Agriculture

Animal and Plant Health Inspection Service

Washington, DC 20250

MEMORANDUM

TO: Gil H. Harden
Assistant Inspector General
for Audit

FROM: Cindy J. Smith /S/
Administrator

SUBJECT: APHIS Response on OIG Report, "Animal and Plant Health Inspection Service„s - Animal Care Program Inspections of Problematic Dealers" (33002-04-SF)

The Animal and Plant Health Inspection Service (APHIS) appreciates the opportunity to comment on this report. We appreciate the Office of Inspector General"s (OIG) interest in our programs. We have provided a response for each Recommendation.

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Recommendation 1: Modify the *Dealer Inspection Guide* to require an enforcement action for direct and serious violations. Also, define a serious violation in the Guide.

APHIS Response: APHIS agrees with this Recommendation. We will provide Animal Care (AC) employees with guidance regarding all enforcement action options including direct and serious Non-Compliant Items (NCIs) drawn from OIG recommendations, Office of the General Counsel (OGC) guidance, and legal decisions. APHIS will incorporate the requirements in a new document entitled "Inspection Requirements." This document will be distributed to and discussed with AC employees during the AC National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements" document and consolidate it with the Research Facility Inspection and the Exhibitor Inspection Guides into one comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

Recommendation 2: Remove "no action" as an enforcement action in the *Dealer Inspection Guide*.

APHIS Response: APHIS agrees with this Recommendation. We changed the title of the "Enforcement Action Worksheet" to "Enforcement Action Option Worksheet" and changed the flow chart title to read "Enforcement Actions (EA) Guidance for Inspection Reports." We modified these to clarify that: (1) inspectors will forward

to AC management a recommended EA (they believe will be most effective in attaining compliance) for all repeats and directs and any facility with inspection results that cause it to go from a lower frequency to High Inspection Frequency; and (2) taking no immediate action requires Regional Director approval and a 90-day reinspection to determine if compliance was achieved or if EA is necessary. Copies of the modified worksheet and flow chart are attached. AC will retain copies of all EA sheets in the facility files in accordance with records retention guidelines. AC"s supervisors verbally directed their employees to utilize the modified EA worksheet beginning on December 1, 2009. In addition, this will be reemphasized at the National Meeting.

Recommendation 3: Incorporate instructions provided in the "Animal Care Enforcement Actions Guidance for Inspection Reports" into the *Dealer Inspection Guide* to ensure inspectors and their supervisors follow them in selecting the appropriate enforcement.

APHIS Response: APHIS agrees with this Recommendation. We will provide AC employees with guidance regarding all EA options to recommend to AC management drawn from OIG recommendations, OGC guidance, and legal decisions. AC will incorporate the requirements in a new document entitled "Inspection Requirements." This document will be distributed and covered for AC employees during AC"s National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements" document and consolidate it with the Research Facility Inspection and the Exhibitor Inspection Guides into one comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

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Recommendation 4: Modify regulations to allow immediate confiscation where animals are dying or seriously suffering.

APHIS Response: APHIS agrees with the intent of this Recommendation, but believe that current regulations are sufficient to allow immediate confiscation. We believe that we can effect the intent of the Recommendation by reviewing and clarifying the confiscation processes so that confiscations can be accomplished with maximum speed and effectiveness. We will distribute the clarified guidance to employees during AC"s National Meeting, April 19-22, 2010.

Recommendation 5: Establish written procedures to refer animal cruelty cases to the States that have such felony laws.

APHIS Response: APHIS agrees with this Recommendation. While the Animal Welfare Act (AWA) does not give APHIS the authority to determine if state or local animal cruelty laws have been violated, we do believe that we should work with state and local authorities in our shared goal of eliminating animal cruelty. APHIS will

refer issues of mutual interest to appropriate local authorities who enforce state laws and share inspection reports and EAs with several states that have state-level enforcement capability (e.g., Colorado, Iowa, Kansas, Missouri, and Pennsylvania). AC has modified the regional "Enforcement Action Option Worksheet" to include a check box for inspectors to indicate whether or not they contacted local or state authorities. A copy of the modified worksheet is attached. We will reemphasize with inspectors the need to notify appropriate authorities who enforce state humane laws during AC"s National Meeting from April 19-22, 2010. APHIS will develop a Standard Operating Procedure to refer suspected animal cruelty incidents to appropriate authorities that have felony laws for animal cruelty. This document will be completed by September 30, 2010.

Recommendation 6: Provide more comprehensive training and detailed guidance to the inspectors and supervisors on direct and repeat violations, enforcement procedures, evidentiary requirements (e.g., adequately describing violations), shelter medicine, and animal abuse.

APHIS Response: APHIS agrees with this Recommendation. We have provided training for all inspectors on identifying direct and repeat NCIs and adequately describing NCIs, during fall 2009 meetings between supervisors and their inspector teams. We will provide additional training and guidance (i.e., the "Inspection Requirements" document) to inspectors and supervisors on identifying direct and repeat NCIs, adequately describing NCIs, enforcement procedures, and common medical conditions seen at commercial kennels during AC"s National Meeting, April 19-22, 2010. In addition, we will provide a training session on shelter medicine at the National Meeting. We will develop a comprehensive technical training plan through the Center for Animal Welfare, by November 30, 2010.

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Recommendation 7: Revise the *Dealer Inspection Guide* to require photos for all violations that can be documented in this manner.

APHIS Response: APHIS agrees with this Recommendation. Our current guidance calls for photographs of: direct NCIs; repeat NCIs; NCIs that may result in EA or an investigation; NCIs that are additional information for ongoing investigations; and transportation violations. In addition, our guidance states that inspectors may choose to take photographs in other circumstances. We will modify guidance to add NCIs documented on the third prelicense inspection and NCIs documented on inspections that may be appealed. We will reemphasize with inspectors when to take photographs. We will incorporate this information in the new "Inspection Requirements" document, and distribute it to employees during the AC National Meeting, April 19-22, 2010. APHIS will update the *Dealer Inspection Guide* to include the information in the "Inspection Requirements" document and consolidate it with the Research Facility Inspection and the Exhibitor Inspection Guides into one

comprehensive document. APHIS anticipates completing the document consolidation by September 30, 2010.

Recommendation 8: Limit total penalty reductions on the new worksheet to less than 100 percent.

APHIS Response: APHIS agrees with this Recommendation. We will develop and implement a new worksheet which limits total penalty reductions to less than 100 percent by September 30, 2010.

Recommendation 9: Establish a methodology to determine a minimum stipulation amount and consistently apply that amount, when appropriate.

APHIS Response: APHIS agrees with this Recommendation. We will formally document the "minimum stipulation amount" in the "Determining Penalties Under the Animal Welfare Act" document by September 30, 2010.

Recommendation 10: Designate a responsible party to ensure that "Determining Penalties Under the Animal Welfare Act" (April 2006) is consistently followed by AC and IES and that penalties are properly calculated.

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APHIS Response: APHIS agrees with this Recommendation. We recently reorganized the enforcement component of our Investigative and Enforcement Services (IES) to establish two branches: the Animal Health and Welfare Enforcement Branch (AHWEB) and the Plant Health and Border Protection Enforcement Branch. A GS-14 Chief will supervise each branch with full supervisory authority for branch staff. The Chief of AHWEB and his/her subordinate staff are responsible for EAs involving only AC and the APHIS Veterinary Services programs, greatly increasing the level of staff specialization afforded to these programs when compared to that in place during the audit. The Chief of AHWEB will assume responsibility for ensuring that AWA penalty calculations are consistent and in accordance with the instructions included in "Determining Penalties Under the Animal Welfare Act." In an instance where the AWHEB Branch Chief is unavailable or the position is vacant, the IES Deputy Director will assume this responsibility.

Recommendation 11: Include instructions in "Determining Penalties Under the Animal Welfare Act" to count each animal as a separate violation in cases involving animal deaths and unlicensed wholesale activities.

APHIS Response: APHIS partially agrees with this Recommendation. The Recommendation is not always practical for unlicensed wholesale activities. We will request an opinion from OGC about a penalty structure for unlicensed wholesale activities by September 30, 2010. However, we will count each animal as a separate violation when an animal death results from NCIs. Specifically, AC will clarify the

penalty guidelines by September 30, 2010, to count each animal as a separate violation when an animal death resulting from NCIs is involved.

Recommendation 12: Propose that the Secretary seek legislative change to exclude Internet breeders from the definition of "retail pet store," and require that all applicable breeders or brokers who sell through the Internet be regulated under AWA.

APHIS Response: APHIS agrees with this Recommendation. APHIS is currently providing information (including potential options) to Congress as requested regarding the proposed Puppy Uniform Protection and Safety Act (or PUPS). This bill would place dogs sold directly to the public via the Internet, telephone, and catalogue sales within the jurisdiction of the AWA. In addition, APHIS will concurrently draft a legislative proposal for the Secretary by May 31, 2010.

Recommendation 13: Correct all security issues pertaining to ACIS that were identified by USDA's Cyber Security Office during its concurrency review.

APHIS Response: APHIS agrees with this Recommendation. We have already corrected all security issues pertaining to ACIS. Our corrective actions are documented in the attached memorandum entitled "Approval for Interim Authority to Operate for Animal and Plant Health Inspection Service Animal Care Information System (ACIS)," dated October 21, 2009.

cited in ALDF v. USDA,
No 17-16858 archived on August 27, 2019

Recommendation 14: Require FMD to ensure that IES follows the payment plan process by conducting additional training and periodic reviews, or require FMD to reassume its responsibility for establishing payment plans for stipulations.

APHIS Response: APHIS agrees with this Recommendation. IES will follow the applicable federal regulations and Financial Management Division"s (FMD) Guidelines for Establishing Payment Plans when establishing payment plans. Consistent with these authorities, in September 2009, IES and FMD developed the attached Memorandum of Agreement (MOA) for persons who request a payment. IES has implemented the MOA in its International Organization for Standardization (ISO) Payment Plan process. In addition, IES and FMD have developed a method to jointly review and reconcile payment plans, stipulations, and orders assessing penalties on a monthly basis. IES" Chief, Document Control Branch, will train the IES personnel who handle payment plans, in accordance with FMD"s Guidelines for Establishing Payment Plans and IES" ISO Payment Plan process.

Please note that OIG"s characterization of 31 C.F.R. § 901.8 and FMD"s Guidelines for Establishing Payment Plans differs from the plain language of those authorities. For example, OIG asserts that 31 C.F.R. § 901.8 states, "require that plans ***must*** be based on debtor"s inability to pay in a reasonable time, which should be supported by

financial information," but the regulation actually states, "Agencies ***should*** obtain financial statements from debtors who represent that they are unable to pay in one lump sum and independently verify such representations whenever possible." (emphasis added) Additionally, OIG states, "APHIS" debt management polices ***require*** that the plans be signed by the debtor," but FMD"s Guidelines for Establishing Payment Plans actually state, "Agencies ***may*** accept installment payments notwithstanding the refusal of the debtor to execute a written agreement or provide financial statements." (emphasis added)

We hope that with this memorandum you are able to reach management decisions.

Attachments

cited in ALDF v. USDA,
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Enforcement Action Option Worksheet

Licensee / Registrant Name:

License / Registration Number(s):

Customer Number:

Site No.(s):

Date(s) of Alleged Violation(s):

Date of Inspection Report(s):

Photos Included: ☐ Yes ☐ No

Airbill Included: ☐ Yes ☐ No ☐ NA

Local or State Authorities Contacted ☐ Yes ☐ No ☐ NA

Action Taken:
(Check one)

- ☐ **Reinspection within 90 days (complete information below)**
- ☐ **APHIS Form 7060**
- ☐ **Initiate investigation**
- ☐ **Add to current investigation/case**
- ☐ **Other (explain):**
- ☐

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Basis for Recommendation of "Reinspection within 90 days":

_____ Violation(s) are not severe enough to necessitate enforcement action at this time

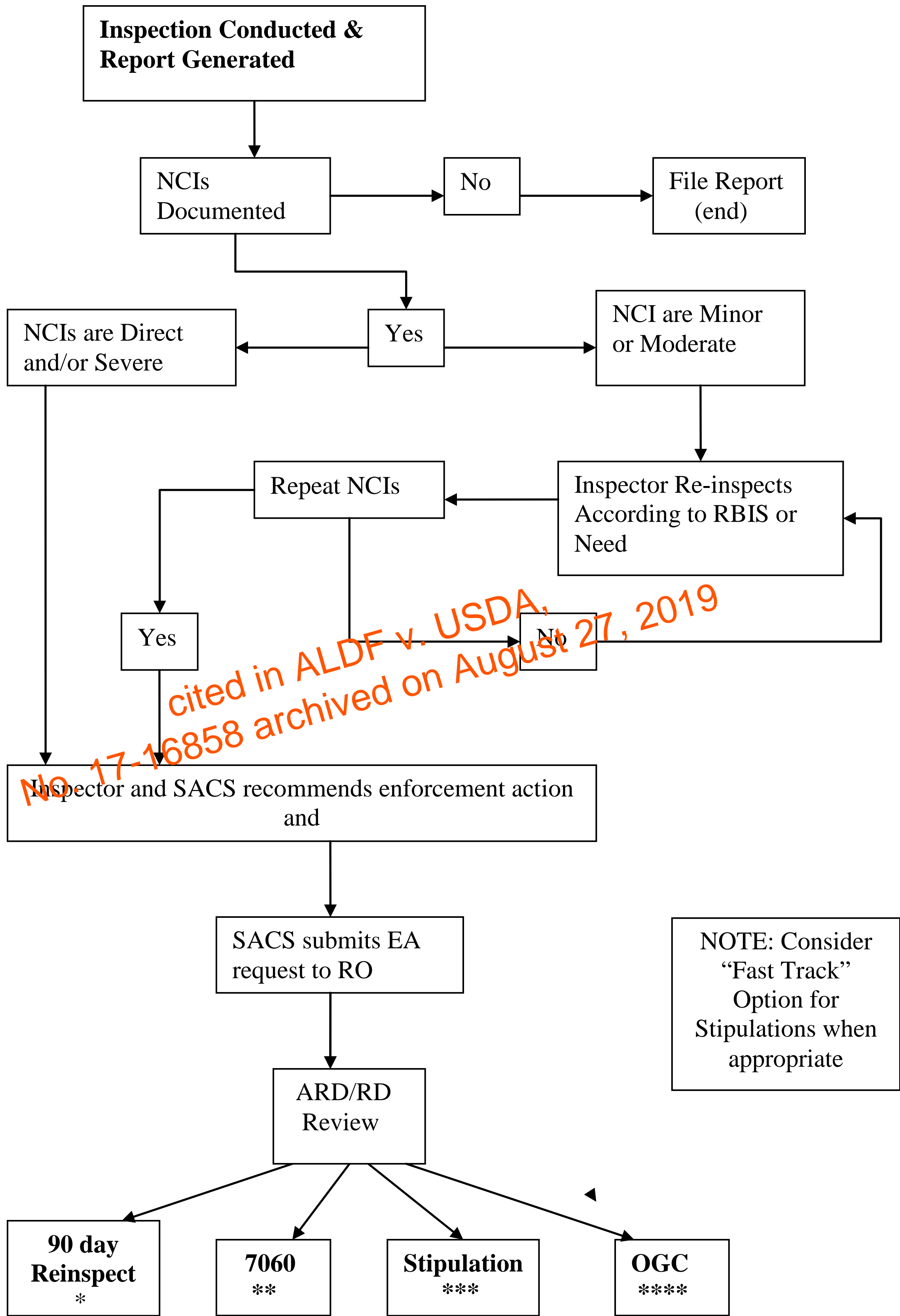
_____ Evidence that facility is making credible progress towards full compliance - to be verified on reinspection.

_____ Other: (Explain)

SACS Signature________________________________ **Date**______________

RD Concurrence_______________________________ **Date**______________

Animal Care
Enforcement Actions (EA) Guidance for Inspection Reports



cited in ALDF v. USDA, No. 17-16858 archived on August 27, 2019

October 21, 2009

TO: Marilyn Holland
Chief Information Officer
Animal and Plant Health Inspection Service

FROM: Charles T. McClam /S/ R. Coffee
Deputy Chief Information Officer
Office of the Chief Information Officer

SUBJECT: Approval for Interim Authority to Operate for Animal and Plant Health Inspection Service (APHIS) Plant Health Information System (PHIS)

I have reviewed your request dated September 30, 2009, for an Interim Authority to Operate (IATO) for PHIS. I concur with your request for an IATO, effective for 90 days from the date of this memorandum under the following conditions. APHIS will:

- Submit a security categorization document, privacy threshold analysis/privacy impact assessment, risk assessment and system security plan into the Cyber Security and Management (CSAM) system for review.
- Create Plans for Action and Milestones (POAMS) in CSAM that document the accreditation project.
- Operate the system with appropriate security controls in place.
- Submit bi-weekly reports to the Office of Cyber and Privacy Policy and Oversight as to the status of its accreditation activities.
- Continually monitor the security posture of the system to ensure that no security vulnerabilities arise.
- Ensure that any vulnerabilities reported during the continuous monitoring process do not result in any unacceptable risk to USDA operations and assets.
- Accredit the system before the IATO expires.

If you have any questions, please contact Valarie Burks, Associate Chief Information Officer for Cyber and Privacy Policy and Oversight at 202-690-2396 or via e-mail at Valarie.Burks@usda.gov.

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United States Department of Agriculture | Marketing and Regulatory Programs | Financial Management Division | Minneapolis Financial Services Branch
Debt Management Team
PO Box 3334
Minneapolis, MN 55403

AGREEMENT BETWEEN
UNITED STATES DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH INPECTION SERVICE
AND

____

TIN: ___________ CASE # ________

This Agreement, dated this _____ day of _________ is between ___________of ____________________________, and the United States Department of Agriculture, Animal and Plant Health Inspection Services, Financial Service Branch, Minneapolis, MN, hereinafter referred to as APHIS.

_____________ acknowledges that a civil penalty debt is owed to APHIS in the principal amount of . ___________agrees to pay this amount to APHIS in monthly installments. The first installment payment of _____ shall be due on ________________with subsequent payments of _____ due on the (either 1st or 15th) of each successive month, beginning __________. Please annotate your case number on the payment.

_________________understands the terms of this agreement and agrees as follows:

- In accordance with the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996, late payments will be subject to interest and or penalty charges.
- In the event of default on the payment schedule (which default remains uncured for 60 days from the due date thereof), the total unpaid balance shall be immediately due and payable without demand or notice thereof. The balance due will be unpaid principal, interest calculated from the first day following the due date of the payment schedule, and late payment penalty.
- Failure to complete payments agreed to in this payment plan will result in this debt being prepared for referral to the United States Department of Treasury for further collection action.
- The interest rate will be the current value of funds rate established by the Department of Treasury. For late payments, interest will be charged from the first day following the due date of the payment.
- ______________agrees to reference their USDA APHIS account number on all payments, and to remit all installment payments under this Agreement to the USDA APHIS lockbox bank in accordance with either of the following methods:

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Mail Address:
USDA, APHIS, (Case #)
P.O. Box 979043
St. Louis, MO 63195

Physical Address:
U.S. Bank (Case #)
Attn: Gvmt Lockbox – P. O. Box 979043
1005 Convention Plaza
St. Louis, MO 63101

Please return the signed agreement to:

USDA, APHIS, IES (Case #)
Attn: (Specialist name)
4700 River Road, Unit 85
Riverdale, MD 20737

APHIS and ________________ understand and will abide by all of the terms outlined in this agreement.

____

_______(Signature) ___________________________
(_print name) ________________
Date

USDA Animal and Plant Health Inspection Service

_______(Signature) ___________________
(Specialist & Phone #.) ________
Date

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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