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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ANIMAL LEGAL DEFENSE FUND, STOP ANIMAL EXPLOITATION NOW, COMPANION ANIMAL PROTECTION SOCIETY, and ANIMAL FOLKS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE and ANIMAL AND PLANT HEALTH INSPECTION SERVICES,

Defendants.

Case No. 3:17-cv-00949

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dept: Courtroom 2, 17th Floor
Judge: Hon. William H. Orrick
Hearing Date: May 17, 2017
Hearing Time: 2:00 p.m.

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INTRODUCTION

Plaintiffs seek a preliminary injunction to the *status quo ante*, or the last, uncontested status before the dispute, requiring USDA to continue its years-long practice of allowing public access to the continually updated records in the APHIS databases pending the outcome of the litigation. In both the Motion for Preliminary Injunction and this Reply, plaintiffs have shown a likelihood of success on the merits because the agency is in violation of 5 U.S.C. § 552(a)(2) for failing to affirmatively disclose records and acted arbitrarily in blocking public access to the databases. Further, plaintiffs have demonstrated severe and ongoing irreparable harm should this preliminary injunction be denied. Lastly, the disclosure of these records is in the public interest and the balance of equities weighs in plaintiffs' favor.

ARGUMENT

I. Plaintiffs seek a prohibitory, not a mandatory, injunction.

Contrary to the government's assertion, plaintiffs are seeking to maintain the last uncontested status, which is USDA's longstanding practice of allowing public access to the records contained in the APHIS databases. The government incorrectly asserts that the "last uncontested status" is "the status quo 'at the time the suit was filed.'" Defs.' Opp'n 4 n.2 (quoting *N.D. ex rel. Parents Acting As Guardians Ad Litem v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010)). However, the caselaw defines the status quo as "the last, uncontested status *which preceded the pending controversy*." *N.D.*, 600 F.3d at 1112 n.6 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)) (emphasis added). Prohibitory injunctions can, and frequently do, require parties to return to a status that precedes the technical filing date, they simply cannot require parties to take new actions different from the prior status quo.

For example, in a trademark infringement case, the *Marlyn Nutraceuticals* court concluded that ordering a defendant to recall allegedly infringing products and reimburse those customers constituted a mandatory injunction. 571 F.3d at 878. Importantly, though, the court distinguished the portion of the preliminary injunction that ordered the defendant to stop manufacturing and selling the allegedly infringing product. Even though the defendant was

manufacturing and selling the product on the date the complaint was filed, the court approved of a *prohibitory* injunction to enjoin the defendant from any future manufacture or sales of the product.

Similarly, in *Hawaii Department of Education*, the Ninth Circuit considered a request for an injunction to prevent the ongoing implementation of an announced policy of state-wide school furloughs under which 17 days of school would be cancelled. 600 F.3d at 1112 n.6. At the time of the filing of the complaint, though no scheduled furlough days had yet occurred, the "furlough contracts had already been signed." The court concluded the injunction required was prohibitory. The requested injunction necessarily would have placed the parties back in a position they were in not as of the date of the complaint, but prior to the execution of the furlough contracts when the previously announced school calendar was in effect.

The status quo, then, is not necessarily the state of affairs on the date of the filing of the complaint, but rather the last uncontested status before the allegedly wrongful activity. By contrast, a mandatory injunction is one that seeks to force a party to act not as it previously had, but in a new, affirmative way—ordering a party to recall a product, *Marlyn Nutraceuticals*, 571 F.3d at 878, or requiring a housing authority to execute brand new rental contracts, *Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). These examples stand in stark contrast to the relief requested by plaintiffs here, which is merely a return to the status quo immediately before USDA wrongfully removed the APHIS databases from the website.

Even if this Court were to conclude that the injunction sought is mandatory in nature, plaintiffs have met the higher standard of proof. Plaintiffs have demonstrated that "very serious damage will result" to the execution of their organizational activities that is not "capable of compensation in damages" and that the merits of the case clearly favor plaintiffs. *See Marlyn Nutraceuticals*, 571 F.3d at 879. The scope of relief requested is therefore proper. Moreover, neither a prohibitory or mandatory preliminary injunction grants plaintiffs full relief on the merits. If, after a full merits determination, defendants prevail, the agency will be free to remove the records while it conducts a privacy review.

II. Plaintiffs have demonstrated a likelihood of success on the merits.

a. This court has jurisdiction to hear plaintiffs' FOIA claims.

i. There is a cause of action to enforce FOIA's reading room provisions.

The government argues that the only remedy a court can order for a violation of FOIA is an order to produce to plaintiffs records wrongfully withheld in response to a request. This position misreads both the statute's plain terms and the scant precedent shedding light on this important question. Quite to the contrary, holding the available relief to be so narrow would effectively write out of the statute all obligations for agencies to create a "reading room" and affirmatively publish certain records without a predicate request. This Court should hold that FOIA provides authority to require an agency to make records publicly available on an ongoing basis to enforce the reading room provisions.

To begin, FOIA grants jurisdiction to the district court both "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) (emphasis added). The use of the conjunctive "and" suggests two forms of relief; the latter is directed at ordering disclosure to the plaintiffs and the former provision permits district courts to order broader injunctive relief. To hold otherwise would render the first provision superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

Many established remedies, such as ordering additional searches or ordering an agency to grant a fee waiver, are far less tethered to the language of FOIA's judicial review provision than a remedy ordering the ongoing publication of records required to be made affirmatively available under FOIA's reading room provision. The Supreme Court itself has relied on the language of FOIA to broadly declare that "there is little to suggest . . . that Congress sought to limit the inherent power of any equity court" in fashioning a FOIA remedy. *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974). The Ninth Circuit has likewise regularly approved courts exercising broad equitable powers to fashion relief under FOIA, including

prospective relief and relief that goes beyond ordering disclosure to a particular plaintiff. *See, e.g.*, *Long v. U.S. Internal Revenue Serv.,* 693 F.2d 907, 909 (9th Cir. 1982) ("In utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate . . . to bar future violations that are likely to occur." (citation omitted)); *Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 56 (9th Cir. 1997) (ordering an agency to waive otherwise-applicable fees associate with a FOIA request because disclosure was in the public interest); *see also Nat. Res. Def. Council v. U.S. Dep't of Def.*, 388 F. Supp. 2d 1086, 1109 (C.D. Cal. 2005) (ordering an agency to conduct an additional search for records).[1]

Because of basic principles of statutory construction and Supreme Court and Ninth Circuit precedent broadly construing remedial powers under FOIA, the D.C. Circuit's recent decision in *CREW v. DOJ* is incorrect in holding that disclosure to plaintiffs is the only remedy available under FOIA for violations of the reading room provisions. *See* 846 F.3d 1235, 1243 (D.C. Cir. 2017). This court is, of course, unconstrained by the *CREW* decision and should, consistent with the language of FOIA, as well as Supreme Court and Ninth Circuit interpretations thereof, recognize the power to issue injunctive relief to fully enforce FOIA's reading room provisions.

ii. Plaintiffs need not file a FOIA request prior to enforcing FOIA's affirmative disclosure obligation, but plaintiffs have done so and have exhausted administrative remedies.

The government asserts that a plaintiff must first file a FOIA request and exhaust administrative remedies with respect to that request before filing suit to enforce FOIA's affirmative disclosure obligations—even though the central goal of affirmative disclosure is to

[1] The government then attempts to have it both ways. It first claims that there is no true remedy under FOIA for reading room violations, and then also asserts that the APA also cannot supply a remedy because FOIA provides an adequate alternative remedy. Were this court to conclude that FOIA does not authorize forward-looking remedies for violations of the reading room provisions, FOIA's other remedies—namely the ability to file a FOIA request for particular records for disclosure to the plaintiffs—are wholly inadequate. The aim of the affirmative disclosure provision is to require agencies to make certain records available without the need for a request and to require ongoing production. *See* DOJ, Guide to the Freedom of Information Act, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures-2009.pdf ("federal agencies are required to affirmatively and continuously disclose records proactively by subsection (a)(2) of the FOIA"). Obliterating the distinction between the agencies' obligations under the reading room provisions and their obligations to respond to requests would render the reading room provisions essentially advisory. As such, FOIA would provide no adequate remedy and the APA would then supply a cause of action and jurisdiction for this court to enjoin ongoing violations of FOIA's reading room provisions.

require agencies to publish certain records without a predicate request. The plain language of the statute is clear about when a request is required. Under FOIA's affirmative disclosure provision "[e]ach agency… shall make available for public inspection in an electronic format" all agency orders and frequently requested records. 5 U.S.C. § 552(a)(2). By contrast, FOIA's traditional access provision clearly provides that "each agency, upon *any request* for records . . . shall make the records promptly available to any person." (emphasis added). Congress knew precisely how to require a request before triggering the agency's obligation. 5 U.S.C. § 552(a)(3).

In *In re Steele*, cited by the government as requiring request-and-exhaustion in "all" FOIA cases, there was no claim of violation of affirmative disclosure obligations, and thus the court had no occasion to consider the matter. *See* 799 F.2d 461 (9th Cir. 1986). Moreover, in the recent D.C. Circuit decision in *CREW v. DOJ*, contrary to the government's characterization, the court squarely stated: "Equally certain under our case law, 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)." 846 F.3d 1235, 1240 (D.C. Cir. 2017) (emphasis added).

To be sure, FOIA permits—but does not require—a person to make a request to enforce FOIA's affirmative disclosure obligations and, if such a request is made, describes how a person may exhaust administrative remedies with respect to that request. *See* 5 U.S.C. § 552(a)(6)(A), (C)(1). Such an approach makes sense; given that FOIA is a statutory scheme designed to be used by laypeople and lawyers alike, it is reasonable to ensure that technicalities—such as which provision a request is made under—do not stand in the way of requesters' ability to access the statute's full remedial options. But nothing in FOIA *requires* requests to be made to enforce the affirmative disclosure provisions. Unlike the access provisions in Section 552(a)(3), which provides access only "upon any request for records," the access rights of the public under the affirmative disclosure provisions have no such language making a request a prerequisite for access. Rather, as the Department of Justice has explained, "federal agencies are required to affirmatively and continuously disclose records proactively," making a request ineffective in enforcing ongoing obligations. Dep't of Justice, *Guide to the Freedom of Information Act: Proactive Disclosures* 9 (2014) (citing *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"), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf.

Even if this court were to disagree and conclude that that a predicate request and exhaustion of administrative remedies were necessary to enforce the agency's reading room obligations, plaintiffs here have met those requirements. As detailed in the declarations submitted in support of plaintiffs' motion for a preliminary injunction, each plaintiff has submitted at least one request for categories of records previously available in the APHIS databases. *See* Liebman Decl. ¶ 15; Budkie Decl. ¶ 8; Howard Decl. ¶ 10; Olson Decl. ¶ 5. ALDF, for example, submitted on February 21, 2017, a request for:

> the following records created by USDA/APHIS between February 21, 2014 and February 21, 2017:
>
> - **Annual Report of Research Facility** records for all facilities that submitted such reports to USDA;
> - **Inspection Report** records of all inspections conducted by USDA;
> - **Official Warning** records of all official warnings issued by USDA;
> - **Citation and Notification of Penalty** records of all citations issued by USDA; and
> - **Complaint** records of all enforcement action complaints filed by USDA.

Liebman Decl. Ex. H (emphasis in original). ALDF subsequently sent an identical request covering each new weekly period on February 28, 2017, March 7, 2017, March 14, 2017, and March 21, 2017. ALDF has received no responses to any of those requests, and thus the twenty-business day deadline has passed as to each and ALDF has in fact exhausted its administrative remedies as to these requests.[2] *See* 5 U.S.C. § 552(a)(6)(C)(1) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."). The categories of records ALDF has requested constitute all of the categories previously published in the APHIS databases, by the government's own admission. Shea Decl. ¶ 4. Accordingly, even if a request-and-exhaustion

[2] As such, the government's argument about plaintiffs' failure to exhaust appears to amount to a technicality of pleading, which, were this Court to find it necessary, plaintiffs would be happy to cure by filing an amended complaint.

requirement applied as a prerequisite to suits to enforce the reading room provisions, plaintiffs have met such requirements here.

iii. The claims are ripe for review because the Agency's decision to remove the documents has been executed.

The action and harm that plaintiffs contest has already occurred, which makes the FOIA claim ripe for review. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Here, the government's past decisions and actions, namely blocking public access to the APHIS databases, are at issue.

The agency's violation of its affirmative disclosure obligations under FOIA has already occurred. The cases cited by the government concern issues of ripeness where plaintiffs are making allegations about the government's future actions, such as those related to future requests of "substantially similar" documents, *Gulf Oil Corp. v. Brock*, 778 F.2d 834 (D.C. Cir. 1985), and those related to an agency rule that had been repealed and replaced while the replacement rule was open for public comment, *Am. Petroleum Institute v. EPA*, 683 F.3d 382, 386–88 (D.C. Cir. 2012).[3] Here, the agency decided to remove public access to the APHIS databases and then acted upon that decision. That past action is the foundation of the alleged FOIA violation. The question before this court is whether the records in the APHIS databases are required to be made available affirmatively or not. Therefore, plaintiffs' claims are ripe for judicial review.

b. The agency's proposed interpretation of the meaning of "release" under the affirmative disclosure provision leads to absurd results.

The government does not contest that the records previously published in the APHIS databases are subject to frequent FOIA requests. Indeed, the agency's own FOIA logs show numerous requests for records that used to be available in the databases and show that many such requests encompassed whole categories of database records. *See* Mot. for Prelim. Inj. 5–7. Rather,

[3] The court issued an important warning about the need to prevent agency abuse of finality, the court noted that it was not holding that "an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." *Am. Petroleum*, 683 F.3d at 388.

the agency's position centers on its contention that, despite evidence of voluminous requests for those records, none of those records were ever "released to any person under paragraph (3)" of FOIA in response to a request. Defs.' Opp. 6–7. This is so, it contends, because when it did receive requests under paragraph (3) for records in the databases, "APHIS generally referred requesters to the website, rather than processing and releasing records already available on the agency website." Shea Decl. ¶ 17. That is to say, the government claims that responding to a request by providing records through the website rather than by sending the requester an individual copy is not "releas[ing]" the record to the requester.

Such a proposition is plainly absurd. The word "release" does not inherently only mean sending a single copy of the record directly to a single requester. In fact, to be in compliance with FOIA, the agency is required to release non-exempt records in response to a proper request made under paragraph (3). *See* 5 U.S.C. § 552(a)(3). Given that the agency, by its own admission, routinely responded to requests under paragraph (3) by directing the requester to the copy of the responsive records on the website, Shea Decl. ¶ 17, if the government's interpretation were correct, the government would essentially be admitting it was routinely violating FOIA by not releasing records that were properly requested under paragraph (3). But such a result is of course not called for. In fact, providing a copy of a record available on the website in response to a paragraph (3) request has been implicitly approved by the Department of Justice as an appropriate response, with the caveat that "any subsequent FOIA request received for such records has to be responded to in the regular way as well, if the requester so chooses." Dep't of Justice, *Guide to the Freedom of Information Act: Proactive Disclosures* 18 (2014), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. That the requester's preference is relevant simply speaks to the fact that there are multiple ways to "release" records in response to a paragraph (3) request.

The government falls back on a policy argument that such an interpretation would deter agencies from engaging in voluntary affirmative disclosure by turning a discretionary act into a mandatory one. Publication of records that may have begun as voluntary, however, does not exempt them from reading room requirements simply because the initial publication may not have

been required. Rather, publication becomes mandatory once the records are the subject of frequent requests under the statute, and once the agency releases the records (as it is required to do) in response to those requests. Even if the agency had not published the databases at the outset, it would have had to publish these categories of records once they were the subject of frequent requests. The result would thus be the same, and in fact, the incentives for agencies to engage in proactive disclosure to save resources responding to one-by-one FOIA requests remain robust.

Rather it is the government's position that would lead to a perverse incentive. If the agency could never be said to have "released" a record under paragraph (3) so long as it simply posted the record on its website rather than giving an individual copy to the requester, agencies could avoid ever being subject to the frequently requested records requirements simply by, in response to a request, posting the requested records and directing the requester online. Such a result would be plainly contrary to the intent of the frequently requested records provision.

Finally, the government attempts to distance itself from agency officials' past conclusions that these records were subject to the reading room provisions requiring affirmative posting, Defs.' Opp. 8 n.5, but ignores the legal operative effect that such conclusions have. Under USDA's own regulations, once the agency concludes certain records must be posted as frequently requested records, those records may be removed from the public domain only "when the appropriate official determines that it is unlikely there will be substantial further requests for that document." 7 C.F.R. § 1.4(f). The government does not even suggest such a finding was made. *Cf.* Dep't of Justice, *FOIA Post (2003): FOIA Counselor Q&A: "Frequently Requested" Records*, https://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records (last modified Sept. 27, 2002) (admonishing agencies that they may not take down from their electronic reading rooms records that they had determined were likely to be subject to future requests simply because the expected requests do not materialize). The agency's own conclusions that the records were required to be disclosed thus invoke an obligation to, at a minimum, make a finding that the records are no longer likely to be requested in the future before removing them from the public sphere.

c. Several categories of previously published records constitute "orders" required to be published under FOIA.

Although plaintiffs do concede that they have uncovered no evidence that inspection reports, official warning letters, and pre-litigation settlements are treated as precedential as a formal matter, the government incorrectly asserts that whether something is an agency "order" for the purposes of 5 U.S.C. § 552(a)(2)(A) turns exclusively on whether the agency action is treated as binding precedent. While such an effect certainly will counsel in favor of categorizing an action as an "order," the case law suggests that the most relevant considerations are whether the agency decision is the end of a process and whether it affects the rights of a member of the public.

In the leading case, *NLRB v. Sears, Roebuck, & Co.*, the Supreme Court concluded that memoranda from the general counsel's office to a regional director at the NLRB that directed the agency not to file an administrative complaint about an alleged unfair labor practice constituted orders for the purposes of Section 552(a)(2)(A). 421 U.S. 132, 158–59 (1975). Importantly, similar to the agency's assertions here, the government had argued that these memoranda "numbered several thousand, and that in the General Counsel's view they had no precedential significance." *Id.* at 144. Nevertheless, the Supreme Court concluded that because the memorandum constituted the "final disposition of the agency" of a matter affecting a member of the public, the memoranda were agency orders that had to be made affirmatively available. *Id.* at 158–59. This holding effectuates Congress's intent that agencies not be allowed to have "secret law," which, as this case illustrates, is not limited to formally binding precedent, but includes the body of final dispositions of an agency that reflect the agency's application of the law it is charged with administering. *See id.* at 155.

The cases from which the government selectively quotes are, when read in full, entirely consistent with the Supreme Court's approach. For example, in *American Immigration Lawyers Association v. EOIR*, "the ability of a third party to participate as a party and to obtain personal relief in a proceeding" and to "obtain a determination concerning the statute or other laws the agency is charged with interpreting and administering," were the key factors identified as qualifying an agency action as an "order." 830 F.3d 667, 679 (D.C. Cir. 2016) (internal citations

and quotation marks omitted). There, resolution of complaints about immigration judges were not orders because they "do not reflect a final decision as to the rights of outside parties." *Id.* at 670.

The government concedes that the records at issue have all of the characteristics of agency orders. According to the government, "APHIS may *resolve* the alleged violation through the issuance of regulatory correspondence (such as . . . an official warning) or through enforcement action." Shea Decl. ¶ 10 (emphasis added). APHIS also offers settlement agreements in some cases, and if the private party accepts, "APHIS does not conduct further investigation with respect to matters involved in the voluntary settlement agreement." *Id.* at ¶ 11. Moreover, as to inspection reports, a noncompliant finding in a report can be appealed by the private party "by submitting a detailed, written appeal," and an "appeals team reviews each appeal and either makes a decision regarding the final content in the inspection report or requests more information." *Id.* at ¶12. That inspection report, the government contends, "does not have any binding or precedential effect on the agency, nor any effect on regulated persons *other than the one who is the subject of the inspection*." *Id.* at ¶ 12 (emphasis added). In these descriptions, the government concedes that inspection reports, which can be subject to a detailed appeals process, affect the rights of the inspected party. The government also concedes that official warning letters and settlement agreements are the final dispositions as to the rights of those parties and the alleged violation. These are, therefore, orders that must be disclosed under FOIA's reading room provisions.

III. Plaintiffs have demonstrated both that the harm they will suffer absent an injunction is serious and that it will occur absent immediate relief.

The government concedes that the types of harm documented by plaintiffs constitute irreparable harm under the law, but simply argues that the harm is not "considerable." But the government ignores some of the most powerful evidence of serious harm plaintiffs put forth in their motion for a preliminary injunction.

To begin, the government contends that plaintiffs' economic losses, although non-recoverable due to sovereign immunity, do not constitute irreparable injury because they result from having to comply with extra administrative process. But here plaintiffs' injury is not "the mere need" to submit FOIA requests, Defs.' Opp. 19, but being required to comply with the very

process that Congress expressly rejected for certain categories of records so important to the public that the agency has an obligation to affirmatively disclose them. In *California ex rel. Christensen v. FTC*, relied on by the government, the court determined that litigation costs incurred during the administrative remedy process do not constitute irreparable injury that would excuse the *exhaustion* of administrative remedies. 549 F.2d 1321, 1323 (9th Cir. 1977). *Christensen* is inapplicable to this case because, as explained above, plaintiffs are not required to go through the FOIA request process prior to bringing a claim for a violation of 5 U.S.C. § 552(a)(2)(D). *See supra* II.a.ii. Thus, there are no administrative remedies for plaintiffs to exhaust, and the economic burden and harm to plaintiffs' activities that results from delay in receiving information constitute irreparable harm that will be suffered pending a final merits determination.

The government wrongly asserts plaintiffs' economic losses are not "considerable," but the plaintiffs provided strong evidence to the contrary. For example, the executive director of Stop Animal Exploitation Now (SAEN), attested that SAEN recently hired an additional staff member "made necessary in significant part because of the removal of the APHIS databases from public view." Budkie Decl. ¶ 11. SAEN is a very small organization, and an entire new staff position is "considerable" by any measure. Animal Folks, another very small non-profit, is "currently dedicating time to creating a process for requesting categories of information on an ongoing basis, attempting to balance [its] needs for frequent updated information with the burden on [] staff in submitting frequent requests." Olson Decl. ¶ 14. The government is thus incorrect in asserting plaintiffs' demonstrated economic harm is not considerable.

As to non-economic injuries, contrary to the government's assertion, plaintiffs have demonstrated specific issues of timeliness that make immediate access to the information essential to execute their organizations' activities. As correctly noted by the agency, there is irreparable harm where "Congress is considering legislation" related to the records because "delayed disclosure of the requested materials may cause irreparable harm to a vested constitutional interest" of public participation. Opp. at 20 (citing various cases). Plaintiffs have illustrated the deleterious effect the agency's action has had on pending legislation. Animal Folks

just last month testified before a city council on a humane pet store ordinance and had to rely on some out-of-date data because the APHIS databases were no longer online. Olson Decl. ¶ 11. Advocacy for local ordinances is also a central part of CAPS's work, and CAPS has ongoing work with the City of Riverside, California, to pass a pet store ordinance and cannot access the inspection reports it needs to provide full information to legislators. Howard Decl. ¶ 9.

Plaintiffs documented other imminent timeliness issues. ALDF received complaints about two animal exhibitors in Oregon and Virginia, but has been unable to investigate those facilities by reviewing previously available APHIS inspection reports and other database records to substantiate those complaints. Liebman Decl. ¶ 13. Animal Folks files numerous complaints under state cruelty laws based in part on records that used to be published in the APHIS databases, and state law enforcement will only consider timely complaints, making delayed access potentially the death-knell of Animal Folks' ability to conduct one of its central activities. Olson Decl. ¶¶ 4–6. Moreover, there is an underlying irreparable harm to the interests of animals when delayed or denied law enforcement and legal protections result in prolonged suffering and sometimes even death of animals who should be protected by the Animal Welfare Act.

IV. The government's unsubstantiated interest in protecting personal privacy, especially given its admitted four-year delay in pursuing that objective, does not outweigh the public's interest in agency oversight and accountability.

When considering the public interest in issuing a preliminary injunction, the government both fails to substantiate its claim that there is a strong privacy interest at stake and fails to consider the competing public interests in play. To begin, the government by its own admission spent four years "considering revisions to its Privacy Act System covering AWA records" and then at least another year engaging in a "comprehensive review of records it made available" through the APHIS databases. Shea Decl. ¶ 20. Indeed, it made the decision to remove the records in November 2016, and did not actually remove them until February 2017. *Id.* at ¶¶ 23, 25. The privacy concerns cannot possibly be so serious or imminent, then, that removal of all records pending review is required to protect them, since the government has been considering this issue for five years. The government could just as easily keep the records available while conducting its

review, and, if it came to the conclusion that certain information on certain records should no longer be public, then it could replace those records with new versions simultaneously.

Even more strikingly, despite now five years of reviewing the question, the government conspicuously fails to assert that any exemption to mandatory disclosure actually applies to any record that was previously posted in the APHIS databases or would have been posted had the February 3, 2017 policy not gone into effect. By its own admission, in the subset of records that have been reposted, no substantive changes have been made to redacted material. Absent even a single example of exempt material that was mistakenly disclosed through the database, the government cannot assert that privacy interests are so overwhelming as to outweigh the public interest in transparency and oversight.

Moreover, the only information specifically identified by the government that *may* implicate privacy concerns—though again, the government does not claim this information is exempt from disclosure—are the names and addresses of sole-proprietor or closely-held regulated businesses. Even assuming, arguendo, that there can be a privacy interest in the fact of owning a regulated business or in a business address,[4] this type of information has been published in the APHIS databases for upwards of seven years, and the government does not demonstrate any reason why privacy-related harms are likely to occur imminently during the pendency of the lawsuit when none occurred in the past. Moreover, the government asserts that "all of the records previously posted online remain available via FOIA request," Defs.' Opp. 25, and thus it is

[4] It is far from clear that such a proposition is true. These sole-proprietor and closely-held businesses voluntarily engage in regulated commercial activity. The names and addresses in question are the business names and the addresses that the entity has declared to be its place of business, which are both registered in various state and federal regulatory fora. When individuals are voluntarily engaging in commercial activity that is regulated by the government, courts routinely find there exists, at best, a de minimus privacy interest in those individuals' names and addresses. *See, e.g.*, *Wash. Post Co. v. USDA*, 943 F. Supp. 31, 34–36 (D.D.C. Oct. 18, 1996) (rejecting a privacy claim regarding addresses for farmers receiving federal subsidies, even though many lived at their registered business address and stating that "Exemption 6 is designed to protect against unwarranted invasions of *personal* privacy and not typically to protect businesspeople"), *appeal dismissed voluntarily*, No. 96-5373 (D.C. Cir. May 19, 1997); *Ackerson & Bishop Chartered v. USDA*, No. 92-1068, slip op. at 1 (D.D.C. July 15, 1992) (rejecting a privacy claim regarding names of individuals operating as commercial mushroom growers). Moreover, even if some privacy interest were established, exemption 6 only covers records the release of which "would constitute a clearly unwarranted invasion of personal privacy," which requires a balancing against the public interest in disclosure. 5 U.S.C. § 552(b)(6); *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

impossible to see how privacy interests are advanced by simply changing the production method of the records. Finally, the government's effort to point to an example of potential privacy harms via Mr. Pollack's declaration describing the result of a *New York Times* article fall short. While certainly a troubling account of one person's experience, neither the declaration nor the government's brief in any way ties the events described therein to any information that was released through the APHIS databases. *See generally* Pollack Decl.

By contrast, it is the government that ignores competing public interests in uninterrupted access to the APHIS databases. As detailed in plaintiffs' opening brief, USDA's lax enforcement of the Animal Welfare Act has come under harsh criticism from within and outside of government. *See* Mot. for Prelim. Inj. 19. Moreover, the public—including a variety of constituencies such as members of Congress, local governments—and the press have expressed strong interest in continued oversight of agency activities in this area. *See id.* Even regulated businesses and businesses in related industries find access crucial in ensuring greater compliance with the law. The public interest therefore tips decidedly in plaintiffs' favor.

CONCLUSION

Plaintiffs have shown that they are entitled to relief under FOIA for a preliminary injunction that enjoins the agency from blocking public access to the APHIS databases. Further, plaintiffs have demonstrated sufficient irreparable harm to justify the requested preliminary injunction. Accordingly, plaintiffs restate their request that this Court enter a preliminary injunction to the last, uncontested status, requiring the agency to continue its years-long practice of allowing public access to the continually updated records in the APHIS databases pending the outcome of the litigation.

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