



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

August 10, 2018

Alexis R. Graves, Department FOIA Officer
U.S. Department of Agriculture
1400 Independence Ave., SW
South Building Room 4101
Washington, DC 20250

SUBMITTED VIA REGULATIONS.GOV

RE: Docket No. USDA-2018-0003 Request for Comments on Notice of Proposed Rulemaking for USDA Departmental Freedom of Information Act Regulations (83 Fed. Reg. 26,865 (June 11, 2018) (to be codified at 7 C.F.R. pt. 1) (RIN 0503-AA61)

Dear Ms. Graves,

The Animal Welfare Institute (AWI) submits these comments with respect to the USDA's proposed rule revising its Freedom of Information Act (FOIA) regulations, 83 Fed. Reg. 26,865 (June 11, 2018). AWI was established in 1951 to reduce the suffering caused by humans to all animals, including those in agricultural systems and scientific laboratories and on dealer and exhibitor premises, affected by USDA's FOIA regulations.

Because AWI frequently requests records from the USDA and its components, the proposed rule is highly relevant and consequential to its work. AWI offers the following comments to the USDA's unsubstantiated proposal, and asks the Department to remedy the following deficiencies before finalizing the rule.

1. The proposed rule reverses course without adequate explanation or a meaningful opportunity to comment.

The proposed rule fails to provide an adequate basis for departing from the existing USDA FOIA regulations. The proposed rule wipes nearly all existing FOIA regulations, many of which have been in place since 1987 and which have served as effective tools for guiding requesters and the USDA in complying with FOIA. The notice gives no insight into why the agency believes its existing regulations are inadequate.

It is a well-settled principle of administrative law that a federal agency may not adopt a position that abruptly changes direction from prior agency regulations without providing a reasoned explanation for the change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* ("State Farm"), 463 U.S. 29, 42 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("adjudication is subject to the requirement of reasoned decisionmaking"),

Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (an agency has a duty to "explain its departure from prior norms"). In *State Farm*, the U.S. Supreme Court noted that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42. Courts reviewing abrupt agency changes of direction apply this principle when an agency formally rescinds or revises an existing regulation, *id.* at 42, 46, 57, and when it alters a prior interpretation of its own rules or governing statute. See, e.g., *N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182–83 (2d Cir. 2005); *Lal v. INS*, 255 F.3d 998, 1008–09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because the agency changed course from its settled policies).

In administrative rulemaking, the rationality requirement extends from the principle that changes to regulatory law should be founded on reasoned analysis based on agency experience and expertise. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (1994). According to a recent Supreme Court decision, when changing a policy, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citing *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). "In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* (citation omitted). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16. "It follows that an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 136 S. Ct. at 2126 (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

No "adequate explanation," "awareness" that it is changing policy, or "good reason" has been provided in USDA's proposed rule. The public is provided one paragraph of justification by USDA—that these "revisions" will "streamline USDA's FOIA processing procedures," and "most importantly incorporate changes brought about by the FOIA Improvement Act of 2016 and the OPEN Government Act of 2007." However, nothing about the proposed rule appears to support the FOIA Improvement Act of 2016's goal of providing the public with "greater access to information and records that are disclosable under FOIA" and of creating a "presumption of openness." CONG. RESEARCH SERV., *Bill Summary of S. 337* (February 2, 2015). Further, the USDA's proposed rule does more than "incorporate changes"—it significantly alters the long-established policies of the USDA in managing FOIA requests, including significant changes to the fee waiver regulations, categories of requesters, and a wholly inadequate "public reading room" provision.

The Administrative Procedure Act (APA) also requires that the public have a *meaningful* opportunity to submit written analysis regarding a proposed rulemaking. 5 U.S.C. § 553(c). USDA is also under an obligation to remain "open-minded" about the issues raised and engage with substantive responses submitted. *Rural Cellular Ass'n v. Fed. Comm. Comm'n*, 588 F.3d

1095 (D.C. Cir. 2009). Because commenters have no reasoned basis for the USDA's departure from longstanding policy and thus no "meaningful" opportunity to comment, USDA's actions are arbitrary and capricious. 5 U.S.C. § 706(2).

2. The proposed rule's public reading room provision fails on its face to comply with USDA's obligations under the FOIA Improvement Act of 2016.

The FOIA Improvement Act of 2016 clarified the proactive disclosure mandate implemented by the 1996 FOIA Amendments. Now, pursuant to 5 U.S.C. § 552(a)(2), federal agencies are obligated to publish records in an electronic format, in the agency's electronic reading room in two circumstances: 1) when the records have been requested three or more times, or 2) when the records, because of the nature or their subject matter, 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). The Act also required that federal agencies establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format." 44 U.S.C. § 3102.

Congress intended this mandate to "encourage on-line access to government information" so that "the public can more directly obtain and use Government information." H. Rep. No. 104-795 (1995). Congress also intended that this mandate would "prompt agencies to make information available affirmatively on their own initiative in order to meet anticipated public demand for it." S. Rep. No. 104-272. The mandate was also meant to increase efficiency by reducing individual FOIA requests, the backlog of unfulfilled requests, and processing time. H. Rep. No. 104-795.

The proposed rule fails to address Congress' intent and specific requests. First, the regulation fails to implement a process for agencies to manage proactive disclosures for records requested three or more times. Second, the regulation fails to provide adequate guidance to USDA components about when or how a determination can and should be made for records that have become or are likely to become the subject of subsequent requests for substantially the same records. Finally, no procedures are established under this proposed rule for USDA components to identify records of public interest for disclosure in an electronic format.

AWI is painfully aware of the consequences of USDA's choice to flout Congress' proactive disclosure mandate. USDA's Food Safety and Inspection Service regularly releases noncompliance records and memoranda of interview under the Humane Methods of Slaughter Act ("HMSA") and the Poultry Products Inspection Act ("PPIA") in response to requests under section (a)(3) yet fails to affirmatively disclose these records under section (a)(2). Indeed, because these records are FSIS's principal records of implementation of these statutes, advocacy organizations, journalists, and members of the public submit requests for these records on a regular basis, typically every three months. FSIS's FOIA logs reveal that the agency regularly receives multiple requests for the same records, and that the public frequently requests all such records from the agency. In fact, FSIS has received at least 139 requests for all such records since 2009, and, since Congress enacted the FOIA Improvement Act of 2016, routinely receives at least three requests for such records. Nevertheless, despite the fact that proactively disclosing these records is clearly required under FOIA's affirmative disclosure mandate and would save the agency and the public money, FSIS fails to make these records proactively available online.

A likely reason that USDA and its components fail to comply with FOIA's affirmative disclosure mandate, as described above, is that they do not make the necessary determination as to whether released records "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), and do not provide information about how often records are requested. As the Department of Justice has explained, "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 become the subject of multiple requests in the future." DOJ FOIA Guide at 17. However, USDA and its components do not make this determination *even when requesters specifically ask the agency to do so*. Attachment 1: *AWI GCP FOIA Request* at 1-2; Attachment 2: *AWI HMSA FOIA Request* at 1-2; Attachment 3: *AWI FOIA Request* at 3-5.

In fact, because the USDA has failed to implement procedures for making proactive disclosure determinations, such requests are ignored by USDA components despite the fact that FSIS has already publicly acknowledged that these types of records are the most commonly requested records. Attachment 3: *AWI FOIA Request* at 20. FSIS disregarded AWI's direct request that it proactively disclose HMSA and GCP records online. Attachment 4: *FSIS Acknowledgement Letter* at 1 ("you requested a copy of records relating to the Implementation [sic] of the Humane Methods of Slaughter Act and the Poultry Products Inspection Act, from January 1, 2018 to May 16, 2018"). Instead, FSIS merely disclosed the records without acknowledging that a proactive disclosure request had been made. Even appealing the FSIS's fulfillment of AWI's request has failed to produce results on this front. Attachment 5, *AWI Administrative FOIA Appeal*. FSIS merely responded that it is "considering" AWI's request to proactively disclose these records and that it "routinely evaluates the types of information that should be made publicly available." FSIS also directed AWI to comment on this docket. Attachment 6, *FSIS Response to Administrative Appeal*.

The proposed rule also removes what little regulatory guidance USDA and its components *did* have in making decisions regarding proactive disclosure of records. In the existing regulations at 7 C.F.R. § 1.4(4), several factors are provided for determining whether a record falls in to the category mandating the agency to determine if it should be proactively disclosed. The new rule removes this list and limits the discussion of proactive disclosure to one paragraph in the public reading rooms section (1.2). Section 1.2(a) merely indicates that a component is responsible for maintaining public reading rooms and for determining which of the records it generates are required to be made publicly available. This is clearly insufficient given the requirements of the FOIA Improvement Act of 2016 and the difficulty USDA and its components currently face in implementing the proactive disclosure requirement. Removal of this § 1.4(4) with no explanation as to why – when components clearly need guidance – is arbitrary, capricious and not in accordance with law. 5 U.S.C. § 706(2).

USDA should use this proposed rule to implement meaningful, descriptive regulations to guide its components in implementing the proactive disclosure mandate to meet the requirements of the FOIA Improvement Act of 2016. This requires that the agency implement regulations to comply with the proactive disclosure mandate, reduce individual requests, the request backlog, and

improve processing times. USDA should 1) craft specific instructions and factors for components to consider in making proactive disclosure determinations, 2) provide specific guidance for agencies to manage disclosure of records which have been subject to three or more requests, and 3) provide a process for requesters to make requests that certain categories of records be proactively disclosed.

3. The proposed rule significantly amends existing USDA FOIA regulations on fee waivers without justification or cause.

In the existing FOIA regulations, USDA is required to “waive or reduce fees on request for records if disclosure of the information in the records is deemed to be in the public interest. A request is in the public interest if it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester.” 7 C.F.R. Pt. 1, Subpt. A, App A § 6(a)(1) (hereinafter referred to as § 6). In order to determine whether fees should be waived or reduced, section 6 outlines a six-factor test.

The six-factor test was first promulgated in 1987 in response to the 1986 FOIA amendments and Department of Justice (DOJ) guidance for FOIA fee waivers. 52 Fed. Reg. 49,383 (July 28, 1987) (effective Feb. 1, 1988); Freedom of Information Reform Act of 1986, Pub. Law No. 99-570, 100 Stat. 3207 (1986); Dep’t of Justice, *FOIA Update: New Fee Waiver Policy Guidance* (Jan. 1, 1987), available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>. These factors were applied and implicitly approved by the Court of Appeals for the Ninth Circuit in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). According to this court, FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Id.* (quoting 132 CONG. REC. S14298 (Sept. 30, 1986) (Sen. Leahy)).

While USDA claims to have modeled the proposed rule on a DOJ published template for agencies to consider in amending their FOIA regulations (U.S. Dep’t of Justice, *Template for Agency FOIA Regulations*, available at <https://www.justice.gov/oip/template-agency-foia-regulations>), the test outlined in the proposed rule at § 1.12(p) deviates inexplicably from the template and is a substantial departure from the current six-factor test. As written, the proposed rule’s factors for determining whether a disclosure is in the public interest are unnecessarily vague and burdensome. In the new test, USDA places the burden exclusively on the requester to demonstrate in the request that the disclosure is in the public interest and not of a commercial interest. 82 Fed. Reg. 26,871. This new “public interest” definition clearly violates FOIA’s substance and spirit by implementing new, ambiguous standards that place even more burden upon public interest requesters and allow USDA and its components to second guess the motivation of requesters, effectiveness of requesters in disseminating that information, and the utility of releasing the information free of charge.

The proposed rule also removes the ability for the agency to determine *sua sponte* that a fee waiver is appropriate if the information is in the public interest. Compare § 6 (a)(2) (“an agency may, in its discretion, waive or reduce fees associated with a request for disclosure, regardless of whether a waiver or reduction has been requested, if the agency determines that disclosure will primarily benefit the general public.”) to 82 Fed. Reg. 26,871. USDA has provided no reasoned basis for removing this section despite the potential negative effect this could have on

unsophisticated requesters who may not be aware of the ability to make requests for fee waivers, or requesters who do not adequately explain how they meet the fee waiver requirement.

USDA's proposed rule reverses course on established policy that has existed for years. The proposed rule would insert unnecessary ambiguity in an area in which courts across the country have already provided clear and consistent standards. USDA simply has not faced difficulty in applying the existing 6-factor test, and this rulemaking does not explain why a departure from existing policy is necessary. Because the USDA has failed to provide a reasoned basis for its reversal, as required by the APA, it has failed to provide a meaningful opportunity for interested parties to comment. *State Farm*, 463 U.S. at 42 (1983); *Rural Cellular Ass'n*, 588 F.3d 1095. Because USDA has failed to engage in rational decisionmaking as required by law, its action is arbitrary and capricious.

4. Changes in the definitions of “Categories of Requesters” could have a significant chilling effect on the ability of the public to hold government accountable.

FOIA defines five categories of requesters for fee purposes: commercial requesters, educational institution requesters, noncommercial scientific institution requesters, representatives of the news media, and all other requesters. The categories in the proposed rule comport with FOIA but subtle changes to the definitions of each type of requester could significantly narrow the number of requesters that are eligible for fee reductions and thus have a chilling effect on the ability of the public to hold government accountable.

“Commercial requesters” are defined as “requesters who ask for information for a use or a purpose that furthers commercial, trade or profit interests, which can include furthering those interests through litigation. (emphasis added). Although public interest groups, and nonprofit organizations are explicitly called out as examples of requesters who “might” fall under the category of “all other requesters,” the reference to litigation as a commercial activity could adversely affect public interest groups or nonprofit organizations that may engage in litigation. At the very least, clarification is needed to make clear that “litigation” itself is not a strictly commercial activity. *McClellan Ecological Seepage Situation*, 835 F.2d at 1285 (“Information helpful to a tort claim furthers a requester’s interest in compensation or retribution, but not an interest in commerce, trade, or profit.”); *McClain v. U.S. Dep’t of Justice*, 13 F.3d 220, 220 (7th Cir. 1993) (“McClain sought the documents primarily to facilitate a challenge to his conviction; this is not a ‘commercial’ interest.”)

The definition of “educational institution” has been significantly narrowed in the proposed rule, again without explanation or justification. “Records sought by students at an educational institution for use in fulfilling their degree requirements do not necessarily qualify for educational institution status. Students must document how the records they are requesting will further the scholarly research aims of the institution in question.” Appendix A—Fee Schedule Section 2. (b)(2)(i), 83 Fed. Reg. 26,872. Even the DOJ template indicates that “[a] student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of [the educational institution] fee category.”

USDA's proposed change to the definition of "educational institution" is in conflict with *Sack v. U.S. Dep't of Def.*, 823 F.3d 687 (D.C. Cir. 2016), which found that students, as well as teachers, qualify for reduced fees. *Sack* found that OMB guidelines stating that student FOIA requests to further coursework do not qualify as educational-institution requests were inconsistent with the FOIA statute. Judge Brett Kavanaugh wrote, "Students who make FOIA requests to further their coursework or other school-sponsored activities are eligible for reduced fees under FOIA because students, like teachers, are part of an educational institution." 823 F.3d at 688. "It would be a strange reading of [FOIA's] broad and general statutory language – which draws no distinction between teachers and students – to exempt teachers from paying full FOIA fees but to force students with presumably fewer financial means to pay full freight." *Id.* at 692.

Once again, USDA has provided no explanation for these proposed changes despite the potentially massive effect this could have on eligibility to receive records at reduced or no cost. This change is extremely consequential and affects a longstanding policy upon which serious reliance interests must be taken into account. *Encino Motorcars v. Navarro*, 136 S. Ct. at 2126. This unexplained inconsistency and change in agency policy without further explanation is an arbitrary and capricious change from agency practice. *Id.*

Thank you for considering AWI's comments. Please feel free to contact Nadia Adawi, General Counsel at (202) 446-2122 or nadia@awionline.org, Erin Thompson, Staff Attorney, at (202) 446-2147 or erin@awionline.org, or Johanna Hamburger, Wildlife Attorney, at (202) 446-2136 or johanna@awionline.org.

Sincerely,

/s/Nadia Adawi
Nadia Adawi
Executive Director/General Counsel

/s/Erin Thompson
Erin Thompson
Staff Attorney, Farm Animal Program

/s/Johanna Hamburger
Johanna Hamburger
Wildlife Attorney

Attachments:

1. AWI GCP FOIA Request
2. AWI HMSA FOIA Request
3. AWI FOIA Request
4. FSIS's Acknowledgement Letter
5. AWI Administrative FOIA Appeal
6. FSIS Response to Administrative Appeal



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

January 17, 2018

Freedom of Information Act Officer
USDA, Food Safety and Inspection Service
Room 2168 South Building
1400 Independence Ave., SW
Washington, DC 20250

FOIA Request: Good Commercial Practices Documents

Dear FOIA Officer:

This is a request for public records made on behalf of the Animal Welfare Institute (AWI), pursuant to the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. This request satisfies the written request requirement pursuant to 7 C.F.R. § 1.5(a).

We request that you please provide the following documents related to poultry slaughter establishment good commercial practices (GCP):

1. All 04C05 inspection task records for non-compliance related to the humane treatment of poultry under the PPIA, including Noncompliance Records (NRs), and Memorandums of Interview (MOIs), issued during the months of October, November, and December 2017.
2. All remaining records in FSIS's possession related to the humane treatment of poultry under the PPIA, including Memorandum of Information, Letters of Concern, and Letters of Cause, issued during the months of October, November, and December 2017.

Please provide the records in the format that will ensure the most immediate response—electronically, hardcopy, or CD-ROM. Additionally, please provide the records as they become available.

In the event that you deny access to any of the requested records, please provide me with all reasonably segregable, non-exempt portions of the relevant records. *See* 5 U.S.C. § 552(b). Additionally, please describe the deleted material in detail, specify the statutory basis for the denial, and explain the basis for your belief that the material is exempt. I further request that you separately state your reasons for not invoking your discretionary powers to release the requested

documents in the public interest. Finally, please notify me of any appeal procedures available under the law, as well as the office and address where such an appeal can be sent.

We also request that, consistent with the 1996 amendments to FOIA, and the FOIA Improvement Act of 2016, FSIS post all inspection task records for non-compliance related to the humane treatment of poultry under the PPIA, including Noncompliance Records (NRs), and Memorandums of Interview (MOIs) and all remaining records in FSIS's possession related to the humane treatment of poultry under the PPIA, including Memorandum of Information, Letters of Concern, and Letters of Cause online in the agency's electronic reading room, for review by AWI and other interested members of the public. These documents have been released by FSIS and requested at least three times; additionally, because of these documents' subject matter, these are and will continue to be the subject of numerous requests for substantially the same records. Accordingly, we request that FSIS proactively make these documents available in its electronic reading room and post all such documents that it produces to FOIA requesters online from this point forward.

Fee Waiver

AWI is a nonprofit organization promoting the humane treatment of animals, including animals in agriculture. The information subject to this request will be used to educate concerned individuals about animal welfare in slaughter establishments. The information the records contain would contribute significantly to the public understanding of humane and public health issues at major U.S. slaughter facilities as well as the evidence relied upon by the agency in reaching decisions regarding the treatment of farm animals.

Additionally, the records covered by this request are not publically posted or otherwise published, and AWI has no intention to use the information disclosed under this request for financial gain. If, however, the waiver is denied and the request will involve more than two search hours or more than 100 pages of documents, and fees will exceed twenty dollars (\$20.00), please notify me immediately by telephone before the request is processed so that we can decide whether to pay the additional fees or to appeal the denial of the request for waiver.

If you have any questions regarding this request, you may contact me at (202) 446-2147 or erin@awionline.org. The records and any related correspondence should be sent to my attention at the address above.

Sincerely,



Erin Thompson
Staff Attorney, Farm Animal Program
Animal Welfare Institute



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

January 17, 2018

Freedom of Information Act Officer
USDA, Food Safety and Inspection Service
Room 2168 South Building
1400 Independence Ave., SW
Washington, DC 20250

FOIA Request: Humane Methods of Slaughter Act Noncompliance Records

Dear FOIA Officer:

This is a request for public records made on behalf of the Animal Welfare Institute (AWI), pursuant to the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. This request satisfies the written request requirement pursuant to 7 C.F.R. § 1.5(a).

We request that you please provide the following documents related to Humane Methods of Slaughter:

1. All Noncompliance Records, Memorandums of Interview, and supporting records for noncompliance with humane handling and slaughter regulations under 9 CFR 313 and the Humane Methods of Slaughter Act (ISP Code 04C02) issued by FSIS during the months of October, November, and December 2017.

Please provide the records in the format that will ensure the most immediate response—electronically, hardcopy, or CD-ROM. Additionally, please provide the records as they become available.

In the event that you deny access to any of the requested records, please provide me with all reasonably segregable, non-exempt portions of the relevant records. *See* 5 U.S.C. § 552(b). Additionally, please describe the deleted material in detail, specify the statutory basis for the denial, and explain the basis for your belief that the material is exempt. I further request that you separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Please also notify me of any appeal procedures available under the law, as well as the office and address where such an appeal can be sent.

We also request that, consistent with the 1996 amendments to FOIA, and the FOIA Improvement Act of 2016, FSIS post all Noncompliance Records, Memorandums of Interview, and supporting records for noncompliance with humane handling and slaughter online in the agency's electronic reading room, for review by AWI and other interested members of the public. These documents

have been released by FSIS and requested at least three times; additionally, because of these documents' subject matter, these are and will continue to be the subject of numerous requests for substantially the same records. Accordingly, we request that FSIS proactively make these documents available in its electronic reading room and post all such documents that it produces to FOIA requesters online from this point forward.

Fee Waiver

AWI is a nonprofit organization promoting the humane treatment of animals, including animals in agriculture. The information subject to this request will be used to educate concerned individuals about animal welfare in slaughter establishments. The information the records contain would contribute significantly to the public understanding of humane and public health issues at major U.S. slaughter facilities as well as the evidence relied upon by the agency in reaching decisions regarding the treatment of farm animals.

Additionally, the records covered by this request are not publically posted or otherwise published, and AWI has no intention to use the information disclosed under this request for financial gain. If, however, the waiver is denied and the request will involve more than two search hours or more than 100 pages of documents, and fees will exceed twenty dollars (\$20.00), please notify me immediately by telephone before the request is processed so that we can decide whether to pay the additional fees or to appeal the denial of the request for waiver.

If you have any questions regarding this request, you may contact me at (202) 446-2147 or erin@awionline.org. The records and any related correspondence should be sent to my attention at the address above.

Sincerely,

Erin Thompson

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VIA ELECTRONIC MAIL

RE: Request for Records, and for Proactive Disclosure of Records, Relating to Implementation of the Humane Methods of Slaughter Act and the Poultry Products Inspection Act

On behalf of our clients, the Animal Welfare Institute (“AWI”) and Farm Sanctuary (“FS”) (collectively “our clients”), we are writing to request that the United States Department of Agriculture (“USDA”) and the Food Safety and Inspection Service (“FSIS”) comply with the affirmative disclosure mandates of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(2), by providing to our clients and posting online certain records relating to the FSIS’s oversight of slaughter practices under the Humane Methods of Slaughter Act (“HMSA”) and the Poultry Products Inspection Act (“PPIA”), that have been frequently requested by our clients and others, and that have already been released pursuant to FOIA requests under 5 U.S.C. § 552(a)(3).



Additionally, because the subject matter of the categories of documents described in this request is such that all records in these categories will be the subject of subsequent requests, *id.* § 552(a)(2)(D)(ii)(I), we further request that the USDA and FSIS comply with FOIA’s affirmative disclosure mandate by proactively posting all such records online without waiting for our clients or others to submit individual requests pursuant to 5 U.S.C. § 552(a)(3).

We further request that the USDA/FSIS produce directly to our clients and post online a complete index of all frequently requested records relating to the HMSA and PPIA, pursuant to 5 U.S.C. § 552(a)(2)(E).

Finally, we request that the USDA/FSIS comply with the congressional mandate to “issue regulations on procedures for the disclosure of records” in accordance with the FOIA Improvement Act of 2016. Pub. L. 114-185 § 3(a).¹

In particular, this request applies to the following categories of documents:

- (1) all noncompliance records and memoranda of interview, under the Humane Methods of Slaughter Act (“HMSA”), including any supporting records relating to their issuance pursuant to humane slaughter regulations under 9 C.F.R. § 313;
- (2) all records of violations of Good Commercial Practices for the humane handling of birds at slaughter under the Poultry Products Inspection Act (“PPIA”), including:
 - a. all inspection records for non-compliance related to the treatment of poultry under the PPIA, including noncompliance records and memoranda of interview;
 - b. any other records relating to humane treatment of poultry under the PPIA, including memoranda of information, letters of concern, or letters of cause; and
 - c. all records of “Good Commercial Practices” under the PPIA.

¹ To be clear, we request that the USDA and FSIS process this request under *both* sections (a)(2) and (a)(3) of FOIA. Thus, we request that the agencies produce responsive records directly to our clients under section (a)(3), and that they post all such responsive records, including existing records and any similar records generated in the future, online pursuant to section (a)(2). If the agencies agree to post all responsive existing and future records online under section (a)(2), we will consider that a complete response and there will be no need to produce the documents directly to our clients. On the other hand, we will not consider merely releasing existing records to our clients under (a)(3) a complete response to this request, because such a release will not satisfy the agencies’ obligations under section (a)(2).

We request that FSIS process this request pursuant to 5 U.S.C. § 552(a)(3) by producing to our clients requested records from January 2018 until the receipt of this request. We further request that FSIS process this request pursuant to 5 U.S.C. § 552(a)(2) by posting requested records online, beginning with records from January 2018 until the receipt of this request, and by proactively disclosing such records in the future, without waiting for further FOIA requests, within 14 days of the generation of such records, as FSIS does for certain other records under the HMSA.²

Statutory Background

1. The Freedom of Information Act’s Affirmative Disclosure Mandate

Congress enacted FOIA “to clarify and protect the right of the public to information.” S. Rep. 1219 (July 22, 1964). In 1996, Congress clarified that “the purpose of the Freedom of Information Act is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies.” S. Rep. 104-272. To that end, Congress in 1996 amended FOIA to require agencies to “make available for public inspection in an electronic format” certain records, including “copies of all records, regardless of form or format,” which have been “released to any person,” and which “because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. § 552(a)(2)(D).

In 2016, Congress again amended FOIA to clarify that this category of frequently requested records includes any records that have been released and “requested 3 or more times.” *Id.* Congress also required agencies to issue regulations within 180 days to implement this affirmative disclosure requirement. Pub. L. 114-185 § 3(a). Thus, FOIA’s affirmative disclosure mandate requires agencies to make available for public inspection in an electronic format – i.e. by posting on the internet – frequently requested records. Similarly, FOIA also requires agencies to post online a “general index” of such frequently requested records. *Id.* § 552(a)(2)(E).

The congressional intent behind FOIA’s affirmative electronic disclosure mandate was “to encourage on-line access to Government information” so that “the public can more directly obtain and use Government information.” H. Rep. No. 104-795, at 11 (1996). Accordingly, Congress acted “to prompt agencies to make information available affirmatively on their own initiative in order to meet anticipated public demand for it.” S. Rep. No. 104-272, at 13 (1996).

Congress also intended for FOIA’s affirmative disclosure mandate to aid in reducing the need for individual FOIA requests by making material available online. Indeed, finding that agency delays in responding to individual requests “continue as one of the most significant FOIA problems,” H. Rep. No. 104-795, at 13 (1996), Congress explained that “[w]ith more affirmative disclosure, agencies can better use their resources,” allowing them to “more efficiently use their

² See <https://origin-www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/regulatory-enforcement/humane-handling-enforcement-actions> (listing dates of posting records within approximately 14 days of the creation of records).

limited resources to complete requests on time,” *id.* at 12–13. As Senator Patrick Leahy, one of the sponsors of the 1996 FOIA amendments, explained, “as more information is made available online, the labor intensive task of physically searching and producing documents should be reduced,” and “[t]he net result should be increased efficiency in satisfying agency FOIA obligations, reduced paperwork burdens, reduced errors and better service to the public.” 142 Cong. Rec. S10, 894 (daily ed. Sept. 18, 1996). Thus, Congress envisioned that improved on-line access to information would also “result in fewer FOIA requests, thus enabling FOIA resources to be more efficiently used in responding to complex requests.” H. Rep. No. 104-795, at 11.

2. Legal Requirements for Humane Treatment of Animals Slaughtered for Human Consumption.

Congress first enacted the Humane Methods of Slaughter Act in 1958, requiring that any meat sold to the U.S. government be slaughtered humanely. In 1978, Congress expanded the HMSA to require that livestock imported into the U.S. for meat be slaughtered humanely. In particular, the HMSA requires that livestock must be “rendered insensible to pain” before slaughter. 7 U.S.C. § 1902(a). However, the USDA failed to meaningfully enforce the HMSA for many years. Consequently, in 2002 Congress called on the Secretary of Agriculture to “fully enforce” the HMSA to “prevent needless suffering” of animals, and reaffirmed that “[i]t is the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.” Public Law 107-171 § 10305. FSIS gathers and maintains records relating to regulated entities’ compliance with the HMSA.

Congress enacted the Poultry Products Inspection Act in 1957, finding that “[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are . . . not adulterated.” 21 U.S.C. § 451. To that end, the PPIA requires poultry processing facilities to “be operated in accordance with such sanitary practices” as will prevent adulterated products, *id.* § 456, and requires FSIS to inspect poultry processing facilities and processed poultry, *id.* § 455. To achieve the PPIA’s goals, FSIS requires that facilities that slaughter poultry operate “in accordance with good commercial practices.” 9 C.F.R. § 381.65. The PPIA prohibits any person from slaughtering or processing poultry in violation of relevant statutory or regulatory provisions, 21 U.S.C. § 458, and requires facilities to maintain records of compliance with the statute and regulations. *Id.* § 460(b)(1). FSIS gathers and maintains records relating to regulated entities’ compliance with the PPIA.

Discussion

1. The USDA and FSIS Must Affirmatively Disclose Frequently Requested Records Under the HMSA and PPIA.

Because the records that FSIS gathers and maintains under the HMSA and PPIA are important indicators of the humane (or inhumane) treatment of animals slaughtered for human consumption, our clients and others have regularly requested these records for years. As to the records requested related to the HMSA, our clients have been requesting such records since at

least 2004; as to the records requested concerning the PPIA, our clients have been requesting such records since at least 2012. Typically, every three months our clients submit FOIA requests under 5 U.S.C. § 552(a)(3) for records under the HMSA and/or the PPIA. Additionally, these same records are regularly the subject of requests from other entities, as FSIS’s FOIA Request Reports Archive illustrates.³

Although our clients have routinely had to wait far more than the 20 working days that FOIA provides for agencies to produce documents in response to FOIA requests, 5 U.S.C. § 552(a)(6), in the past the USDA and FSIS have released records in response to FOIA requests for such records submitted by our clients and others. Accordingly, it is clear that the records described in this request have been frequently requested—far more than three times—and have also been regularly “released” pursuant to requests made under 5 U.S.C. § 552(a)(3). Moreover, and as this request history illustrates, because of the nature of the subject matter in these records, these categories of records will continue to be the subject of subsequent requests for substantially the same records. 5 U.S.C. § 552(a)(2)(D)(ii)(I).

Our clients and others use these records to monitor the USDA and FSIS’s enforcement of the humane handling provisions of the HMSA and the PPIA, to disseminate information about the enforcement of these provisions to the press and the public, and to advocate for better enforcement of these provisions and more humane treatment of animals. In particular, our clients use these records to write reports concerning the USDA’s and FSIS’s exercise of their enforcement authorities (or lack thereof), which our clients disseminate to the press, other advocates, and the public. Our clients also inform the press and the public about particularly egregious violations of humane handling provisions of the HMSA and PPIA—efforts that are hampered by the significant delays in the USDA’s and FSIS’s responses to FOIA requests. Further, our clients use these records to advocate for more effective enforcement of the HMSA and PPIA, including by petitioning the USDA and FSIS to issue more protective regulations, by commenting on agency proceedings, and by requesting that the USDA, FSIS, and state authorities effectively enforce humane handling standards with respect to those regulated entities responsible for egregious violations.

FSIS recognizes that it has legal obligations under FOIA’s affirmative disclosure mandate. Indeed, FSIS’s “FOIA Electronic Reading Room” states that FOIA “requires agencies to make certain types of records . . . available electronically,” including “records that are frequently requested/of interest.”⁴ However, while FSIS maintains a website that includes “Records Frequently Requested/Of Interest,” that website falls far short of fulfilling the agency’s obligations under FOIA’s affirmative disclosure mandate, because it does not include all frequently requested records, including those that are the subject of this request. The USDA and

³ <https://www.fsis.usda.gov/wps/portal/footer/policies-and-links/freedom-of-information-act/fsis-electronic-reading-room/foia-request-reports-archive>

⁴ <https://www.fsis.usda.gov/wps/portal/footer/policies-and-links/freedom-of-information-act/fsis-electronic-reading-room/fsis-electronic-reading-room>

FSIS's failure to post these records runs counter to FSIS's own prior acknowledgment that these records "are frequently requested through the Freedom of Information Act." See FSIS Notice 07-15, *Instructions for Writing Poultry Good Commercial Practices Noncompliance Records and Memorandum of Interview Letters for Poultry Mistreatment* (January 21, 2015).

As the USDA and FSIS are aware, based in part on our clients' and others' history of regularly submitting FOIA requests for these records, as well as our clients' intent to continue regularly requesting these records (unless the USDA and FSIS agree to post them proactively online), that these records, "because of the nature of their subject matter" will be "the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D). Indeed, our clients' FOIA requests have informed FSIS of the intent to routinely request these records and have encouraged FSIS to make these documents available online pursuant to FOIA's proactive disclosure mandate. In fact, the USDA and FSIS recently described the requested records as the two most commonly requested types of records for FSIS, specifically describing "Humane Handling Enforcement Actions" as "Frequently Requested Records," and describing "Humane Handling," "Good Commercial Practices," and "Non-Compliance Records" as "Commonly Requested Records." See Attachment. Thus, it is clear that the records requested here will be "the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D).⁵

Complying with FOIA's affirmative disclosure mandate by posting these records online would not only effectuate the congressional intent of the 1996 and 2016 amendments to FOIA, but would also serve the interests of the USDA and FSIS by drastically reducing the agencies' FOIA backlogs. As Congress explained, "as more information is made available online, the labor intensive task of physically searching and producing documents should be reduced," and "[t]he net result should be increased efficiency in satisfying agency FOIA obligations, reduced paperwork burdens, reduced errors and better service to the public." 142 Cong. Rec. S10, 894.

2. The USDA Must Issue Regulations For Implementing FOIA's Affirmative Disclosure Mandate.

As described above, Congress stated in 2016 that all agencies "shall issue regulations on the procedures for the disclosure of records" under FOIA's affirmative disclosure mandate "[n]ot later than 180 days after the date of enactment" of the FOIA Improvement Act of 2016. Pub. L. 114-185 § 3(a). Because the FOIA Improvement Act of 2016 was enacted on June 30, 2016, the deadline for agencies to issue implementing regulations was *December 27, 2016* – more than a year ago. However, the USDA has not issued any such regulations, or even any notice of proposed rulemaking. To comply with the congressional deadline in the FOIA Improvement Act of 2016, the USDA must issue regulations establishing procedures for the disclosure of records pursuant to FOIA's affirmative disclosure mandate.

⁵ To the extent that the USDA and FSIS believe they have not "determine[d]" that these records "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), we hereby request that the agencies make this determination.

These regulations must clarify the procedure individuals should use to request affirmative disclosure of records pursuant to 5 U.S.C. § 552(a)(2), as well as the procedure the agency will follow in responding to such requests. Indeed, we note that in similar contexts, the USDA has insisted that entities that wish to compel the agency's compliance with FOIA's affirmative disclosure mandate must first file a request for affirmative disclosure of records pursuant to 5 U.S.C. § 552(a)(2)—but when the agency received such requests, it has informed requesters that, in the USDA's view, these are not "proper" requests under FOIA. *See, e.g.*, Letter from Tonya Woods, Director, Freedom of Information & Privacy Acts, USDA, to Delcianna Winders, *Final Response to Request No. 2018-APHIS-02370-F* (March 5, 2018) (stating that a request for proactive disclosure of documents "is not a proper request under FOIA"). This inconsistent approach to this issue requires clarification. Consequently, the agency's mandated implementing regulations must establish a reasonable mechanism by which individuals can seek to enforce the affirmative disclosure requirements of 5 U.S.C. § 552(a)(2), as well as specify the agency's procedures for responding to any requests for affirmative disclosures under FOIA.

Fee Waiver Request

We request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and section 6(a)(1) of 7 C.F.R. Part 1, Appendix A. FOIA provides that agencies "shall" provide records "without any charge" or at a reduced rate where "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). This statutory standard, and the agency's guidelines, are easily met here.

1. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

As an initial matter, the requested records all concern the implementation of the HMSA and PPIA by the USDA and FSIS. Because these records concern the agencies' implementation of federal law, they unquestionably concern the operations or activities of the government.

Furthermore, disclosure of the requested records will contribute significantly to the public's understanding of the government's operations or activities. The public has a strong interest in the USDA's and FSIS's implementation of the HMSA and PPIA – both in terms of public concern for the welfare of animals slaughtered for human consumption and the public interest in food safety. Disclosure of the requested records will serve the public interest in understanding the manner in which the USDA and FSIS implement the HMSA and PPIA, the agencies' record of enforcement (or lack of enforcement) regarding instances of non-compliance with these statutes, and whether regulatory or statutory amendments may be necessary to more fully effectuate the purposes behind the HMSA and PPIA.

Additionally, the general public's understanding of the USDA's and FSIS's implementation of the HMSA and PPIA will be significantly enhanced by disclosure of the requested records. Most notably, if the agency complies with this request under 5 U.S.C. § 552(a)(2) by making the requested records publicly available on the internet, the general public's understanding will be well-served because records that were previously only available through the time-consuming process of individual FOIA requests would be accessible more easily online. Accordingly, complying with this request under 5 U.S.C. § 552(a)(2) would unquestionably further the general public's understanding of the USDA's and FSIS's implementation of the HMSA and PPIA. Additionally, even if the agencies instead release records solely to AWI and FS pursuant to 5 U.S.C. § 552(a)(3), the general public's understanding would still be well-served because AWI and FS have a proven ability and strong track record of disseminating such information to the public.

AWI has 20,000 members, many of whom are interested in the well-being of farm animals raised for human consumption. AWI routinely posts information it receives via FOIA requests on its website, which is a frequently trafficked page of AWI's site by both the public and media outlets. In fact, AWI's page on inhumane practices on factory farms is among the most trafficked pages on its website. AWI also disseminates information from these records by writing reports describing the enforcement of the HMSA and the PPIA. For example, AWI has written four reports in recent years about the welfare of livestock and poultry at slaughter.⁶ AWI also uses these records to advocate for improved treatment of animals directly to the regulating body and to inform the public about violations. In particular, a recent string of humane handling violations at Vermont Packinghouse led AWI to contact both the USDA and the Vermont Agency of Agriculture and media coverage of the issue.⁷ AWI also uses these records for advocacy purposes during regulatory rulemaking. Recently, AWI has used records collected from pig and poultry plants to advocate against unlimited line speeds at slaughter, educate the public about the potential negative welfare impacts of FSIS's proposed rules, and rally participation in commenting periods.⁸

Farm Sanctuary is the nation's largest and most effective farm animal rescue and protection organization with more than 500,000 members and supporters. Farm Sanctuary uses

⁶ E.g. AWI Report, *The Welfare of Birds at Slaughter in the United States, 2017 Update*, <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-Welfare-of-Birds-at-Slaughter-Update.pdf>; AWI Report, *Humane Slaughter Update: Federal and State Oversight of the Welfare of Farm Animals at Slaughter*, <https://awionline.org/sites/default/files/products/FA-HumaneSlaughterReport-2017.pdf>.

⁷ *Slaughterhouse in Vermont Violates Humane Handling Laws*, AWI Quarterly (Fall 2017) <https://awionline.org/awi-quarterly/fall-2017/slaughterhouse-vermont-violates-humane-handling-laws> (reporting to our members that AWI contacted USDA and Vermont Agency of Agriculture regarding humane handling violations at Vermont Packinghouse and encouraging the removal of the slaughterhouse's grant of inspection); Huffington Post, *It Isn't Easy Being a 'Humane' Slaughterhouse*, https://www.huffingtonpost.com/entry/transparent-slaughterhouse-usda-violations_us_590a15b8e4b0bb2d08748aa1; Vermont Journal, *"Three strikes you're out" does not apply*, (May 20, 2017) <http://vermontjournal.com/featured-articles/three-strikes-youre-not-apply>.

⁸ Animal Welfare Institute, *Tell the USDA: Speeding up Pig Slaughter Jeopardizes Animal Welfare*, Animal Welfare Institute, *Say No to Faster Chicken Slaughter*, <https://awionline.org/action-ealerts/tell-usda-speeding-pig-slaughter-jeopardizes-animal-welfare>; <https://awionline.org/action-ealerts/say-no-faster-chicken-slaughter>.

the information it receives from FOIA requests about HMSA and PPIA to educate members of the public about risks in our food system and to advocate for the enforcement of food safety and animal protection laws and regulations. Farm Sanctuary distributes this information on its website,⁹ in news articles¹⁰ and scholarly papers¹¹ written by Farm Sanctuary staff, and by contributing information for articles written by others on these issues.¹² Farm Sanctuary has also used HMSA and PPIA enforcement records in connection with petitions for regulatory rulemaking urging better enforcement of the HMSA¹³ and PPIA,¹⁴ and to encourage members of the public to participate in the rulemaking process.¹⁵

2. Disclosure of the Requested Information is Not Primarily in the Commercial Interest of the Requesters.

Neither AWI nor FS has any commercial interest in the requested information. Both AWI and FS are nonprofit organizations that do not make commercial use of information obtained through FOIA requests.

⁹ E.g. Farm Sanctuary website, *The Truth behind "Humane" Labels*, <https://www.farmsanctuary.org/learn/factory-farming/the-truth-behind-humane-labels/>

¹⁰ E.g. Bruce Friedrich, *The cruelty behind your ballpark hot dog*, LA Times, Sept. 18, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-friedrich-humane-slaughter-20150920-story.html>; Bruce Friedrich, *Time to ban slaughter of sick, injured animals: Column*, USA Today, Aug. 14, 2014, <https://www.usatoday.com/story/opinion/2014/08/14/usda-sick-animal-ban-column/13569101/>; Bruce Friedrich, *A mad-cow loophole you could drive a truck through*, Feb. 5, 2015, <http://www.chicagotribune.com/news/opinion/commentary/ct-mad-cow-disease-usda-humane-slaughter-perspec-0206-jm-20150205-story.html>; Bruce Friedrich, *Sad about swans? Think about chickens*, Feb. 12, 2014, <http://www.nydailynews.com/opinion/sad-swans-chickens-article-1.1610298>;

¹¹ Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 Geo L.J. 197 (2015), <https://georgetownlawjournal.org/articles/28/when-regulators-refuse-to/pdf>; Bruce Friedrich, *Still In The Jungle: Poultry Slaughter and the USDA*, 23.2 N.Y.U. Envtl. L.J. 247 (2015) https://www.nyuelj.org/wp-content/uploads/2015/09/Friedrich_ready_for_the_website_1.pdf

¹² E.g. Dylan Matthews, *"The cow was lying in a large pool of blood": the horrifying animal abuses the feds ignore*, Vox, Sept. 3, 2015 <https://www.vox.com/2015/9/3/9257181/usda-humane-slaughter-meat>

¹³ Petition, Farm Sanctuary, Petition calling for regulations under the Humane Methods of Livestock Slaughter Act and Federal Meat Inspection Act that will decrease cruelty to farm animals at slaughter (Sept. 1, 2015), <https://www.fsis.usda.gov/wps/wcm/connect/a49e9039-5060-4bf4-b37b-167302b7bc6e/Farm-Santuary-HMSA-Enforcement-09012015.pdf?MOD=AJPERES>; Petition, Farm Sanctuary, Petition requesting that FSIS amend the ante-mortem inspection regulations to ban the slaughter of non-ambulatory disabled pigs (June 23, 2014), <https://www.fsis.usda.gov/wps/wcm/connect/5faaea60-31ed-4f28-996a-98ca9097b013/Petition-FarmSanctuary-060314.pdf?MOD=AJPERES>

¹⁴ Petition, Farm Sanctuary, Petition requesting that FSIS use its authority under the PPIA to promulgate regulations for the humane handling of poultry (Dec. 17, 2013), <https://www.fsis.usda.gov/wps/wcm/connect/e138fe1a-d380-42b2-88b7-f24a11ed7d7f/Petition-AWI-PPIA-121713.pdf?MOD=AJPERES>

¹⁵ Farm Sanctuary, *Speak Out Against Cruelty to Sick and Injured Farm Animals*; <https://secure2.convio.net/fsi/site/Advocacy?jsessionid=8CD2E9B5973164BB37A91725298C6175.app201a?cmd=display&page=UserAction&id=255>; Farm Sanctuary, *Stop the Slaughter of Sick and Injured Birds*, <https://secure2.convio.net/fsi/site/Advocacy?cmd=display&page=UserAction&id=473>; Farm Sanctuary, *Coalition to USDA: Step Up Enforcement for Farm Animals*, Farm Sanctuary Blog, Sept. 23, 2015, <https://blog.farmsanctuary.org/2015/09/petition-usda-slaughterhouse/>

AWI is a nonprofit organization comprised of supporters dedicated to eliminating the pain and suffering of animals caused by humans. One focus of AWI's work is farm animal welfare, in which the organization works with farmers, retailers, consumers, and the government to improve the lives of animals raised for food. AWI's ability to access information about how FSIS is implementing the HMSA and PPIA is critical to this work. Consequently, AWI routinely requests records from the USDA and FSIS regarding implementation of these statutes.

Farm Sanctuary is a nonprofit organization whose mission is to protect farm animals from cruelty and to inspire change in the way society views and treats farm animals. In addition to rescuing farm animals from inhumane conditions and caring for them at sanctuaries, Farm Sanctuary also educates the public about the inhumane conditions that many farm animals endure and about the implementation of the HMSA and PPIA, as well as advocating for laws and policies that will more effectively prevent animal suffering. Farm Sanctuary regularly requests records from the USDA and FSIS regarding implementation of the HMSA and PPIA, and uses these records in its education and advocacy work.

Because AWI and FS are non-profit organizations with no commercial interest in the disclosure of the requested information, disclosure is clearly not primarily in the commercial interest of the requesters. Instead, disclosure is in the public interest, which will be well-served by AWI and FS disseminating this information to the public.

CONCLUSION

Thank you for your consideration of this request. Consistent with FOIA's statutory deadlines, we expect a response to this request within 20 working days, *see* 5 U.S.C. §552(a)(6)(A), which must "indicate within the relevant time period the scope of documents [the agency] will produce." *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013).

Sincerely,

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United States Department of Agriculture

One Team, One Purpose



Food Safety and Inspection Service

Protecting Public Health and Preventing Foodborne Illness



Food Safety and Inspection Service

Freedom of Information Act (FOIA)

Arianne Perkins

Director, FOIA Staff

Office of Public Affairs and Consumer Education

1 May 2018

The Freedom of Information Act

FOIA @ USDA

- USDA has a decentralized FOIA process
- 19 FOIA Officers across USDA (covering all Agencies, staff offices and mission areas)
- Chief FOIA Officer Alexis Graves (OSEC - DM)
- Received over 25,000 requests in FY2017

Related Topics

- > Information for USDA FOIA Requestors
- > USDA Agencies' FOIA Reading Rooms
- > USDA FOIA Points of Contact
- > FOIA Regulations
- > USDA FOIA Reports



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PAL is a web portal that allows you to create, submit, and track the status of your FOIA request(s). Prior to use, you must register and create a username and password using the link below. Please note the submission site does not currently provide the ability to submit a single FOIA request to multiple agencies. You can, however, easily submit the same request to multiple agencies or in the alternative you can submit one request to the Office of the Chief Information Officer ("OCIO") detailing the agencies likely to maintain responsive records. Upon receipt, the OCIO will then forward your request.

[USDA PUBLIC ACCESS LINK](#)

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FOIA requests can also be submitted via email or mail to any one of USDA's agencies. Please use the link below to access the FOIA Points of Contact for email or mail submissions.

[USDA POINTS OF CONTACT](#)

FREEDOM OF INFORMATION ACT SERVICING CENTERS

Animal Plant Health Inspections Service
Agricultural Marketing Service
Agricultural Research Service
Departmental Management
Economic Research Service
Farm Service Agency
Food Nutrition Service

National Agricultural Statistical Service
National Institute of Food and Agriculture
National Finance Center
Natural Resource Conservation Service
Office of Budget and Program Analysis
Office of the Chief Financial Officer
Office of the Chief Information Officer

The Freedom of Information Act

FSIS FOIA Website (fsis.usda.gov/foia)

- How to submit a FOIA to FSIS
- FSIS FOIA E-Reading Room
- Other Key FOIA Links

Freedom of Information Act (FOIA)

The [Freedom of Information Act \(FOIA\)](#) is a Federal statute that allows any person the right to obtain Federal agency records unless the records (or a part of the records) are protected from disclosure by any of the nine exemptions contained in the law. On October 2, 1996, the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) were signed into law. E-FOIA makes it possible for individuals to have electronic access to certain USDA information without having to make formal FOIA requests.

The Food Safety and Inspection Service (FSIS) is the public health regulatory agency in the U.S. Department of Agriculture (USDA) responsible for ensuring that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged, as required by the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act. For instructions on submitting FOIA requests to other government agencies, please consult their websites or contact their FOIA offices.

- [FOIA Points of Contact for Other USDA Agencies](#)

To Make a FOIA Request

The FSIS FOIA office fulfills requests from its Washington, DC offices. [Follow these instructions to request information from FSIS.](#)

Key FOIA Links

- [FSIS Electronic Reading Room](#)
- [Records Frequently Requested/Of Interest](#)
- [Monthly Reports of Requests Submitted to FSIS](#)
- [USDA FOIA Regulations](#) | [PDF](#)

To Contact Us or Provide Feedback

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The FSIS Freedom of Information Act office is dedicated to processing FOIA requests in an efficient and effective manner. Please e-mail us at fsis.foia@usda.gov to provide feedback on your experience as well as suggestions for improvements.

Related Content

- [FOIA Electronic Reading Room](#)
- [Records Frequently Requested/Of Interest](#)

The Freedom of Information Act

FOIA Electronic Reading Room

The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) requires agencies to make certain types of records, created by the agency on or after November 1, 1996, available electronically (Reading Room). Under E-FOIA, individuals can obtain electronic access to certain agency records without having to make a formal FOIA request (5 U.S.C. §552(a)(2) (2000)). By the same token, records required to be made publicly available pursuant to FOIA section (a)(2) ordinarily cannot be the subject of regular "FOIA requests." (5 U.S.C. §552(a)(3)(A)).

The FSIS Reading Room contains documents specifically identified for inclusion by FOIA section (a)(2) and 7 CFR Subtitle A, Part 1, Section 1.4, and fall in the following four categories:

1. Final opinions [and] . . . orders made in the adjudication of cases;
2. Policy statements and adopted interpretation not published in Federal Register;
3. Administrative staff manuals and instructions that affect the public; and
4. Records that are frequently requested / of interest.
 - [How to Request Labeling Records](#)


Related Content

- [A to Z](#)
- [Freedom of Information Act](#)
- [Records Frequently Requested/Of Interest](#)

FSIS FOIA Website fsis.usda.gov/readingroom

- Frequently requested records
- Monthly report of FOIA requests
- Humane Handling Quarterly Reports/Enforcement Actions
- USDA FOIA Annual Reports

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The reports provide a listing of FSIS FOIA requests received during the designated one-month period.

- Latest Report
 - [March 2018 \(PDF Only\)](#)
- [FOIA Request Reports Archive](#)

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- [USDA Laws and Regulations](#) [↗](#)
 - [Adjudicatory Decisions](#) [↗](#)
 - [Regulations and Directives](#) [↗](#)
- FSIS
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 - [Quarterly Enforcement Reports](#)
 - [FSIS Adjudications](#)
 - [Humane Handling Quarterly Reports and Humane Handling Enforcement Actions](#)

Policy Statements and Adopted Interpretations

- [FSIS Directives](#)
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Administrative Staff Manuals

- [FSIS Significant Guidance Documents](#)
- [Hazard Analysis and Pathogen Reduction](#)
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FSIS FOIA Annual Reports

- Reports for 2006 and later years are incorporated in [USDA's annual FOIA reports](#) [↗](#).

Other Helpful Resources

- [A to Z Index, FSIS Website](#)
- [Open Government Act – S.2488](#) [↗](#)
- [USDA FOIA Regulations](#) [↗](#) | [PDF](#) [↗](#)
- [USDA FOIA Service Center](#) [↗](#)
 - [USDA FOIA Public Access Link \(PAL\)](#) [↗](#)
- [USDA Privacy Act Regulations](#) [↗](#)
- [USDA System of Records Notices](#) [↗](#)
- [U.S. Department of Justice Guide to the Freedom of Information Act](#) [↗](#)

The Freedom of Information Act

FSIS FOIA Website
fsis.usda.gov/readingroom

- **Frequently Requested Records**
 - **FSIS Datasets page**
 - **Humane Handling Enforcement Actions**

Records Frequently Requested / Of Interest

These records have been [requested multiple times](#) or may be of [current interest to the public](#).

Records Frequently Requested

Import/Export

- The [FSIS Datasets page](#) offers data files, establishment-specific data, sample datasets, and corresponding data dictionaries. This includes [data for import refusals](#).

Foster Farms

- [Noncompliance Records from Jan 1, 2012–Mar 6, 2014](#) (PDF Only; 5 MB; 761 pp)
- [FSIS Public Health Alert](#) (Oct 7, 2013)

Notices of Suspension

- [Notice of Suspension for Paul Redlinski & Sons Inc., M-18870/P-18870](#) (Jan 30, 2015; PDF Only)
- See also [Humane Handling Enforcement Actions](#)

Rancho Feeding Corporation

- [Notice of Suspension Held in Abeyance](#) (Jan 27, 2014; PDF Only)
- [Notice of Suspension](#) (Jan 14, 2014; PDF Only)
- [Noncompliance Records](#) (Jan 1, 2013 - Feb 10, 2014; PDF Only)
- [Humane Handling Records](#) (PDF Only)
- [Correspondence, 2014](#) (PDF Only)

Horse Slaughter

- [Information Regarding Horse Slaughter](#)

[\[Back to Top\]](#)

Related Content

- [A to Z](#)
- [FOIA Electronic Reading Room](#)
- [Freedom of Information Act](#)

The Freedom of Information Act

FSIS FOIA Website
fsis.usda.gov/readingroom

- **Records of Interest**
 - Foreign Audit Reports
 - Eligible Foreign Establishments
 - Humane Handling Enforcement Actions
 - Meat, Poultry & Egg Products Inspection Directory
 - Microbiological Testing Programs

Of Interest

Advisory Committee Reports

- [National Advisory Committee on Meat and Poultry Inspection \(NACMPI\)](#)
- [National Advisory Committee on Microbiological Criteria for Foods \(NACMCF\)](#)

Compliance Assistance

- [Compliance Guides Index](#)

Data, Audits, and Reports

- [Foreign Audit Reports](#)
- [Eligible Foreign Establishments](#)
- [FSIS Office of Field Operations Monthly Employment and Vacancy Data, FY 2013 \(PDF Only\)](#)
- [Recall Case Summaries by Year \(2005-current\)](#)
- [Regulatory Enforcement Reports](#)

Directories

- [Meat, Poultry, and Egg Products Inspection Directory](#)
- See also: [Key Agency Contacts](#) | [Field Office Locations and Phone Numbers](#)

Microbiological Testing Programs

Purchase Card Holders [↗](#)

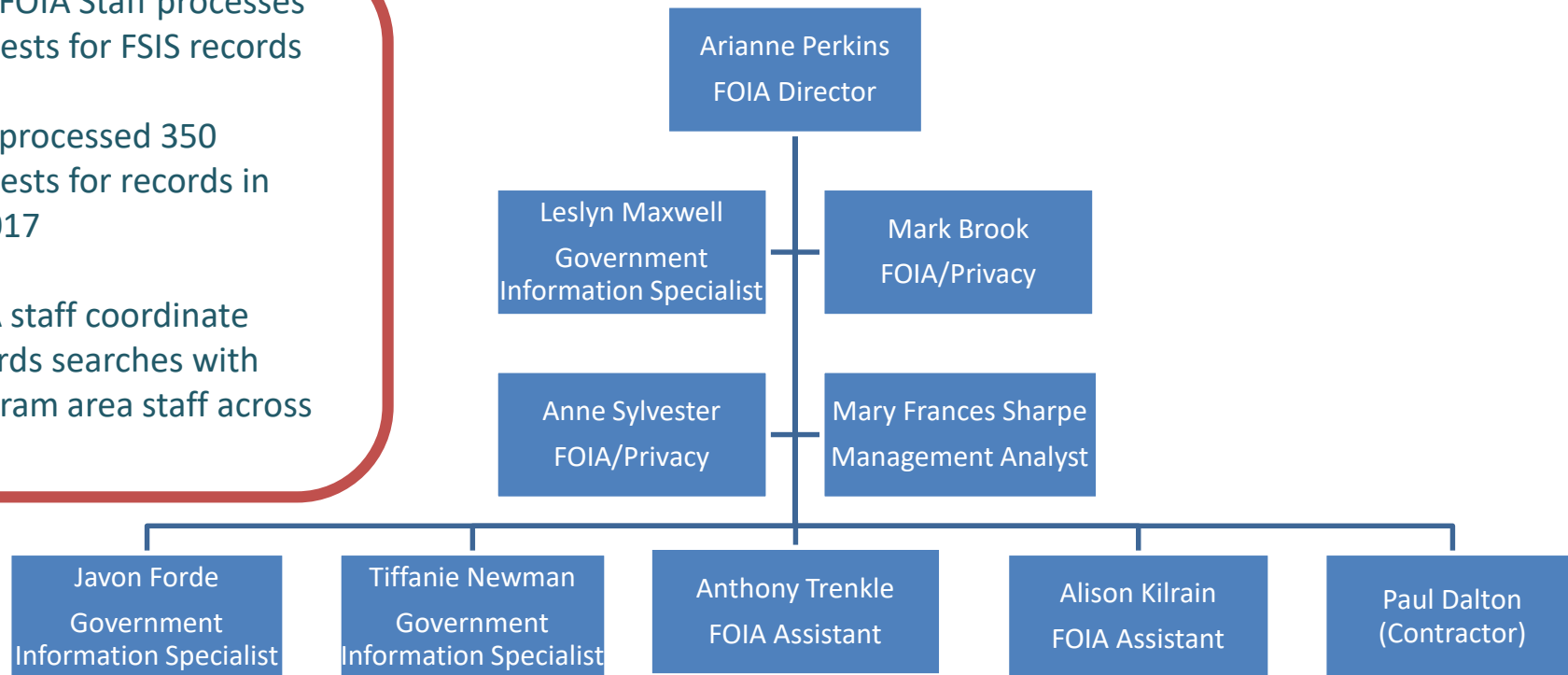
Risk Assessments

Office of Public Affairs and Consumer Education



The Freedom of Information Act

- FSIS FOIA Staff processes requests for FSIS records
- FSIS processed 350 requests for records in FY2017
- FOIA staff coordinate records searches with program area staff across FSIS



The Freedom of Information Act

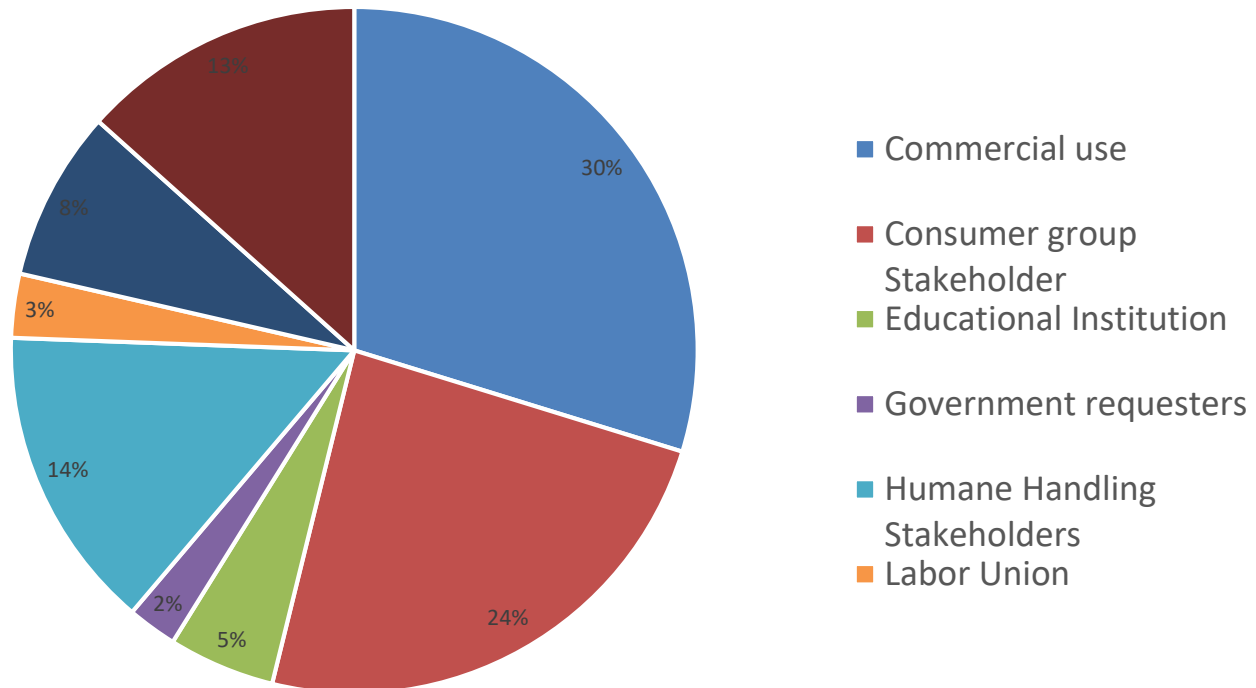


Commonly Requested Records

1. **Humane Handling**
2. **Good Commercial Practices**
3. New Poultry Inspection System (NPIS) records
4. Non-Compliance Records
5. Sampling Data
6. Recall Records

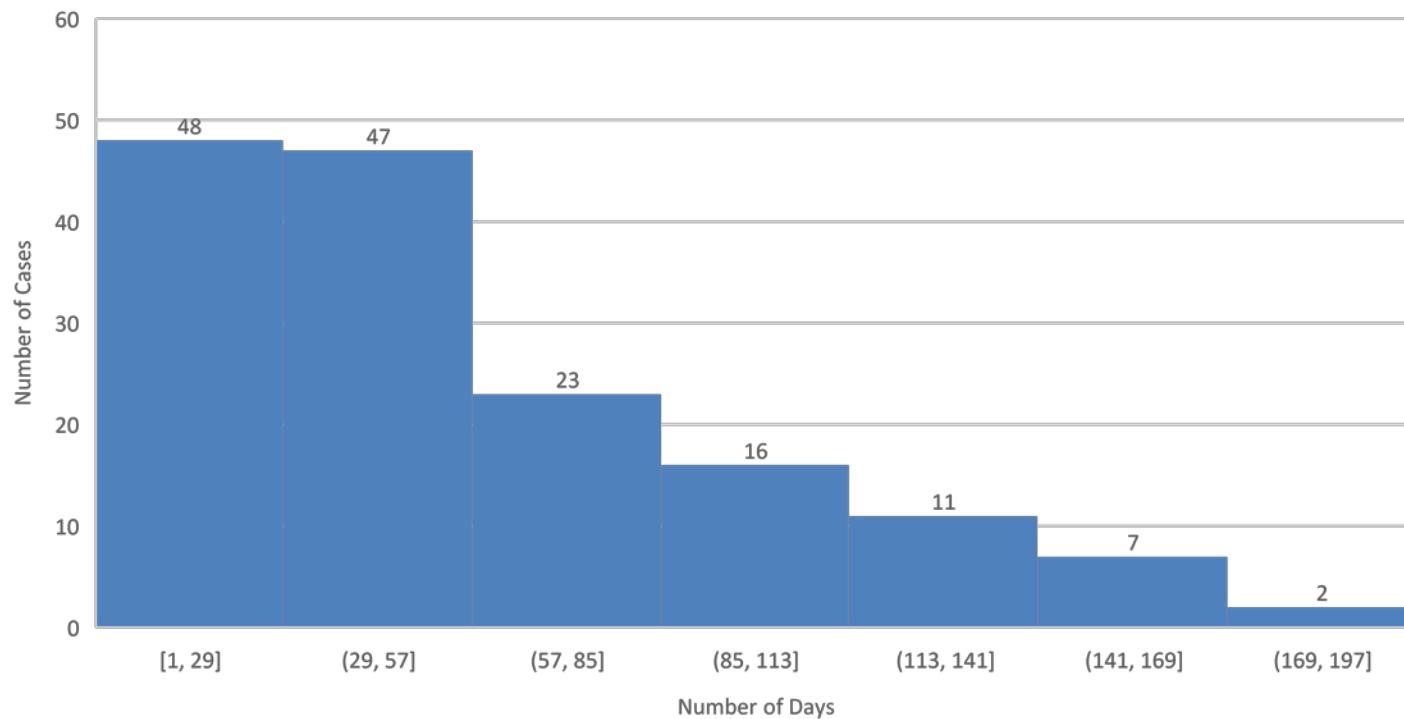
The Freedom of Information Act

FSIS FOIA Requesters FY2018



The Freedom of Information Act

Processing Times for Closed Cases FY 2018



The Freedom of Information Act

Projects to Ensure Compliance and Increase Transparency

- Updates to FOIA Website
- FOIA Training for Program Area FOIA POCs
- FOIA Training for non-FOIA professionals
- Improving the FOIA process for sampling data requests
- Stakeholder outreach

The Freedom of Information Act

FOIA Staff Contact		
Name	Email	Phone
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Food Safety and Inspection Service

Questions?

Arianne Perkins, Director

Arianne.perkins@fsis.usda.gov

(202) 690-2760



United States Department of Agriculture

Food Safety and
Inspection Service

1400 Independence
Avenue, SW.
Washington, D.C.
20250

MAY 31 2018

William N. Lawton
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue, NW, Suite 210
Washington, DC 20016

RE: FOIA-2018-00328

Dear Mr. Lawton:

This letter acknowledges receipt of your Freedom of Information Act (FOIA) request to the Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS) dated May 16, 2018, in which you requested a copy of records relating to the Implementation of the Humane Methods of Slaughter Act and the Poultry Products Inspection Act, from January 1, 2018 to May 16, 2018. FSIS received your request on May 16, 2018, and assigned tracking number FOIA-2018-00328. Please reference this number in any future communications with this office with regard to your request.

Pursuant to the FOIA, 5 USC 552(a)(6)(A)(i), the USDA's FSIS has twenty (20) working days upon receipt of a request to make a determination. In unusual circumstances, such as an agency's backlog or the need to examine a voluminous amount of records required by the request, or the need to consult with another agency, FSIS can extend the 20-day time limit for processing a request.

In addition to your request for records, you asked that we waive all fees associated with processing your request.

The USDA's FOIA Regulations, 7 CFR, Part 1, Subpart A, Appendix A, sets forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

1. Whether the subject of the requested records concerns "the operations or activities of the government."
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.
3. Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.
4. Whether the contribution to public understanding of government operations or activities will be "significant."
5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.
6. Whether the magnitude of any identified commercial interest to the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

As a requester, you bear the burden under the FOIA of showing that the Fee waiver requirements have been met. Based on my review of your May 16, 2018, letter and for the reasons stated herein, I have determined that your fee waiver request does sufficiently meet all of the criteria under the FOIA and the applicable regulations. Therefore, your request for a fee waiver is approved.

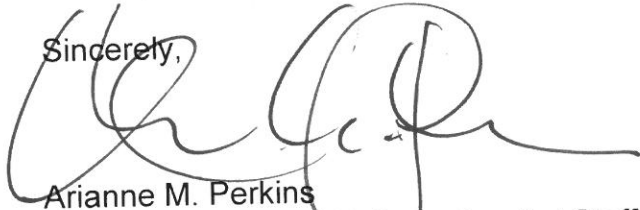
We will comply with your request to the fullest extent permissible by law. Any records not subject to an exemption will be forwarded to you promptly upon completion of FSIS' search and review process or if applicable, following receipt of any fees assessed to you.

If you have any questions regarding the status of your request, please contact Alison Kilrain at (202) 720-0283, or by e-mail at Alison.Kilrain@fsis.usda.gov.

William N. Lawton
Page 3

Thank you for your interest in FSIS programs and policies.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arianne M. Perkins'. The signature is fluid and cursive, with a large initial 'A' and 'P'.

Arianne M. Perkins
Director, Freedom of Information Act Staff
Office of Public Affairs and Consumer Education
Food Safety and Inspection Service

**Be Food Safe: CLEAN: Wash Hands and Surfaces Often SEPARATE: Separate Raw
Meats from Other Foods
COOK: Cook To The Right Temperature CHILL: Refrigerate Food Promptly**

Meyer Glitzenstein & Eubanks LLP

4115 Wisconsin Avenue, N.W., Suite 210
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beubanks@meyerglitz.com

July 18, 2018

Paul Kiecker
Acting Administrator
Department of Agriculture
Food Safety and Inspection Service
1400 Independence Ave. SW
Room 2168, South Building
Washington, D.C. 20250-3700

Re: Freedom of Information Act Appeal of the Response to Request FOIA-2018-00328

Dear Mr. Kiecker:

This is an administrative appeal under the Freedom of Information Act (“FOIA”) of the response from the United States Department of Agriculture’s (“USDA”) Food Safety and Inspection Service (“FSIS”) to request number FOIA-2018-00328, which we submitted on behalf of the Animal Welfare Institute (“AWI”) and Farm Sanctuary (“FS”). On July 6, 2018, FSIS responded to request number FOIA-2018-00328 by releasing 587 pages of responsive records with some redactions. This release is not a complete response to our FOIA request. FSIS has responded to our request solely under 5 U.S.C. § 552(a)(3) by releasing records only to the requester. However, our request was also made under FOIA’s affirmative disclosure requirements, 5 U.S.C. § 552(a)(2), specifically requesting that FSIS comply with these requirements by proactively posting records online. As demonstrated below, by simply ignoring this critical aspect of our request, FSIS is violating FOIA.

Our request was extremely clear and specific regarding USDA and FSIS’s duties under the affirmative disclosure mandates in section (a)(2) of FOIA. Our request also extensively described FOIA’s affirmative disclosure mandate and explained why that mandate applies to the records subject to this request, namely the following:

- (1) all noncompliance records and memoranda of interview, under the Humane Methods of Slaughter Act (“HMSA”), including any supporting records relating to their issuance pursuant to humane slaughter regulations under 9 C.F.R. § 313;
- (2) all records of violations of Good Commercial Practices for the humane handling of birds at slaughter under the Poultry Products Inspection Act (“PPIA”), including:



- a. all inspection records for non-compliance related to the treatment of poultry under the PPIA, including noncompliance records and memoranda of interview;
- b. any other records relating to humane treatment of poultry under the PPIA, including memoranda of information, letters of concern, or letters of cause; and
- c. all records of “Good Commercial Practices” under the PPIA.

We specifically noted that our clients and others have regularly requested these records for years, and that FSIS has routinely released such records pursuant to individual requests under 5 U.S.C. § 552(a)(3). FSIS’s publicly available FOIA logs confirm these facts. Further, we specified the time-frame for our request for proactive disclosure, “request[ing] that FSIS process this request pursuant to 5 U.S.C. § 552(a)(2) by posting requested records online, beginning with records from January 2018 until the receipt of this request, and by proactively disclosing such records in the future.” We also specifically stated our “request that the USDA and FSIS process this request under *both* sections (a)(2) and (a)(3) of FOIA,” and that we would “*not consider merely releasing records to our clients under (a)(3) a complete response to this request, because such a release will not satisfy the agencies’ obligations under section (a)(2).*” *Id.* (emphasis added).

FSIS’s response wholly ignores our request under 5 U.S.C. § 552(a)(2). In fact, FSIS mischaracterizes our request by stating that “[y]ou requested access to a copy of records relating to the Implementation of the Humane Methods of Slaughter Act and the Poultry Products Inspection Act, from January 1, 2018 to May 16, 2018.” By failing to recognize that our request was for proactive disclosure of records regarding the implementation of these statutes—and not merely for a copy of such records—FSIS has failed to respond to a critical part of our request. In fact, FSIS’s response fails even to cite 5 U.S.C. § 552(a)(2) or to explain whether the agency has any intention of complying with its duties under FOIA’s affirmative disclosure mandate.

An agency may not simply ignore a FOIA request under section (a)(2). Indeed, FOIA specifically mandates that “[e]ach agency shall, upon any request for records made under paragraph . . . (2) . . . determine within 20 days . . . whether to comply with such request and shall immediately notify the parson making such request of . . . such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i)(I). “[I]n order to make a determination,” an agency must, *inter alia*, “determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents.” *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). Accordingly, there can be no legitimate dispute that an agency must respond to a request under 5 U.S.C. § 552(a)(2) by indicating what records it intends to make available for public inspection in an electronic format, what records it intends to withhold, and the reasons for the agency’s decision.¹

¹ While we do not believe that a request under 5 U.S.C. § 552(a)(2) is *required* to enforce FOIA’s affirmative disclosure requirement, it is clear that should a requester choose to do so, the agency must nevertheless respond to such a request with the requisite determination. *Compare* 5 U.S.C. § 552(a)(3) (stating that “upon any request for records,” an agency “shall make the

Here, FSIS has flouted its duties under FOIA. FSIS has failed for many years to comply with FOIA's proactive disclosure requirement by posting HMSA and PPIA inspection and enforcement records online, despite the agency itself acknowledging (as described in our request) that *these records are the two most frequently requested types of records for FSIS*, and despite the fact that FSIS has regularly released these records pursuant to individual requests. Moreover, FSIS has completely failed to respond to our request under 5 U.S.C. § 552(a)(2) for the proactive disclosure of these records.²

FSIS's failure to respond to our FOIA request under 5 U.S.C. § 552(a)(2) is unlawful. We originally submitted this request in the hope of avoiding litigation to compel the agency to comply with FOIA's proactive disclosure requirement. However, unless we receive a response to this administrative appeal within 20 working days including a determination that FSIS will make the requested records available online, we will have no choice but to file suit to compel the agency to comply with FOIA's affirmative disclosure mandate.

Sincerely,

/s/

William N. Lawton

Katherine A. Meyer

Meyer Glitzenstein & Eubanks, LLP

4115 Wisconsin Ave., Suite 210

Washington, DC 20007

(202) 588-5206 x 107

nlawton@meyerglitz.com

records promptly available”) *with id.* § 552(a)(2) (stating that an agency “shall make [certain records] available for public inspection in an electronic format” without requiring any request).

² Similarly, FSIS has violated FOIA by failing to respond to our request that the agency make the determination that the records subject to this request “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).

United States Department of Agriculture

Food Safety and
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JUL 31 2018

Mr. William Lawton
Ms. Katherine Meyer
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue, NW, Suite 210
Washington, D.C. 20016

Dear Mr. Lawton and Ms. Meyer:

Thank you for your letter of May 15, 2018, to Acting Deputy Undersecretary Carmen Rottenberg, Acting Administrator Paul Kiecker and the Food Safety and Inspection Service (FSIS) Freedom of Information Act (FOIA) Office requesting records and proactive disclosure of documents.

FSIS has processed your request for existing records. The request was assigned FOIA case number 18-328 and was closed on July 6, 2018.

FSIS is considering your request for the Agency to proactively disclose records related to Humane Methods of Slaughter Act and Poultry Products Inspection Act slaughter activities. The Agency routinely evaluates the types of information that should be made publicly available. FSIS considers factors such as the interest or benefit to the general public and the availability of Agency resources to ensure the information is accurate and routinely updated. The Agency appreciates your feedback and will contact you when a final determination is made.

Regarding your request that FSIS comply with the congressional mandate to issue regulations in accordance with the FOIA Improvement Act of 2016, the U.S. Department of Agriculture has published a Notice of Proposed Rulemaking. The notice requests public comment by August 10, 2018. You may view the request for comment on the USDA website at <https://www.federalregister.gov/documents/2018/06/11/2018-11868/usda-departmental-freedom-of-information-act-regulations>.

If you have further concerns, please contact Ms. Arianne Perkins, FOIA Director, at arianne.perkins@fsis.usda.gov.

Sincerely,



Paul Kiecker
Acting Administrator
Food Safety and Inspection Service