

FULFILLING THE PROMISE OF EFOIA'S AFFIRMATIVE DISCLOSURE MANDATE

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ABSTRACT

In 1996, to address the persistent problem of delays in the processing of Freedom of Information Act (FOIA) requests, Congress passed the Electronic Freedom of Information Act (EFOIA), which included a suite of reforms. Chief among them was the affirmative disclosure mandate: a requirement that agencies proactively post frequently requested records on their websites. These affirmative disclosures were intended to increase public access to government records and to free up agency resources spent reactively responding to FOIA requests by making such requests “an avenue of last resort.”

However, more than two decades since the affirmative disclosure mandate was enacted, delays in processing FOIA requests remain excessive, compliance with it is spotty at best, and attempts to enforce it have met with procedural hurdles. In an effort to make good on the decades-old promise of EFOIA's affirmative disclosure mandate, this Article tackles those procedural hurdles and urges courts reconsider how they handle challenges to agencies' noncompliance with the mandate. This Article argues that the judicial decisions regarding the relief available for violations of the affirmative disclosure mandate have overlooked critical issues and have rendered Congress's mandate largely unenforceable. It concludes with a call to revisit these decisions and to allow relief in the form of compelling precisely what Congress intended—the posting online of frequently requested records. Only by doing so might we finally make good on EFOIA's promise.

“The history of the Freedom of Information Act . . . is a chronicle of the perils and problems of translating rhetoric into performance”¹

“By the time freedom of information requests are fulfilled, the information is often useless to the requester, if the requester has not died of old age.”²

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

2. 142 CONG. REC. 23,439 (1996) (statement of Rep. Maloney).

“It takes constant vigilance, commitment, and common sense to make any law work. I hope we as citizens have all these qualities—in large measure—to keep the FOIA around for a long time and to make it work.”³

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INTRODUCTION

As Professor David Vladeck has noted, “[T]here is now a significant and growing dissonance between the promises made by our federal right-to-know laws and their performance.”⁴ This Article seeks to address one piece of that dissonance: the dissonance between the promise of the affirmative disclosure mandates that were central to the 1996 EFOIA amendments and the reality of rampant disregard of those mandates.

3. Wald, *supra* note 1, at 683.

4. David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1792 (2008).

In 1996, in an effort to meaningfully address the backlogs and serious delays that plagued implementation of FOIA, Congress enacted a suite of reforms.⁵ One key reform was to require that agencies proactively post online all records that had been released in response to a request and “that because of the nature of their subject matter, the agency determine[d] have become or are likely to become the subject of subsequent requests for substantially the same records.”⁶ This affirmative disclosure mandate was intended to benefit agencies—by reducing the number of requests received—as well as the public—by making records available without having to submit a request.⁷ Compliance with the mandate, however, has been spotty at best,⁸ and attempts to enforce it have met with procedural hurdles. In an effort to make good on the decades-old promise of EFOIA’s affirmative disclosure mandate, this Article addresses those procedural hurdles and proposes changes to the way that the courts address challenges to agencies’ noncompliance with the mandate.

This Article proceeds in four parts. Part I provides background on FOIA and the EFOIA amendments, including the failed promise of those amendments. Part II presents a case study to illustrate and interrogate that failed promise. It examines the U.S. Department of Agriculture’s (USDA) compliance—and noncompliance—with the affirmative disclosure mandate in the context of its implementation of the federal Animal Welfare Act (AWA). Part III then analyzes the decisions resolving alleged violations of the affirmative disclosure mandate. Part IV concludes that the courts have erred in their approach and, as a result, have rendered Congress’s mandate largely unenforceable. It then proposes recommendations for remedying these errors to finally make good on EFOIA’s affirmative disclosure promise.

I. FOIA AND EFOIA AMENDMENTS

A. FOIA

At its most basic, FOIA creates a statutory right to government records.⁹ As former Chief Judge for the U.S. Court of Appeals for the District of Columbia Circuit Patricia M. Wald has explained:

The FOIA’s concept is simple but revolutionary. . . . Any person, citizen or non-citizen—for whatever reason, good or ill—may file a request for an agency record, and the agency must disclose it unless the document falls within one of nine exemptions laid down in the law.

5. See President’s Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 2 PUB. PAPERS 1743 (Oct. 2, 1996) [hereinafter President’s Statement].

6. 5 U.S.C. § 552(a)(2)(D)(ii)(I) (2012).

7. See *infra* notes 38–47 and accompanying text.

8. See *infra* Section I.C.

9. See 5 U.S.C. § 552.

If the agency refuses, the citizen can go to court on a priority basis, and the agency has to convince the court that the documents are exempt under the law. Most important, the court decides the issue afresh, without deference to the agency's call.¹⁰

Thus, FOIA's core original mechanism was a reactive one—in response to a request, the government would provide records.¹¹ Even today, FOIA is most known for this ability to obtain records by submitting a request.

But that is not, and has never been, FOIA's only mechanism. Even from the beginning, FOIA included a proactive provision as well. As Professor Michael Herz has described:

From the outset, FOIA required that certain items be either published in the *Federal Register* or “made available for public inspection and copying.” Items in the first category, now known as “(a)(1) material,” after the relevant section of the amended statute, include descriptions of agency organization, rules of procedure, and proposed and final regulations. The second category, “(a)(2) material,” originally consisted of final opinions and orders in agency adjudications, statements of policy and interpretive rules that were not published in the *Federal Register*, and administrative staff manuals. Hard copies of these were to be maintained in “reading rooms” (a term that does not appear in the statute) open to the public.¹²

Hence, in addition to requiring agencies to provide records on request, FOIA has always imposed some proactive responsibilities on agencies as well.¹³ However, as Professor Herz notes, these original provisions “do not require affirmative disclosure of government information. Rather, they provide for disclosure of law.”¹⁴ Because of their focus on the disclosure of law, these provisions were enforced not through direct judicial review for failure to disclose, but rather through a prohibition on relying on law that had not properly been disclosed.¹⁵

10. Wald, *supra* note 1, at 655–56 (footnote omitted); *see also* 5 U.S.C. § 552(b) (stating the exemptions). These exemptions are to be “narrowly construed.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). It is beyond the scope of this Article to discuss the exemptions in detail.

11. *See* Freedom of Information Act, Pub. L. No. 89-487, § 3(c), 80 Stat. 250, 250–51 (1966) (codified at 5 U.S.C. § 552(a)(3)(A)) (“Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person.”).

12. Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 586 (2009) (footnotes omitted) (quoting 5 U.S.C. § 552(a)(1)–(2) (2006); *see also* An Act of Sept. 6, 1966, Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (1966) (codified as amended at 5 U.S.C. § 552(a)(1)–(2) (2012)).

13. Herz, *supra* note 12.

14. *Id.*

15. *See* Freedom of Information Act § 3(b) (codified as amended at 5 U.S.C. § 552(a)(1)).

This mechanism stood in stark contrast to the broad public enforcement available for a failure to respond to a request, i.e., for noncompliance with FOIA's reactive provision.¹⁶ There, FOIA provided:

Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant.¹⁷

Consistent with the legislative history, which rejected the notion that a requestor would have to establish their particular interest in requested records, courts have recognized that this provision “means that any person who submits a request may obtain access to governmental records regardless of whether they have a personal stake in the information sought.”¹⁸ FOIA also provided for expedited treatment of FOIA lawsuits, establishing that they should take precedence on the docket and should be “expedited in every way.”¹⁹ In addition, failure to comply with a court order to produce records was punishable as contempt.²⁰

Despite the promise of FOIA, as Professor Mark Grunewald has noted, “From the outset, delay in processing requests was the source of widespread complaint”²¹ Indeed, just five years after the law was enacted, a House Committee report found that “[t]he efficient operation of the Freedom of Information Act has been hindered by [five] years of foot dragging by the Federal bureaucracy.”²²

Congress sought to address these delays and other concerns through amendments in 1974.²³ Among other things, the 1974 amendments imposed statutory response times and required annual reporting to Congress on compliance.²⁴ The deadlines proved largely meaningless in practice, however.²⁵ As Judge Wald has written:

16. *See id.* § 3(c) (codified as amended at 5 U.S.C. § 552(a)(4)(B)).

17. *Id.*

18. *McDonnell v. United States*, 4 F.3d 1227, 1237 (3d Cir. 1993); *accord* *Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of Commerce*, 968 F. Supp. 2d 88, 95 (D.D.C. 2013).

19. Freedom of Information Act § 3(c) (codified as amended at 5 U.S.C. § 552(a)(4)(B)).

20. *Id.* (codified as amended at 5 U.S.C. § 552(a)(4)(G)).

21. Mark H. Grunewald, *E-FOIA and the “Mother of All Complaints”: Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 345 n.3 (1998) (citing *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings Before a Subcomm. of the Comm. on Gov't Operations H.R.*, 92d Cong. 37, 40 (1972)).

22. H.R. REP. NO. 92-1419, at 8–9 (1972).

23. Jefferey M. Sellers, Note, *Public Enforcement of the Freedom of Information Act*, 2 YALE L. & POL'Y REV. 78, 105 (1983); *see also* H.R. REP. NO. 92-1419, at 8–9.

24. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561, 1561–64 (1974) (codified as amended at U.S.C. § 552(a)) (amending the Freedom of Information Act); Sellers, *supra* note 23, at 81–82, 87, 100–07; *see* Wald, *supra* note 1, at 659–64 (discussing the effects of the 1974 amendments).

25. *See* Wald, *supra* note 1, at 660.

After 1974, the number of FOIA requests and the amount of litigation challenging agency denials increased dramatically. . . . As a result, courts excused the overwhelmed agencies from strict adherence to the statutory ten-day deadline for responses. In fact, requesters often had to wait months, even years on a first come, first served basis.²⁶

Thus, despite these and subsequent amendments to FOIA, delays continued to plague the law.²⁷

B. The EFOIA Amendments and the Affirmative Disclosure Mandate

On October 2, 1996 (thirty years after FOIA was first enacted), President Bill Clinton signed into law the EFOIA Amendments, proclaiming that they would “bring[] FOIA into the information and electronic age” and “broaden[] public access to government information.”²⁸ Similarly, at a House hearing on the bill, one participant stated:

[T]he Electronic Freedom of Information Act will bring the Freedom of Information Act from the technological stone age into the information age. . . .

. . . .

Most importantly, the bill would tackle the mother of all complaints lodged against the Freedom of Information Act: that is, the often ludicrous amount of time it take[s] some agencies to respond, if they respond at all, to freedom of information requests.

By the time freedom of information requests are fulfilled, the information is often useless to the requester, if the requester has not died of old age.²⁹

Senator Patrick Leahy, a cosponsor of the amendments, similarly noted:

Long delays in access can mean no access at all. The current time limits in the FOIA are a joke. Few agencies actually respond to FOIA requests within the 10-day limit required by law. Such routine failure to comply with the statutory time limits is bad for morale in the agencies and breeds contempt by citizens who expect government officials to abide by, not routinely break, the law.³⁰

26. *Id.* (citing *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614–19 (D.C. Cir. 1976)).

27. *See id.*

28. President’s Statement, *supra* note 5.

29. 142 CONG. REC. 23,438–39 (1996).

30. H.R. REP. NO. 104-795, at 16 (1996).

Indeed, the Senate Report notes that “agency delays in responding to FOIA requests” were “the single most frequent complaint about the operation of the FOIA.”³¹

Although the EFOIA amendments included a panoply of mechanisms, chief among them—and the focus of this Article—was the affirmative disclosure mandate for frequently requested records.³² Whereas “for its first thirty years, FOIA imposed no meaningful obligation of affirmative disclosure of government information”³³ other than law, the 1996 EFOIA amendments aimed to change this.³⁴ Thus, with these amendments it became mandatory for agencies to proactively post certain records on their websites.³⁵ Specifically, agencies are responsible for posting records that have been provided in response to a standard, reactive FOIA request and that “because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”³⁶

Agencies were also required to post “a general index of the records” that were subject to the affirmative disclosure mandate.³⁷

Enforcement of the affirmative disclosure mandate was made available through the general judicial review provision of FOIA.³⁸ The Senate Report explained the affirmative disclosure mandate as follows:

The purpose of this provision in the bill is to prompt agencies to make information available affirmatively on their own initiative in order to meet anticipated public demand for it. In other words, FOIA

31. S. REP. NO. 104-272, at 15 (1996).

32. See Grunewald, *supra* note 21, at 365–66.

33. Herz, *supra* note 12, at 587.

34. See *infra* notes 39–44 and accompanying text.

35. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, 3048–49, 3053 (1996) (codified as amended at 5 U.S.C. § 552(a)(2) (2012)) (describing how the amendments required availability by “computer telecommunications,” which has been understood to mean the Internet); DEP’T OF JUSTICE, PROACTIVE DISCLOSURE OF NON-EXEMPT AGENCY INFORMATION: MAKING INFORMATION AVAILABLE WITHOUT THE NEED TO FILE A FOIA REQUEST (2017) (first citing S. REP. NO. 104-272, at 11 (1996); then citing H.R. REP. NO. 104-795, at 20–21 (1996)), https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information (noting that EFOIA Amendments would require (a)(2) materials to be made available online); 142 CONG. REC. 23,789 (1996) (statement of Sen. Leahy) (noting that the bill would encourage agencies to increase online access to government records); 142 CONG. REC. 23,439 (1996) (statement of Rep. Maloney) (“[The bill] would encourage agencies to offer online access to Government information, effectively transforming an individual’s home computer into a Government agency’s public reading room.”).

36. Electronic Freedom of Information Act Amendments of 1996 § 4 (codified as amended at 5 U.S.C. § 552(a)(2)(d)(ii)(I)). More recently, under the FOIA Improvement Act of 2016, Congress enacted what is known as the Beetlejuice rule, requiring that agencies also proactively post records “that have been requested 3 or more times.” See FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538, 538 (codified at 5 U.S.C. § 552(a)(2)(D)(ii)(II)). These records must also be referenced in a publicly available index. See 5 U.S.C. § 552(a)(2)(E).

37. 5 U.S.C. § 552(a)(2)(E).

38. *Id.* § 552(a)(4)(B); see also *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1240 (D.C. Cir. 2017).

processes should not be [e]ncumbered by requests for routinely available records or information that can more efficiently be made available to the public through affirmative dissemination means.³⁹

President Clinton in his signing statement likewise stressed: "As the Government actively disseminates more information, I hope that there will be less need to use FOIA to obtain government information."⁴⁰

More specifically, the aim was to "reduce the number of duplicative FOIA requests for the same records requiring separate agency responses."⁴¹ The House and Senate reports also specifically noted the importance of the index requirement.⁴² For example, the House Report stated: "[T]he general index would help requestors in determining which records have been the subject of prior FOIA requests. By diverting some potential FOIA requests for previously-released records with this index, agencies can better use their FOIA resources to fulfill new requests."⁴³ The Senate Report also noted that agencies themselves would benefit from the index requirement because the index could help them "more readily identif[y]" records that had previously been requested "without the need for new searches," thereby facilitating compliance with FOIA's time limits and also "reduc[ing] costs to agencies in preparing responses."⁴⁴

As Professor Grunewald noted not long after the amendments were enacted: "Perhaps the greatest delay-reducing potential of the Amendments lies not in any of the provisions that seek to address delay directly, but rather in those that seek to speed access by moving from a retail to a wholesale approach to information delivery."⁴⁵ He continued:

By giving publication and reading rooms, including electronic versions, a more central role, the Amendments will at least offer the prospect of increased information delivery to the public with greater efficiency. This opportunity is only enhanced by the fact that most newly-created agency records and many records created in the past decade were created, if not stored, in electronic form. The base thus exists for an information access system that can be both highly automated and broadly available.⁴⁶

Professor Margaret Kwoka has detailed many of the sound policy reasons for mandating affirmative disclosures:

39. S. REP. NO. 104-272, at 13 (1996); *see also* Herz, *supra* note 12, at 588 ("As one observer has written, the basic thrust of EFOIA was to shift from a system in which requestors endure lengthy delays while waiting for paper copies of records to a model in which agencies anticipate requests and act to make records (and information on how to find additional records) available over online systems.").

40. President's Statement, *supra* note 5.

41. S. REP. NO. 104-272, at 13.

42. *See infra* notes 43-44 and accompanying text.

43. H.R. REP. NO. 104-795, at 21 (1996).

44. S. REP. NO. 104-272, at 13.

45. Grunewald, *supra* note 21, at 365.

46. *Id.* at 367.

As a preliminary matter, it is likely to save agencies money. In fact, almost nothing they could do could possibly be as expensive as responding to FOIA requests on a one-off basis when companies are submitting them by the thousands. Some past empirical evidence suggests that affirmative disclosure in other contexts saves agencies time and money. Given that hundreds of requests are submitted for very similar records each year, at the very least the money saved by diminished FOIA processing costs should free up resources for affirmative disclosure. . . .

Cost savings to the agency and freeing up FOIA processing resources is not just a benefit to the public fisc. It also creates the room for FOIA processing to better serve the public interests for which it was intended. If the news media's primary complaint about FOIA is the long wait to receive a response, more resources dedicated to the requests that do fall within FOIA's primary intended use will surely ameliorate that burden.⁴⁷

C. Agency Disregard of the Affirmative Disclosure Mandate

Unfortunately, the promise of EFOIA remains unrealized. As the U.S. District Court for the District of Columbia has recognized, "When enacting the EFOIA, Congress identified as one of the purposes of the Act to 'ensure agency compliance with statutory time limits' Neither the FOIA, nor its amendments in the EFOIA, has managed to accomplish this goal."⁴⁸ Professor Michael Herz has likewise noted that "EFOIA has not wholly lived up to its promise. Although practices vary, not surprisingly, from agency to agency, in general agencies have placed only a fraction of the material that should be available in their reading rooms."⁴⁹

According to Professor Kwoka:

The success of the E-FOIA provisions . . . has been generally regarded as extremely limited because of agencies' implementation failures. Even those agencies that have regularly posted frequently requested records online—or even all records released under FOIA—have generally done so in ways that remain hard for the public to search for and locate records they might want. Accordingly, the public

47. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1432 (2016). Professor Kwoka goes on to note additional benefits as well. *See id.* at 1432–33 ("[A]ffirmative disclosure of highly targeted information would remove the profit potential of mere information reselling, keep the public function of government transparency public, and allow for equal access to the records at issue. . . . In short, it ensures that public resources remain public, rather than becoming the product to be sold for private gain. Moreover, affirmative disclosure may benefit the private market as well. For instance, small businesses or market entrants may not have the resources or the savvy to access the for-profit information reseller services, and thus may be at a competitive disadvantage. Making sure that the entire market has access to the same information could foster fairer competition.").

48. *Al-Fayed v. CIA*, No. Civ.A. 00-2092 (CKK), 2000 WL 34342564, at *6 (D.D.C. Sept. 20, 2000) (quoting 142 CONG. REC. 10,714 (1996)), *aff'd*, 254 F.3d 300 (D.C. Cir. 2001).

49. Herz, *supra* note 12, at 588 (providing examples of the lack of material in reading rooms).

still views the request-and-response model as the centerpiece of FOIA.⁵⁰

Professor Jennifer Shkabatur elaborated:

[E]ven though E-FOIA was intended to be easily implemented, agencies have “by and large failed to comply with E-FOIA’s affirmative disclosure mandate.” A survey conducted ten years after E-FOIA came into force found “massive non-compliance” among 149 administrative agencies. Only twenty-one percent of the surveyed agencies had on their websites all four categories of records (even if only partially), and more than forty percent of agencies had not posted even one frequently requested record.⁵¹

A result of this largescale disregard of the mandate, Professor Vladeck concluded, is “a significant and growing dissonance between the promises made by our federal right-to-know laws and their performance.”⁵²

An illustrative example of the failure to comply with the affirmative disclosure mandate is what has come to be known as the USDA black-out—the USDA’s deletion from its website in early 2017 of thousands of records related to the enforcement of the AWA.⁵³

II. CASE STUDY: AFFIRMATIVE DISCLOSURES AND THE ANIMAL WELFARE ACT

This Part discusses compliance with the affirmative disclosure mandate in the context of the administration of one particular statute—the federal AWA,⁵⁴ our nation’s most significant animal protection law. Primarily intended “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment,”⁵⁵ the AWA regulates more than 2.5 million animals at nearly 11,000 locations across the United States.⁵⁶

50. Kwoka, *supra* note 47, at 1430 (footnotes omitted).

51. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 99 (2012) (footnotes omitted) (first quoting Vladeck, *supra* note 4, at 1789; then quoting NAT’L SEC. ARCHIVE, FILE NOT FOUND: 10 YEARS AFTER E-FOIA, MOST FEDERAL AGENCIES ARE DELINQUENT 1 (2007)).

52. Vladeck, *supra* note 4.

53. See *infra* Section II.B.

54. 7 U.S.C. §§ 2131–2159 (2012).

55. *Id.* § 2131(1).

56. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., 2018 PRESIDENT’S BUDGET 20-49, 20-139 (2018), <https://www.obpa.usda.gov/20aphisexnotes2018.pdf>. For more detailed information about the AWA, including some of the implementation and enforcement issues that have plagued the statute, see generally Delcianna J. Winders, *Administrative License Renewal and Due Process—A Case Study*, 47 FLA. ST. U. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952062 [hereinafter *Administrative License Renewal*], and Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO ST. L.J. 452 (2018).

The AWA has always generated particularly strong public interest.⁵⁷ When it was enacted in the mid-sixties, Congress received more mail about animal welfare than civil rights and the Vietnam War combined.⁵⁸ The D.C. Circuit, sitting en banc, recognized the role of the public in AWA implementation, noting that “the AWA anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored.”⁵⁹ And Senator Robert Dole, in sponsoring critical amendments to the AWA, explained that it aims “to ensure the public that adequate safeguards are in place to prevent unnecessary abuses to animals, and that everything possible is being done to decrease the pain of animals during experimentation and testing.”⁶⁰

Despite enduring strong public interest, the AWA has been plagued by longstanding enforcement problems.⁶¹ For decades the USDA’s own Office of Inspector General (OIG) has issued audit after audit condemning the Agency’s enforcement of the AWA.⁶² A 2014 audit, for example, found that the Agency did not follow its own criteria in closing dozens of cases involving animal deaths or other grave or repeat welfare violations, severely reduced and under-assessed penalties, and failed to ensure that experimental procedures on animals were adequately monitored, putting animals at risk.⁶³ A 2010 audit found that AWA enforcement was “ineffective” and penalties for violators were inappropriately reduced.⁶⁴ A 2005 audit found that the USDA “was not aggressively pursuing enforcement actions against violators of AWA and was assessing minimal monetary penalties . . . making penalties basically meaningless.”⁶⁵ As a result, as the OIG found, violators considered the penalties “as a normal cost of business, rather than a deterrent for violating the law.”⁶⁶ The OIG has also

57. See *infra* note 58 and accompanying text.

58. U.S. DEP’T OF AGRIC., ANIMAL WELFARE ACT 1966–1996: HISTORICAL PERSPECTIVES AND FUTURE DIRECTIONS, at vii (Michael Kreger et al. eds., 1998), https://archive.org/stream/CAT10860535/CAT10860535_djvu.txt. Similarly, a 1966 *Life* magazine article on conditions at dog dealer facilities generated more letters to the magazine than any of its stories on Vietnam or civil rights. Christine Stevens, *Laboratory Animal Welfare*, in ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1990, at 66, 74 (4th ed. 1990).

59. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (en banc).

60. 131 CONG. REC. 29,155 (1985) (statement of Sen. Dole).

61. See *infra* notes 62–67 and accompanying text.

62. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE OVERSIGHT OF RESEARCH FACILITIES AUDIT NO. 33601-0001-41, at 1–3 (2014) (summarizing the series of audits).

63. *Id.* at 3.

64. *Id.* (citing OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS AUDIT NO. 33002-4-SF, at 30 (2010)).

65. *Id.* (citing OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES AUDIT NO. 33002-3-SF, at 10 (2005)).

66. *Id.*; see also OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ENFORCEMENT OF THE ANIMAL WELFARE ACT AUDIT NO. 33600-1-CH, at 13–16 (1995) (finding that the USDA had failed to fully address problems identified in a prior audit and needed “to take stronger enforcement actions to correct serious or repeat violations

criticized the USDA for automatically renewing the licenses of chronic violators, and the Agency has also faced litigation over this practice.⁶⁷

A review of USDA funding requests also indicate a history of apathy toward the AWA, with the Agency in some years even inexplicably reducing the amount of its congressional appropriations requests for AWA enforcement by millions of dollars.⁶⁸ Indeed, even the Senate Appropriates Committee has expressed concern over “reports that the inadequate enforcement of animal welfare regulations has led to repeat violations and continuing mistreatment of animals.”⁶⁹

In addition, as the New York City Bar Association has noted: “[D]ocumented complaints by private parties and animal protection organizations regarding the USDA’s failure to enforce the Act are legion”⁷⁰

In light of this well documented history of both strong public interest in the law and chronic regulatory failure, transparency is especially important. The central purpose of FOIA, as recognized by the Supreme Court, is “to open agency action to the light of public scrutiny.”⁷¹ As the D.C. Circuit has elaborated: “FOIA’s core purpose is to shed light on the operation of government. This purpose is effectuated by ‘facilitat[ing] public access to Government documents, and by ‘pierc[ing] the veil of administrative secrecy and [] open[ing] agency action to the light of public scrutiny.’”⁷²

In short, transparency—and compliance with FOIA, including the affirmative disclosure mandate—are of particular interest in the context of the AWA.

of [the AWA]” and that regulated entities had little incentive to comply with the AWA because monetary penalties were, in some cases, arbitrarily reduced and often so low that violators regarded them as a cost of doing business); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF AGRIC., CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS AUDIT NO. 33601-10-CH at 1 (2010) (calling on USDA officials “to strengthen their inspection processes to ensure that licensed exhibitors comply with safety requirements for exhibiting dangerous animals”); *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 347–48 (2003) [hereinafter *Report of the Committee*] (discussing these and other OIG audit reports).

67. See generally *Administrative License Renewal*, *supra* note 56.

68. *Report of the Committee*, *supra* note 66, at 348–49.

69. *Id.* at 349 (quoting S. REP. NO. 107-41, at 58 (2001)).

70. *Id.* at 347 (citing Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1366 (2000)); see Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 463–77 (1999) (providing a discussion about the failings of the AWA); Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 PACE ENVTL. L. REV. 103, 103 (1998) (discussing the AWA and the Animal Legal Defense Fund’s legal actions); Katherine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 937 (2002) (discussing the lack of enforcement of the AWA); see also *Animal Legal Def. Fund v. Glickman*, 943 F. Supp 44, 48–51 (D.D.C. 1996).

71. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

72. *Lurie v. Dep’t of Army*, 970 F. Supp. 19, 32 (D.D.C. 1997) (citations omitted) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)).

A. The USDA's History of Compliance with the Affirmative Disclosure Mandate in Implementing the AWA

In 2000, the USDA promulgated regulations pursuant to the EFOIA amendments, including a regulation that provides that “[i]n accordance with 5 U.S.C. [§] 552(a)(2),” agencies shall make publicly available “[c]opies of all records, regardless of form or format, which have been released pursuant to a FOIA request under 5 U.S.C. [§] 552(a)(3), and which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records.”⁷³ The regulation proceeds to specify factors for determining whether records are likely to fall under this category:

- (i) Previous experience with similar records;
- (ii) The particular characteristics of the records involved, including their nature and the type of information contained in them; and
- (iii) The identity and number of requesters and whether there is widespread media, historical, academic, or commercial interest in the records.⁷⁴

Consistent with the EFOIA amendments, the regulation also requires that agencies make available “[a] general index of the records.”⁷⁵

Three key categories of documents are generated in the course of implementing the AWA that have received particular public interest and that the USDA has repeatedly recognized qualify as records that have been and are likely to be frequently requested: inspection reports, annual reports, and enforcement records.⁷⁶

73. USDA FOIA Regulations, Final Rule, 65 Fed. Reg. 46335, 46337 (July 28, 2000) (codified at 7 C.F.R. § 1.4(a)(4) (2018)).

74. 7 C.F.R. § 1.4(a)(4)(i)–(iii).

75. *Id.* § 1.4(a)(5). Notably the USDA recently proposed amendments to its FOIA regulations that would do away with these detailed requirements for frequently requested records and would instead much more generally require that “[c]omponents within the USDA maintain public reading rooms containing the records that the FOIA requires to be made regularly available for public inspection in an electronic format. Each component is responsible for determining which of the records it generates are required to be made available in its respective public reading room.” USDA FOIA Regulations, Proposed Rule, 83 Fed. Reg. 26865, 26866 (June 11, 2018).

76. See *infra* notes 92, 96, 99, 101–02 and accompanying text.

Under the AWA, regulated entities—researchers, exhibitors, breeders, dealers, and transporters—are subject to routine, unannounced inspections by the USDA.⁷⁷ Each time such an inspection is conducted, an inspection report is generated.⁷⁸ The inspection report documents failures to comply with minimum animal welfare standards.⁷⁹

Annual reports are records that the AWA requires research facilities to complete and submit to the USDA.⁸⁰ These reports document the number and types of animals used for research and, importantly, of those subjected to pain and distress, including without painkillers or other relief.⁸¹ Research facilities must also include an explanation of why unalleviated pain or distress was considered necessary.⁸² These reports also must identify and explain certain departures from the minimum welfare standards.⁸³

Enforcement records reflect the final action where the Agency believes that action to address violations is warranted.⁸⁴ Enforcement records include warnings, settlement agreements (sometimes referred to as “stipulations”), administrative complaints, and administrative law judge determinations.⁸⁵

As early as 1997, the USDA provided access to summary data from AWA inspection reports on its EFOIA web page.⁸⁶ In September 2001, the Agency began posting full inspection reports⁸⁷ and acknowledged that it

77. 7 U.S.C. § 2147 (2012); AWA Inspection and Annual Reports, U.S. DEP’T AGRIC.: ANIMAL PLANT INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports (last modified Aug. 18, 2017).

78. See USDA, ANIMAL WELFARE INSPECTION GUIDE 2-4 (May 2018), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

79. See *id.* Notably, in 2015, reportedly in response to “outrage” by dog breeders “over the fact that a growing coalition of municipalities and states were passing laws limiting the number of violations a breeder could have on his inspection reports and still sell to local pet shops,” RORY KRESS, THE DOGGIE IN THE WINDOW: HOW ONE DOG LED ME FROM THE PET STORE TO THE FACTORY FARM TO UNCOVER THE TRUTH OF WHERE PUPPIES REALLY COME FROM 58 (2018), the USDA began omitting certain violations from the inspection reports and instead documenting them on separate, not publicly available “teachable moment” forms. *Id.*; APHIS, *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, USDA (Jan. 14, 2016), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6>.

80. 7 U.S.C. § 2143(a)(7); 9 C.F.R. § 2.36 (2018).

81. 9 C.F.R. § 2.36(b)(5)–(7).

82. 7 U.S.C. § 2143(a)(7)(B)(iii); 9 C.F.R. § 2.36(b)(7).

83. 7 U.S.C. § 2143(a)(3)(E); 9 C.F.R. § 2.36(b)(3).

84. See APHIS, *Animal Welfare Act Enforcement*, USDA, https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_enforcements (last modified Feb. 3, 2017).

85. See APHIS, *Animal Care Enforcement Summary (AWA and HPA)*, USDA, https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_performance_metrics/ies-ac_enforcement_summary (last modified July 17, 2018).

86. Memorandum from Chester Gipson, Deputy Adm’r, Animal Care, APHIS, to Kenneth Cohen, Assistant Gen. Counsel, Gen. Law Div., Office of the Gen. Counsel, USDA (Apr. 18, 2003) [hereinafter Memorandum from Chester Gipson] (on file with author); see also ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., STRATEGIC DIRECTION FOR THE ANIMAL CARE PROGRAM (2000), <http://www.catbox.com/usda/strategic.html> [hereinafter STRATEGIC DIRECTION FOR THE ANIMAL CARE PROGRAM] (noting “previous E-FOIA posting of inspection results” that included “counts of the noncompliant and corrected items”).

87. Memorandum from Chester Gipson, *supra* note 86.

was doing so pursuant to EFOIA's affirmative disclosure mandate.⁸⁸ Annual reports were also being posted online by this point.⁸⁹ On March 6, 2002, in the midst of post-9/11 heightened national security concerns, the records were removed from the website at the direction of the Department of Homeland Security.⁹⁰ However, the records were subsequently restored.⁹¹

In a March 2004 memo, the USDA acknowledged that AWA "inspection and annual reports . . . qualify as records subject to multiple requests under EFOIA and must be made available to the public via electronic means."⁹² By March 2009, the USDA was routinely posting AWA inspection reports online⁹³ and experienced a thirty-five percent reduction in incoming FOIA requests as a result.⁹⁴ During this same time period, APHIS also began posting annual reports, noting that they "are of tremendous interest to our animal welfare community."⁹⁵ The Agency also began proactively posting all "Investigative and Enforcement Services enforcement actions, and copies of all redacted FOIA responses."⁹⁶ The Agency has also acknowledged that enforcement records are frequently requested and thus subject to the affirmative disclosure mandate.⁹⁷ For example, in response to a reporter's FOIA request for enforcement records, the Agency stated that such records "are frequently requested and, as a result, APHIS,

88. *Id.* ("Prior to September 11, 2001, AC and FOIA determined that AC inspection reports and annual reports qualified as 'reading room' records because of the continuing high interest from animal groups and the general public."); *see also* Complaint of Petitioner at ¶¶ 17–18, *Humane Soc'y of the U.S. v. U.S. Dep't. of Agric.*, No. 1:05-CV-00197, 2005 WL 1173393, at *3 (D.D.C. Jan. 27, 2005); Karl Field et al., *Electronic Freedom of Information: Challenges Facing the Regulators and the Regulated*, LAB ANIMAL, June 2003, at 43–45 ("On 21 October 2001, Animal and Plant Health Inspection Service, Animal Care (APHIS, AC) complied with the 'reading room' provision by posting 'frequently requested documents' to their internet website."); Soc'y of Toxicology, *Watching Washington: Annual AWA Report Signature No Longer Posted by USDA*, COMMUNIQUÉ, Summer/Fall 2006, at 15.

89. Memorandum from Chester Gipson, *supra* note 86.

90. *Id.*

91. Soc'y of Toxicology, *supra* note 88, at 3.

92. Memorandum from Kenneth E. Cohen, Assistant Gen. Counsel, Gen. Law Div., Office of Gen. Counsel, USDA, to Chester A. Gipson, Deputy Adm'r, Animal Care, APHIS, & Michael S. Marquis, Assistant Dir. for Freedom of Info., Legislative and Pub. Affairs, APHIS (Mar. 12, 2004).

93. ANIMAL AND PLANT INSPECTION SERV., U.S. DEP'T OF AGRIC., CHIEF FOIA OFFICER REPORT TO THE DEPARTMENT OF JUSTICE 1 (2009), <https://www.aphis.usda.gov/foia/downloads/Chief%20Officer%20Reports/APHIS%202009%20APHIS%20Chief%20FOIA%20Officer%20Report.pdf>.

94. *Id.*

95. *Id.*

96. ANIMAL AND PLANT INSPECTION SERV., U.S. DEP'T OF AGRIC., CHIEF FOIA OFFICER REPORT TO THE DEPARTMENT OF JUSTICE 21 (2010), <https://www.aphis.usda.gov/foia/downloads/Chief%20Officer%20Reports/APHIS%202010%20APHIS%20Chief%20FOIA%20Officer%20Report.pdf> [hereinafter 2010 FOIA REPORT TO THE DOJ].

97. *See* Letter from Tonya Woods, Dir., Freedom of Info. & Privacy Act, Legislative & Pub. Affairs, APHIS, to James Shiffer, Star Tribune (Jan. 23, 2015).

in compliance with the Electronic Freedom of Information Act Amendments of 1996, made the determination to provide the requested records on its agency website.”⁹⁸

As anticipated—indeed intended—by the EFOIA amendments, these proactive disclosures “resulted in a significant reduction in the number of incoming FOIA requests—525 fewer requests between FY 2009 and FY 2010, or approximately a 42% reduction in the number of requests received.”⁹⁹ The Agency noted: “In FY 2010—through a combination of efforts, APHIS reduced the Agency’s overall backlog of FOIA requests by almost 43%—unprecedented in more than a 10-year backlog and far exceeding our 25% goal for the year.”¹⁰⁰

The Agency repeatedly made clear that these postings were being made pursuant to the EFOIA amendments because they were frequently requested records.¹⁰¹ For example, a May 2009 Agency memo noted, “For the past several years, inspection reports have been the most frequently requested document from APHIS with approximately 850 requests fulfilled each year.”¹⁰² A June 2009 memo touted compliance with EFOIA’s affirmative mandates as something that would “not only aid increased understanding” by the public but also “decrease the number of FOIA requests, give the public convenient, instant access to pertinent records, and create informed citizens.”¹⁰³ Echoing the legislative history of the EFOIA

98. *Id.*

99. 2010 FOIA REPORT TO THE DOJ, *supra* note 96, at 21.

100. *Id.*

101. *See, e.g.*, STRATEGIC DIRECTION FOR THE ANIMAL CARE PROGRAM, *supra* note 86 (“The previous *E-FOIA* posting of inspection results did not provide descriptions of specific violations, only counts of the noncompliant and corrected items. While *seeking to comply with the provisions of E-FOIA*, AC wants to ensure that publicly released information fairly portrays inspection results through full implementation of the new inspection data base.” (emphases added)); CHESTER GIBSON, ELECTRONIC POSTING OF INSPECTION REPORTS FOR RESEARCH, FEDERAL, AND VETERAN’S ADMINISTRATION FACILITIES (2009), https://www.aphis.usda.gov/animal_welfare/downloads/stakeholder/stakeholder11_02_2009.pdf (“APHIS Animal Care receives an average of 715 FOIA requests each year, and these Class R inspection reports have been among the most frequently requested documents.”); Field et al., *supra* note 88 (“On 21 October 2001, Animal and Plant Health Inspection Service, Animal Care (APHIS, AC) complied with the ‘reading room’ provision by posting ‘frequently requested documents’ to their internet website.”); Soc’y of Toxicology, *supra* note 88 (“USDA first began posting such reports on October 1, 2001 as part of its compliance with the Electronic Freedom of Information Act (E-FOIA) Amendments.”); Letter from Chester Gipson, Deputy Adm’r, Animal Care, APHIS (May 18, 2009) [hereinafter Letter from Chester Gipson] (“For the past several years, inspection reports have been the most frequently requested document from APHIS with approximately 850 requests fulfilled each year.”); Enclosure to Letter from Kevin Shea, Acting Adm’r, & Bill Clay, Acting Assoc. Adm’r, APHIS, USDA (June 19, 2009), <https://www.aphis.usda.gov/foia/downloads/APHIS%20Commitment%20to%20Transparency.pdf> [hereinafter Enclosure to Letter from Kevin Shea] (Facility inspection reports “were the most frequently requested APHIS records under FOIA and making them available on our Web site will go a long way toward informing the public of our commitment to animal welfare, while also supporting our FOIA backlog reduction efforts. . . . APHIS will continue to increase its compliance with the Electronic Freedom of Information Act (E-FOIA) and post current documents to the APHIS E-FOIA reading room.”).

102. Letter from Chester Gipson, *supra* note 101.

103. Enclosure to Letter from Kevin Shea, *supra* note 101.

amendments, the memo underscored: “The goal of E-FOIA is to make information publicly available online so that FOIA requests become an avenue of last resort.”¹⁰⁴ A few months later another memo reiterated that inspection reports were “among the most frequently requested documents.”¹⁰⁵

B. The USDA Blackout

Despite having the USDA repeatedly touted its posting of this information as required by the EFOIA amendments, in the public interest, and highly conducive for reducing FOIA backlogs,¹⁰⁶ on February 3, 2017, the USDA suddenly, and with very little explanation, removed all three of these categories of records from its website. The Agency explained its move with the following rather Orwellian statement: “Based on our commitment to being transparent, remaining responsive to our stakeholders’ informational needs, and maintaining the privacy rights of individuals, APHIS is implementing actions to remove documents”¹⁰⁷ The real reasons for the deletion remain unclear. As of the date of this Article, despite the passage of a year and a half since a FOIA request for records about the decision to remove the documents was granted expedited treatment, the Agency has not released any information. Nor has it otherwise proffered much in the way of further explanation.

The Association of Zoos and Aquariums, the United States’ leading accrediting body for zoos, promptly registered its disagreement with the removal of records, noting: “Public disclosure of relevant animal care and welfare information represents our license to operate and is essential for ensuring the public’s trust and confidence in our profession, enabling the public to distinguish the best animal care facilities from poorly run breeding farms and roadside zoos and menageries.”¹⁰⁸ Petland, one of the nation’s largest retail suppliers of dogs, and Speaking of Research, a group that defends animal research, raised similar concerns.¹⁰⁹

104. *Id.*

105. CHESTER GIBSON, *supra* note 101; *see also* 2009 PowerPoint presentation (on file with author) (Inspection Reports were posted online as “[r]equired by EFOIA Amendments to Freedom of Information Act”).

106. *See supra* notes 92–105 and accompanying text.

107. ANIMAL AND PLANT INSPECTION SERV., U.S. DEP’T OF AGRIC., ANIMAL WELFARE ENFORCEMENT ACTIONS (2017), <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions>.

108. *Nation’s Best Zoos and Aquariums Disagree with Decision to Remove Online Access to USDA Inspection Reports*, ASS’N ZOOS & AQUARIUMS (Feb. 6, 2017), <https://www.aza.org/aza-news-releases/posts/nations-best-zoos-and-aquariums-disagree-with-decision-to-remove-online-access-to-usda-inspection-re>.

109. *See Petland Reacts to USDA Decision*, PETLAND (Feb. 6, 2017), <http://www.petland.com/news/2017-2-6b.htm>; *The USDA’s Removal of Information About Animal Research Is a Step Backwards for Transparency*, SPEAKING RES. (Feb. 7, 2017), <https://speakingofresearch.com/2017/02/07/the-usdas-removal-of-information-about-animal-research-is-a-step-backwards-for-transparency>.

Congress also entered the fray. Eighteen Senators sent a letter to the USDA condemning the blackout and, the following day, more than 100 Representatives from both sides of the aisle sent a similar letter to President Trump.¹¹⁰ The House and Senate have both introduced legislation to require reposting of the records.¹¹¹

Regardless of the reasons underlying the removal of the records from the APHIS's website, the record makes clear that had the highly predictable consequence of significantly increasing the Agency's FOIA request backlog and response times—precisely the things that EFOIA's affirmative disclosure mandate sought to mitigate.¹¹² An analysis by the author of APHIS's FOIA logs, which were obtained pursuant to a FOIA request, reveals that from February 3, 2017—the date the records removed from the website—and May 15—the date through which logs were provided¹¹³—the Agency received 751 FOIA requests, more than double the number for that same time period in the preceding year.¹¹⁴ Moreover, more than seventy percent of these requests were at least in part—and often in full—for records that, prior to February 3, 2017, had been available online.¹¹⁵ As of August 9, 2017, APHIS's FOIA backlog had increased to 1,596 open requests, more than 2.5 times what it was the month preceding the blackout.¹¹⁶

The blackout provides an excellent opportunity to observe the impact of affirmative disclosures in action. Even before the blackout APHIS was slow to process FOIA requests.¹¹⁷ According to the USDA's most recent annual FOIA report to Congress, as of last year it could take more than two years to process a “simple” FOIA request, more than three years for a

110. See Letter from Earl Blumenauer et al., U.S. Representatives, to Donald J. Trump, U.S. President (Feb. 14, 2017), <https://blumenauer.house.gov/media-center/press-releases/blumenauer-calls-donald-trump-restore-vital-animal-welfare-data-online>.

111. See Animal Welfare Accountability and Transparency Act, H.R. 1368, 115th Cong. (2017).

112. See *infra* notes 113–16 and accompanying text.

113. Although historically APHIS has routinely posted its FOIA logs online, beginning in 2017 the Agency stopped routine, timely postings. See *FOIA Logs*, U.S. DEP'T. AGRIC.: ANIMAL PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/resources/foia/CT_FOIA_Logs (last modified July 27, 2018).

114. U.S. DEP'T. OF AGRIC., FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2016, at 6 (2016), https://www.dm.usda.gov/foia/docs/USDA_FY16_Final.docx [hereinafter FOIA REPORT FOR 2016] (noting 1143 APHIS FOIA requests received in 2016 compared to 514 requests pending at the beginning of the 2016 fiscal year); see *FOIA Logs*, *supra* note 113.

115. See *FOIA Logs*, *supra* note 113.

116. Karin Brulliard, *People Who Care About Animal Welfare Are Demanding Information from USDA*, WASH. POST (Aug. 10, 2017), https://www.washingtonpost.com/news/animalia/wp/2017/08/10/people-who-care-about-animal-welfare-are-demanding-information-from-usda/?noredirect=on&utm_term=.d6d31dc62e1e; see FOIA REPORT FOR 2016, *supra* note 114 (noting 649 requests pending at the beginning of the 2017 fiscal year).

117. See *infra* note 118 and accompanying text.

“complex” request, and more than five months even for an “expedited” request.¹¹⁸

III. LITIGATING THE AFFIRMATIVE DISCLOSURE MANDATES—NO RIGHT WITHOUT A REMEDY

This Part discusses litigation efforts to hold agencies—including the USDA—accountable for complying with the affirmative disclosure mandate.

A. *Kennecott Utah Copper Corp. v. U.S. Dep’t of the Interior*¹¹⁹: *The D.C. Circuit Holds That It Cannot Compel Publication in the Federal Register Under FOIA*

The first major case seeking to compel disclosure pursuant to an affirmative disclosure mandate was filed before the 1996 EFOIA amendments.¹²⁰ The plaintiff, Kennecott Utah Copper Corporation, sought an order requiring publication in the Federal Register of a Department of Interior regulation.¹²¹ Kennecott argued that the regulation was a “substantive rule of general applicability” that was “adopted as authorized by law,” and as such was subject to an affirmative disclosure mandate.¹²²

“The district court rejected Kennecott’s Freedom of Information Act claim, ruling that because the Act did not authorize it to order the relief Kennecott requested—publication of the 1993 Document in the Federal Register—it lacked jurisdiction.”¹²³ The D.C. Circuit affirmed.¹²⁴

Looking at the language of FOIA’s judicial review provision, § 552(a)(4)(B), which authorizes district courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,”¹²⁵ the D.C. Circuit agreed that the district court lacked authority “to order publication of such documents.”¹²⁶

The Court explained:

While it might seem strange for Congress to command agencies to “currently publish” or “promptly publish” documents, without in the

118. U.S. DEP’T. OF AGRIC., FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2017, at 7–8 (2017). Already the agency has more than tripled this time frame in the context of the author’s expedited request for records about the decision to remove records from APHIS’s website.

119. 88 F.3d 1191 (D.C. Cir. 1996).

120. *Id.*

121. *Id.* at 1199, 1201.

122. *Id.* at 1202; *see* 5 U.S.C. § 552(a)(1)(D) (2012) (requiring proactive disclosure of “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency” in addition to the above-discussed disclosure of frequently requested records).

123. *Kennecott*, 88 F.3d at 1202.

124. *Id.*

125. 5 U.S.C. § 552(a)(4)(B).

126. *Kennecott*, 88 F.3d at 1202.

same statute providing courts with power to order publication, we think that is exactly what Congress intended. . . . The question, then, is whether Congress intended “production” to include “publication.” The dictionary does not resolve the matter. “Production” could mean either providing the document to an individual or broadcasting it to the broader public. Nor is this a situation where only one interpretation comports with the statute’s purpose. The statute imposes “a general obligation on the agency to make information available to the public,” an obligation that could be fulfilled either by handing the document over to an individual or by publishing it in the Federal Register.¹²⁷

To resolve the ambiguity in the government’s favor, the court focused on two factors. First, the court found support in its reading of § 552(a)(4)(B) as providing relief to individuals:

We think it significant . . . that § 552(a)(4)(B) is aimed at relieving the injury suffered by the individual complainant, not by the general public. It allows district courts to order “the production of any agency records improperly withheld *from the complainant*,” not agency records withheld from the *public*. Providing documents to the individual fully relieves whatever informational injury may have been suffered by that particular complainant; ordering publication goes well beyond that need.¹²⁸

Importantly, the court also stressed that:

Congress has provided an alternative means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register. As amended in 1974, § 552(a)(1) protects a person from being “adversely affected by” a regulation required to be published in the Federal Register unless an agency either published the regulation or the person had actual and timely notice of it. This gives agencies a powerful incentive to publish any rules they expect to enforce.¹²⁹

It is important to underscore that this alternative compliance incentive played a significant factor in the court’s conclusion.¹³⁰ Importantly, there is no similar mechanism in place to motivate compliance with the requirement to post frequently requested records.

It is also worth noting that the *Kennecott* decision focuses the entirety of its analysis on the courts’ authority to “order the production of any agency records improperly withheld from the complainant,” while giving no attention whatsoever to the broad, separate, disjunctive authorization to courts “to enjoin the agency from withholding agency records.”¹³¹ As dis-

127. *Id.* at 1202–03 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (citations omitted)).

128. *Id.* at 1203 (quoting 5 U.S.C. § 552(a)(4)(B)).

129. *Id.* (citations omitted) (quoting 5 U.S.C. § 552(a)(1)).

130. *Id.*

131. *Id.* at 1202.

cussed in Part IV below, basic canons of construction require that this separate clause be given independent meaning, separate from the mandate for ordering disclosure.

*B. Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*¹³²: *The D.C. Circuit Expands Kennecott*

In *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, the plaintiff, Citizens for Responsibility and Ethics in Washington (CREW), sought public posting of opinions issued by the Department of Justice’s Office of Legal Counsel pursuant to FOIA’s affirmative disclosure mandates.¹³³ Specifically, CREW contended that these opinions were “final opinions . . . made in the adjudication of cases” and “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” both of which FOIA requires to be made publicly available.¹³⁴

Notably, like *Kennecott*, *CREW* involved what Professor Herz has referred to as mandates for disclosures of law, rather than disclosures of information,¹³⁵ and, like the material at issue in *Kennecott*, the material at issue in *CREW* also had in place a separate compliance incentive.¹³⁶ Thus, just as “Congress has provided an alternative means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register . . . [by] protect[ing] a person from being ‘adversely affected by’ a regulation required to be published in the Federal Register unless an agency either published the regulation or the person had actual and timely notice of it,”¹³⁷ Congress likewise provided that:

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.¹³⁸

CREW sought relief in the form of, inter alia, “an order requiring ‘[D]efendants to make all final opinions made in the adjudication of cases and statements of policy and interpretations available for public inspection

132. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice (CREW)*, 164 F. Supp. 3d 145 (D.D.C. 2016), *aff’d*, 846 F.3d 1235 (D.C. Cir. 2017).

133. *Id.* at 147.

134. *Id.* at 147–48 (quoting 5 U.S.C. § 552(a)(2)(A)–(B)).

135. *See Herz, supra* note 12, at 586.

136. *See infra* notes 137–38 and accompanying text.

137. *Kennecott*, 88 F.3d at 1203 (quoting 5 U.S.C. § 552(a)(1)).

138. 5 U.S.C. § 552(a)(2)(E).

and copying, including on an ongoing basis, and without a specific request for any specific opinion or category of opinion.”¹³⁹

Because, in CREW’s view, *Kennecott* foreclosed the possibility of such relief under FOIA directly, it filed suit under the Administrative Procedure Act (APA).¹⁴⁰ Judicial review is available under the APA only where there is no other judicial remedy available.¹⁴¹

The district court held that the FOIA’s judicial review provision authorized a suit to enforce FOIA’s affirmative disclosure mandates and that accordingly an APA claim was not available and dismissed the case.¹⁴² Characterizing the case as one to “enforce disclosure” and a challenge to “the withholding of records,” the district court held that it fell within the scope of Section 552(a)(4)(B).¹⁴³

With regard to the question of the adequacy of relief available under FOIA, the district court noted CREW’s position that the only relief available under FOIA “is compelled disclosure of records specifically requested by and withheld from a FOIA requester,” and not continuous, affirmative, proactive disclosure.¹⁴⁴ Although the Department of Justice agreed that this was indeed the full scope of available relief under FOIA, the district court expressed strong skepticism:

The court is far from convinced that the parties are correct about the limited extent of the court’s remedial authority under FOIA. The statute itself provides district courts with the authority “to enjoin the agency from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant.” The statute’s use of the conjunctive “and” suggests that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records. That conclusion is bolstered by the Supreme Court’s observation that “[t]he broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do . . . ; and the fact that the Act, to a definite degree, makes the District Court the enforcement arm of the statute,” offers “little to suggest . . . that Congress sought to limit the inherent powers of an equity court.” The Court of Appeals has echoed the same: “FOIA imposes no limits on courts’ equitable powers in enforcing its terms.”¹⁴⁵

139. *CREW*, 164 F. Supp. 3d at 149 (quoting Amended Complaint for Injunctive and Declaratory Relief at 13, *Citizens*, 164 F. Supp. 3d 145).

140. *Id.*

141. 5 U.S.C. § 704.

142. *CREW*, 164 F. Supp. 3d at 154.

143. *Id.*

144. *Id.*

145. *Id.* at 155 (citations omitted) (first quoting 5 U.S.C. § 552(a)(4)(B); then quoting *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19–20 (1974); and then quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)).

The court did not, however, resolve this question, noting that, regardless of the scope of relief available, APA review was precluded under the case law.¹⁴⁶

On appeal, the D.C. Circuit affirmed.¹⁴⁷ Despite acknowledging that FOIA “vests courts with broad equitable authority” and the “the wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief,”¹⁴⁸ the D.C. Circuit nevertheless held that judicial authority stopped short of the ability to order that records be made available for public inspection.¹⁴⁹ Relying entirely on its prior decision in *Kennecott*, the court held that CREW could “seek an injunction that would (1) apply prospectively, and would (2) impose an affirmative obligation to disclose upon OLC, but that would (3) require disclosure of documents and indices only to CREW, not disclosure to the public.”¹⁵⁰

*C. Animal Legal Def. Fund v. U.S. Dep’t of Agric.*¹⁵¹: *Northern District of California Adopts CREW*

In a case following the USDA’s deletion of AWA-related records from its website, the courts had an opportunity to assess the scope of judicial relief available in the context of a disclosure mandate for information beyond law—i.e., for information that is required to be posted because it is frequently requested pursuant to § 552(a)(2)(D).¹⁵² Shortly after the February 2017 removal of records, a coalition of animal protection groups, led by the Animal Legal Defense Fund and represented by Professor Kwoka, filed suit against the USDA in the U.S. District Court for the Northern District of California.¹⁵³

Unconstrained by the D.C. Circuit’s precedent, the plaintiffs filed claims under both the APA and FOIA, “seeking to compel publication of the [previously-available APHIS] documents.”¹⁵⁴

Despite not being bound by the D.C. Circuit’s precedent but relying entirely on *Kennecott* and *CREW*, the court held that

federal courts do not have the power to order agencies to make documents available for public inspection under [S]ection 552(a)(4)(B) of FOIA. While plaintiffs may bring suit to enforce [S]ection 552(a)(2) and may seek injunctive relief and production of documents to them

146. *Id.*

147. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1238 (D.C. Cir. 2017).

148. *Id.* at 1241–42.

149. *Id.* at 1243.

150. *Id.* at 1244.

151. No. 17-CV-00949-WHO, 2017 WL 3478848 (N.D. Cal. Aug. 14, 2017), *appeal filed*, Animal Legal Def. Fund v. U.S. Dep’t of Agric., No. 17-16858 (9th Cir. Sept. 14, 2017).

152. *See id.*

153. *Id.* at *1.

154. *Id.*

personally, they cannot compel an agency to make documents available to the general public.¹⁵⁵

The court likewise adopted the *CREW* court's decision as to the availability of an APA claim, holding that "because FOIA provides an adequate alternative remedy," plaintiffs cannot sustain their alternative claim under the APA.¹⁵⁶

To date, the courts that have considered the question of whether the broad public access that Congress mandated under FOIA's affirmative disclosure provisions can be judicially ordered have consistently ruled in the negative. The next, and final, Part of this Article argues that these courts have gotten it wrong—that for both legal and policy reasons FOIA should be read to allow such relief.

IV. THE PATH FORWARD: GIVING TEETH TO THE AFFIRMATIVE DISCLOSURE MANDATE

As a preliminary matter, there is no legal reason that the D.C. Circuit in *Kennecott* was required to resolve what it admitted was an ambiguity in FOIA's judicial review provision in favor of more limited review. Again, that provision affords the district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."¹⁵⁷ As the *Kennecott* court acknowledged, whether "production" includes "publication" could not be resolved by plain language or dictionary definitions and "[p]roduction" could mean either providing the document to an individual or broadcasting it to the broader public.¹⁵⁸ Moreover, the *Kennecott* court provided no analysis whatsoever of the separate authority, apart from ordering the production of records, to enjoin the withholding of records. In short, there is a clear statutory basis for authorizing publication of records that an agency has failed to disclose in accordance with the affirmative disclosure mandate.

Moreover, given the broad remedial purposes of FOIA, the strong public interest at the core of the statute, and the recognized breadth of injunctive authority under the statute, it makes sense to read it this way.

155. *Id.* at *6.

156. *Id.* at *2.

157. 5 U.S.C. § 552(a)(1)(B) (2012).

158. *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1202–03 (D.C. Cir. 1996).

The Supreme Court has repeatedly recognized, “[t]he mandate of FOIA calls for broad disclosure of Government records,”¹⁵⁹ and the legislative history of the affirmative disclosure requirements makes clear that they were crafted precisely to fulfill this mandate.¹⁶⁰

And, specifically discussing the scope of injunctive relief available under FOIA, the Supreme Court has stressed:

The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do, and the fact that the Act, to a definite degree, makes the District Court the enforcement arm of the [statute], persuade us that the . . . principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act’s primary purpose, that Congress sought to limit the inherent powers of an equity court.¹⁶¹

Citing that Supreme Court decision, the D.C. Circuit has likewise underscored that “[t]he FOIA imposes no limits on courts’ equitable powers in enforcing its terms.”¹⁶²

Moreover, the D.C. Circuit has repeatedly recognized that FOIA authorizes judicial review of challenge not just as to “specific request[s],” but also of “an agency policy or practice” that impairs “lawful access to information,” including “in the future.”¹⁶³ As the court has explained:

So long as an agency’s refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party’s challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.¹⁶⁴

The *Kennecott* court also noted that it opted to read FOIA narrowly because “[p]roviding documents to the individual fully relieves whatever

159. U.S. Dep’t of Justice v. Julian, 486 U.S. 1, 8 (1988) (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985)); accord *Milner v. Dep’t of the Navy*, 562 U.S. 562, 563 (2011) (quoting U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989)); *Baldrige v. Shapiro*, 455 U.S. 345, 352, 352 n.7 (1982) (“The broad mandate of the FOIA is to provide for open disclosure of public information.” “This principle has been reiterated frequently by this Court.”) (first citing *Weinberger v. Catholic Action of Haw. / Peace Educ. Project*, 454 U.S. 139, 143 (1981); then citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978); and then citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

160. See *Kwoka*, *supra* note 47, at 1367–68.

161. *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.*, 415 U.S. 1, 19–20 (1974) (citations omitted).

162. *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (citing *Bannerkraft Clothing Co.*, 415 U.S. at 19–20).

163. *Newport Aeronautical Sales v. Dep’t of the Air Force*, 684 F.3d 160, 164 (D.C. Cir. 2012) (emphasis omitted) (quoting *Payne*, 837 F.2d at 491).

164. *Payne*, 837 F.2d at 491 (footnote omitted).

informational injury may have been suffered by that particular complainant; ordering publication goes well beyond that need.”¹⁶⁵ However, the first point is not necessarily accurate; the second point, even if true, would not necessarily cut in favor of narrow relief.

It is certainly conceivable that a particular plaintiff challenging non-compliance with the affirmative disclosure mandate might be injured not only by not having access themselves to information but also by the public more broadly not having access. An organization that advocates on behalf of consumers, for example, would not necessarily be made whole by private disclosure, where its members sought public access. Likewise, an advocacy organization, or a scholar, may be uniquely injured even if they privately have access to information by virtue of nonpublication if, for example, their claims are rendered not independently verifiable by the government’s compliance failures. Thus, it is not necessarily true that “ordering publication goes well beyond” relieving an informational injury.

And even if it were true, this is no legal basis for denying such relief. Courts routinely grant relief that happens to benefit the public and not just the individual plaintiff. Indeed, in certain contexts, such as antitrust, individual litigants are seen as “efficient enforcers” who are “vindicat[ing] the public interest.”¹⁶⁶ And in the specific context of informational injury, the Supreme Court has rejected the contention that a court is deprived of jurisdiction merely because the inability to access information is an injury “shared in substantially equal measure by all or a large class of citizens.”¹⁶⁷

At bottom, refusing to grant relief in the form of publication renders virtually unenforceable an entire arm of FOIA—one that holds immense promise of reducing the burdens on the public and agencies alike caused by backlogs and delays.

There are also myriad policy reasons for the courts to specifically order publication in cases involving violations of the affirmative disclosure mandates. Doing so removes the need for multiple lawsuits over the same records, saving agency and judicial resources. It also ameliorates concerns about FOIA being coopted by profiteers seeking to hoard and sell information, instead keeping it in the public domain.¹⁶⁸

Most importantly, rendering EFOIA’s affirmative disclosure mandate enforceable holds immense promise for finally reducing agency backlogs.

165. *Kennecott Utah Copper Corp. v. U.S. Dep’t of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996).

166. *See, e.g., Gatt Commc’ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 78 (2d Cir. 2013).

167. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998) (quoting Brief for Petitioner at 28, *Akins*, 524 U.S. 11); *see also id.* at 25 (“[T]he fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”).

168. *See Kwoka, supra* note 47, at 1432–33.

CONCLUSION

More than two decades after the EFOIA amendments were signed into law to require agencies to proactively disclose frequently requested records as a means of simultaneously reducing regulatory burden and enhancing public access to information, violations of the affirmative disclosure mandate are unbridled. Unchecked violations of the mandate can be attributed in large part to a series of cases erecting procedural roadblocks not compelled by—and ultimately inconsistent with—FOIA. To address these rampant violations, it is critical that courts revisit how they handle these legal challenges. Specifically, pursuant to the Supreme Court’s recognition of the courts’ broad equitable authority when reviewing FOIA cases,¹⁶⁹ courts resolving violations of EFOIA’s affirmative disclosure mandate must be willing to specifically order publication. Only then can the promise of EFOIA’s affirmative disclosure mandate be fulfilled.

169. See *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19–20 (1974).