No. 17-16858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 17-cv-00949
Hon. William H. Orrick

APPELLANTS' OPENING BRIEF

John S. Rossiter
JRossiter@perkinscoie.com
Lindsey E. Dunn
LDunn@perkinscoie.com
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105-3204
Tel: 415.344.7000

Attorneys for Animal Legal Defense Fund

Margaret B. Kwoka
mkwoka@law.du.edu
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave
Denver CO 80208
Tel: 303.871.6275

Christopher Berry
cberry@aldf.org
Matthew Liebman
mliebman@aldf.org
ANIMAL LEGAL DEFENSE FUND
525 E. Cotati Ave.
Cotati, CA 94931
Tel: 707.795.2533

Attorneys for Plaintiffs

CORPORATE DISCLOSURE STATEMENT

Plaintiffs Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks have no parent corporations. They also have no stock, and therefore, no publicly held company owns 10% or more of its stock.

Date: February 2, 2018

/s/ *Margaret B. Kwoka*
Margaret B. Kwoka

Attorney for Appellants Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Freedom of Information Act ("FOIA") imposes an affirmative obligation on government agencies to electronically post certain categories of particularly important records on an ongoing basis without the need for any specific request from the public. When a government agency violates its affirmative obligations under FOIA, the remedy should be an order compelling the agency to post—or, in this case, re-post—those records. The question presented here, one of first impression in this Circuit, is whether FOIA's judicial review provision authorizes the district court to grant such relief.

Ordering agencies to post records for public access is a remedy that falls comfortably within the language of FOIA's judicial review provision, which gives district courts the power to "enjoin the agency from withholding agency records" in addition to the power to "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(4)(B). Moreover, in every other context, courts have interpreted this judicial review provision to confer broad equitable powers on the district court to order a range of injunctive relief. For example, courts have fashioned remedies for FOIA violations

by issuing injunctive orders compelling agencies to conduct additional searches of their records or to grant a fee waiver. Yet in this case the district court concluded that FOIA does not allow the court to issue an injunctive order mandating that the agency post the records in compliance with its statutory obligation to "make [the records] available for public inspection."

The records at issue here document the Animal and Plant Health Inspection Service's ("APHIS") enforcement of the Animal Welfare Act ("AWA"). The plaintiffs-appellants are all non-profit organizations dedicated to promoting animal welfare. Not only do they use the records to monitor the agency's response to animal abuses, but their advocacy work also depends on the records being publicly available. For example, plaintiffs have successfully advocated for local ordinances and settlement agreements that require businesses like pet stores to access the APHIS records to ensure that they are only dealing with reputable breeders that treat animals humanely.

This Court should hold that FOIA empowers the district court to remedy violations of affirmative disclosure obligations by requiring agencies to publicly post the records. But if this Court concludes it does

not, then FOIA provides no adequate alternative remedy for the plaintiffs, whose injuries cannot be remedied by production of documents only to the plaintiffs. Accordingly, the Administrative Procedures Act ("APA") must provide an avenue to enforce the agency's non-discretionary affirmative obligations at issue here.

Separately and irrespective of the relief granted under FOIA, the APA provides an independent basis for review of the agency's arbitrary and capricious policy decision to block public access to the disputed records, for which it ironically cited its "commitment to being transparent [and] remaining responsive to [its] stakeholders' informational needs." FOIA provides no mechanism to review the rationality of the decision to change the agency's access policy, and thus the APA grants jurisdiction to review this final agency action.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 to adjudicate claims arising under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*., and jurisdiction under FOIA itself to adjudicate the claims arising thereunder, 5 U.S.C. § 552(a)(4)(B).

This Court has jurisdiction under 28 U.S.C. § 1291 because this appeal arises from the decision issued on August 14, 2017, Excerpts of Record ("ER") ER0002, and subsequent final judgment entered on October 10, 2017, ER0001. The plaintiffs' notice of appeal was timely filed on September 13, 2017, ER0014, and deemed to be filed on October 10, 2017. *See* Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."). Appellate jurisdiction was noted in this Court's November 15, 2017 Order. ER0008.

ISSUES PRESENTED

FOIA imposes on federal agencies the affirmative obligation to "make available for public inspection" certain types of records. 5 U.S.C. § 552(a)(2). FOIA also empowers district courts "to enjoin [agencies] from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B) (emphasis added). This remedial provision vests courts with broad equitable authority to fashion remedies under FOIA. The issues presented are:

1. Under section 552(a)(4)(B), may a court require an agency to comply with FOIA's affirmative disclosure obligations to make certain records "available for public inspection"?

2. If section 552(a)(4)(B) does not authorize a district court to order compliance with FOIA's affirmative disclosure obligations, may an agency's obligations be enforced under section 704 of the APA, which provides for judicial review of any "final agency action for which there is no other adequate remedy in a court"?

3. Regardless of FOIA's affirmative disclosure obligations, is an agency's policy change to block public access to databases on its website separately reviewable under the APA, where FOIA provides no mechanism to review the rationality of the agency's decision?

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. The Freedom of Information Act.

FOIA's "basic purpose" is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against

corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To that end, FOIA is particularly concerned with records that "shed[] light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Taken together, its various provisions enforce citizens' right to know "what their government is up to." *Id.* (quoting S. Rep. No. 89-813, at 3 (1965)).

Reading-Room Requirements. FOIA imposes on federal agencies both reactive and affirmative disclosure requirements. As to reactive obligations, section 552(a)(3) requires agencies to "make . . . records promptly available" "upon [the receipt of] any request." 5 U.S.C. § 552(a)(3). But the statute begins elsewhere, with two types of affirmative obligations that go to the heart of FOIA's basic purpose. The first, section 552(a)(1), mandates that agencies publish certain categories of policy records, such as final regulations, in the Federal

Register. *Id.* § 552(a)(1). The second affirmative obligation is section 552(a)(2)—the "reading-room"[1] provision at issue here—which requires agencies to "make available for public inspection in an electronic format" other categories of policy records, including final opinions and orders, statements of policy, and records that are frequently requested by the public. *Id.* § 552(a)(2).[2]

---

[1] The reading-room provision is so named because agencies historically met their obligation under section 552(a)(2) by placing records in a public "reading room." The 1996 E-FOIA Amendments, however, required that section 552(a)(2) records be made available in an electronic format. H.R. Rep. No. 104-795, at 11 (1996). Accordingly, agencies now post records in electronic "reading rooms" on their websites. Dep't of Justice, *Department of Justice Guide to the Freedom of Information Act: Proactive Disclosures*, 12-13 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf.

[2] The reading-room provision provides, in relevant part:

> (2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(Cont'd)

The mandate that agencies affirmatively disclose their opinions, orders, and policy documents—a requirement that dates back to FOIA's original enactment—aims to "eliminat[e] . . . secret law." *Reporters Comm.*, 489 U.S. at 772 n.20. Congress later added the requirement to post frequently requested records in the reading room, with the dual purpose of reducing the need for individual FOIA requests and ensuring that records of particular public interest are readily available. *See* Dep't

---

> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
> (D) copies of all records, regardless of form or format—
> (i) that have been released to any person under paragraph (3); and
> (ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
> (II) that have been requested 3 or more times; and
> (E) a general index of the records referred to under subparagraph (D);

5 U.S.C. § 552(a)(1).

of Justice, *Department of Justice Guide to the Freedom of Information Act: Proactive Disclosures*, 16-18 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. As the Department of Justice has explained, section 552(a)(2) "requires agencies to not only maintain, but also to continuously update, the records" subject to disclosure. *Id.* at 12.

Judicial Review. Central to this case is the meaning of FOIA's judicial review provision. That provision reads, in relevant part:

> On 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, or in the District of Columbia, *has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant*.

5. U.S.C. § 552(a)(4)(B) (emphasis added).

This provision vests district courts with broad equitable authority to fashion appropriate remedies under FOIA. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974) ("With the express vesting of equitable jurisdiction in the district court . . . , there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."); *In re Steele*, 799 F.2d

461, 465 (9th Cir 1986) (FOIA's remedial provision "vests the district court with all the powers of an equity court to issue injunctive relief from withholding of agency records"). And, "[a]s the enforcement arm of the FOIA, the courts are charged with the responsibility of ensuring the fullest responsible disclosure." *Long v. U.S. Internal Revenue Serv.*, 693 F.2d 907, 909 (9th Cir 1982).

B. The Administrative Procedure Act

The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The APA's jurisdictional grant embodies a "presumption of reviewability for all final agency action." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (quoting *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 128 (2012)). A court exercising jurisdiction under the APA may, among other remedies, "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

II. Facts

A. Animal Welfare Act Records

The AWA sets minimum standards for the humane treatment of animals and regulates four categories of commercial animal enterprises: (1) animal dealers, such as brokers and breeders; (2) animal exhibitors, such as zoos and circuses; (3) animal research facilities; and (4) animal carriers and intermediate handlers. *See* 7 U.S.C. § 2132; 9 C.F.R. § 1.1. Regulated entities[3] are required to provide animals with adequate care, including meeting minimum requirements for shelter, nutrition, sanitation, exercise, and veterinary care. *See* 9 C.F.R. §§ 2.1 *et seq.*, 3.1 *et seq*. APHIS enforces the AWA on behalf of the United States Department of Agriculture ("USDA"). *See* 7 U.S.C. §§ 2131 *et seq.*; 9 C.F.R. §§ 1.1 *et seq*. As relevant here, APHIS's enforcement activities generate five types of documents, each described in greater detail below:

[3] Regulated entities include those that are registered or licensed by the USDA. Animal dealers and exhibitors must obtain and maintain a license from USDA to engage in regulated activities. 7 U.S.C. § 2133; 9 C.F.R. §§ 2.1 *et seq*. Research facilities, carriers, and intermediate handlers must maintain registration with the USDA to engage in regulated activities. 7 U.S.C. § 2136; 9 C.F.R. §§ 2.25 *et seq*., 2.30, *et seq*.

annual reports, inspection reports, official warning letters, pre-litigation settlement agreements, and administrative complaints.

First, scientific research facilities are required to submit annual reports detailing the number and species of animals used in research experiments, the degree of pain the animals experienced, and the anesthetics used (if any). 9 C.F.R. § 2.36. Second, all regulated entities are subject to APHIS inspections, the results of which are documented in inspection reports. *See* 9 C.F.R. § 2.3. The inspection reports detail AWA violations, sometimes including shocking instances of serious abuse or neglect, and a negative inspection report can impose certain consequences for the non-compliant entity. ER0038, at ¶ 10; ER0073-77.

APHIS also documents its enforcement response to each AWA violation. The third category of records are official warning letters, an enforcement response APHIS uses to end the investigation of certain, often less serious, AWA violations. ER0038, at ¶ 10; ER0079. Fourth, if APHIS feels a monetary penalty is appropriate, it will sometimes negotiate a pre-litigation settlement agreement with the regulated entity, which will typically include a finding that the AWA violation occurred and an agreed-upon fine. ER0039, at ¶ 11; ER0081. The fifth

category of records results from APHIS's strongest enforcement tool: the initiation of formal enforcement proceedings before the USDA's Office of the Administrative Law Judge ("OALJ") by filing an administrative complaint, which details APHIS's position on the violation and begins the adjudication process. *See* USDA, APHIS, *IES Frequently Asked Questions*, *What types of enforcement actions can APHIS take?* (modified May 24, 2017), https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_faq.

Access to the APHIS records allows the public to assess the adequacy of the government's oversight in protecting vulnerable animals used in commercial enterprises. It also allows the public to ensure they are patrons of reputable businesses—dog breeders or circuses, for example—that are in compliance with the AWA.

B. APHIS's Electronic Reading Room

Beginning nearly a decade ago, APHIS maintained two online databases in the FOIA reading-room portion of its website. ER0017. Those databases were known as the Animal Care Information Search ("ACIS") and the Enforcement Actions ("EA") databases (collectively, the "APHIS databases"). ER0017. The ACIS database contained the

annual reports submitted by scientific research facilities and inspection reports for all regulated entities, including those pertaining to pre-licensing inspections and unannounced compliance inspections. ER0061, at ¶ 3. The EA database contained the agency's enforcement responses to AWA violations, including all official warning letters, voluntary settlement agreements, and administrative complaints brought before the OALJ.[4] ER0062, at ¶ 5. Notably, at all times APHIS posted the AWA records after having reviewed and redacted them to protect personal privacy. ER0287, at ¶ 3; *see also* ER0073.

APHIS's longstanding policy of posting records of its AWA enforcement activities in these two databases was rooted in FOIA's affirmative disclosure requirements. As early as 2009, APHIS described its disclosure policy as promoting two goals of paramount importance: "[M]aking [AWA inspection reports] available on our Web site will go a

---

[4] The EA database also contained OALJ consent decisions and final decisions, but because these two categories of records are also made available on the OALJ's website, they were not at issue in this case. ER0029; ER0296, at ¶ 36.

long way toward informing the public of our commitment to animal welfare, while also supporting our FOIA backlog reduction efforts." USDA APHIS, *Letter from APHIS Acting Administrator and Associate Administrator to APHIS Management Team and Program Leaders Group*, 1 (June 19, 2009), https://www.aphis.usda.gov/foia/downloads/APHIS%20Committment%20to%20Transparency.pdf. Since then, APHIS has repeatedly described the records contained in the databases as being subject to FOIA's affirmative disclosure requirements; for example, as to all records in the EA database, APHIS declared: "The requested records are frequently requested and as a result, APHIS, in compliance with the Electronic Freedom of Information Act Amendments of 1996, made the determination to provide the requested records on its agency website." ER0185. The agency's FOIA logs show the details of past records requests and confirm frequent requests for the records posted in the ACIS and EA databases. USDA, APHIS, *FOIA Logs* (modified Aug. 1, 2017), https://www.aphis.usda.gov/aphis/resources/foia/ct_foia_logs.

After nearly a decade's experience with this successful disclosure policy, APHIS suddenly blocked public access to the ACIS and EA

databases on February 3, 2017. ER0287, at ¶ 2; ER0003. In so doing, APHIS ironically announced that, based on its "commitment to being transparent," it was "implementing actions to remove documents." ER0287, at ¶ 2; ER00296, at ¶ 38. Despite the APHIS records having been freely and publicly available for many years and already having been reviewed and redacted to protect personal privacy, APHIS also cited privacy concerns in removing them. ER0303, at ¶ 68.

Public access to the APHIS databases is still blocked, and, by APHIS's own admission, only a fraction of the AWA records once posted in the APHIS databases are now on the agency's website.[5] ER0046-47, at ¶¶ 26, 30. Notably, not a single enforcement record from the EA

[5] Those records that have been reposted are now made available in a new tool labeled the "USDA Animal Care Public Search Tool." *See* USDA, APHIS, *APHIS - Animal Care*, https://acis.aphis.edc.usda.gov/ords/f?p=118:1:0::NO. Even those records that have been reposted are often missing critical components. For example, inspection reports used to contain inventories of the type and number of animals observed at each facility during an inspection. S*ee* USDA, APHIS, *AWA Inspection and Annual Reports* (modified Aug. 18, 2017), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports.

databases has been reposted. Defendants' Report at 4, *People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, No. 1:17-cv-00269-CRC (D.D.C. Dec. 4, 2017), ECF No. 40. The missing enforcement records number in the thousands and include official warnings, pre-litigation settlement agreements, and administrative complaints. *Id.* There is nothing temporary about the records' absence; the agency has represented that "APHIS does not intend to repost [these] records." *Id.*

In place of its previous policy of posting AWA records in its electronic reading room, the USDA now directs the public to submit FOIA requests for these records. USDA, APHIS, *Animal Welfare Enforcement Actions* (modified Aug. 18, 2017), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions. Yet, even in 2016—when the APHIS databases were online and available to the public—the agency was unable to process FOIA requests within the twenty business-day timeframe required by statute. 5 U.S.C. § 552(a)(6)(A). For simple requests, it took 93 days, on average, for APHIS to respond; for complex requests, the average rose to 233 days. USDA, APHIS, *Department of Agriculture Freedom of Information Act Annual Report for Fiscal Year 2016*, at 22,

https://www.dm.usda.gov/foia/reading.htm#reports (follow "DOCX" hyperlink for USDA Annual FOIA Reports 2016). In one case, APHIS failed to respond for over three years. *Id.*

III. Proceedings Below

Plaintiffs—Animal Legal Defense Fund ("ALDF"), Stop Animal Exploitation Now ("SAEN"), Companion Animal Protection Society ("CAPS"), and Animal Folks—are all non-profit organizations dedicated to animal welfare. ER0017. Before the agency blocked access to the APHIS databases, Plaintiffs used them as an integral part of their day-to-day operations. For example, the Executive Director of SAEN checked the databases up to ten times a day and used the records for numerous campaigns, including one concerning Santa Cruz Biotechnology that culminated in the USDA revoking the company's dealer license, canceling its research registration, and imposing a $3.5 million fine. ER0190, at ¶ 4. For its part, CAPS has helped enact a series of local ordinances that require pet shops to keep recent inspection reports for their animal dealers and to refrain from sourcing animals from dealers with certain AWA violation histories—legal requirements that can be met only if the pet shops have access to the

APHIS databases. ER0207-08, at ¶¶ 3-7. Animal Folks and ALDF routinely used the databases to identify areas of animal welfare concern and seek enforcement actions, including asking the USDA to revoke licenses or bring facilities into compliance. ER0274, at ¶¶ 3-5; ER0062-64, at ¶¶ 7-11. And ALDF has used the databases in the course of numerous legal actions, including the recent settlement of a lawsuit with a pet shop chain in which the chain agreed to regularly check the APHIS databases to ensure its animals were not sourced from unscrupulous puppy and kitten mills. ER0062, at ¶ 8. The settlement that ALDF secured relied on continued public access to the APHIS databases. ER0062, at ¶ 8. Since February 3, 2017, Plaintiffs have resorted to submitting ongoing FOIA requests for records that used to be affirmatively posted; plaintiffs have received a small fraction of the documents they have requested over the year that the APHIS databases have been missing. *See, e.g.*, ER0065-66, at ¶¶ 16-17; ER0172; ER0196-97; ER0271; ER0281.

On February 23, 2017, Plaintiffs filed a complaint against the USDA and APHIS ("Defendants") in the U.S. District Court for the Northern District of California. ER0286. The complaint alleges that

APHIS, by failing to publicly post these critical AWA records, is violating its affirmative disclosure obligations under FOIA's reading-room provision, and also that its decision to block public access to the databases was arbitrary and capricious in violation of the APA.

As detailed in the complaint, and by the agency's own admission, all of the records at issue are subject to affirmative disclosure obligations because they are frequently requested. *See* 5 U.S.C. § 552(a)(2)(D); USDA APHIS, *Letter from APHIS Acting Administrator and Associate Administrator to APHIS Management Team and Program Leaders Group*, 1 (June 19, 2009), https://www.aphis.usda.gov/foia/downloads/APHIS%20Committment%20to%20Transparency.pdf. Moreover, some of the records must be disclosed affirmatively for the additional reason that they constitute final agency orders, such as pre-litigation settlement agreements, which formally end the agency's investigation of an AWA violation,

conclusively announce a finding of an AWA violation, and impose a penalty.[6] *See* 5 U.S.C. § 552(a)(2)(A).

The complaint contains three claims against USDA and APHIS. The first count pleads a violation of FOIA's reading room provisions and requests that the district court "enjoin the agency from withholding [the records in the APHIS databases]" by ordering that the agency to make the records "publicly available in an electronic format on an ongoing basis." ER0301-02, at ¶¶ 54, 57. The second count alternatively requests the same relief—an injunction requiring APHIS to comply with its affirmative disclosure obligations—under the APA, in the event such a remedy is not available under FOIA. ER0302, at ¶¶ 58-63. The third count pleads a separate violation of the APA, alleging that APHIS's policy decision to remove two key databases from its website is a final agency action that is arbitrary, capricious, and an abuse of

[6] For example, one such settlement agreement reads: "The Department may enter into a stipulation to resolve the above-described violations. Your payment constitutes a waiver of your right to a hearing, a finding that the violations of law have occurred, and settlement of such violations." ER0081.

discretion. ER0303-04, at ¶¶ 64-74. The third count requests the district court to order APHIS to "return its practices to the status quo prior to February 3, 2017." ER0304, at ¶ 74.

On March 29, 2017, plaintiffs moved for a preliminary injunction to stop the agency from blocking public access to the APHIS databases and return to the status quo during the pendency of the litigation. On May 31, 2017, the district court denied the motion, concluding, *inter alia*, that plaintiffs were unlikely to succeed on the merits of their claims because "federal courts do not have the power to order agencies to make documents available for public inspection under section 552(a)(4)(B) of FOIA." ER0026. While FOIA complainants "may seek injunctive relief and production of documents to them personally," the district court reasoned, "they cannot compel an agency to make documents available to the general public." ER0026. The district court further concluded that Plaintiffs were unlikely to prevail on their alternative APA claim because, in the district court's view, FOIA provided plaintiffs an "adequate alternative remedy." ER0028-29.

On August 14, 2017, the district court granted defendants' motion to dismiss the complaint for essentially the same reasons. Specifically,

the district court held that "courts cannot order agencies to make records available to the public at large . . . [, which] dooms plaintiffs' FOIA claim." ER0005. It also reiterated its view that an action under the APA to enforce an agency's compliance with its affirmative disclosure obligations was not viable because FOIA provides an "adequate alternative remedy." ER0005. Finally, the district court addressed for the first time plaintiffs' second APA claim—that APHIS's decision to remove the databases was arbitrary and capricious. ER0006-07. The district court again concluded that APA-relief was barred because FOIA provides an adequate remedy for plaintiffs' "informational injury." ER0007.

SUMMARY OF THE ARGUMENT

Since its inception, FOIA has mandated that agencies allow public access to their records—subject to limited exemptions—in two basic ways. First, some categories of records must be affirmatively made "available for public inspection"—that is, posted by the agency without waiting for a specific request. Second, the public may request any other agency records, and the agency must produce them. Plaintiffs, animal welfare organizations, brought suit to enforce the first set of obligations:

the affirmative disclosure of certain categories of records deemed so important by Congress that the public need not file a request.

Despite FOIA's broad remedial judicial review provision, the district court decided it lacked jurisdiction to hear plaintiffs' FOIA claim because plaintiffs may only seek "production of documents to them personally" and not a court order that agencies "make documents available for public inspection." ER0027. The question of first impression in the Ninth Circuit in this appeal is whether FOIA's judicial review provision grants district court's jurisdiction to remedy violations of FOIA's affirmative disclosure obligations by ordering agencies to "make documents available for public inspection in an electronic format," as the statute requires. 5 U.S.C. § 552(a)(2).

The district court's decision to render unenforceable one of FOIA's centrally important provisions should be reversed for four reasons. First, FOIA's judicial review provision grants jurisdiction not only to "order the production of any agency records improperly withheld from the complainant" but also more broadly to "enjoin [an] agency from withholding agency records." 5 U.S.C. § 552(a)(4)(B). Ignoring this additional clause in the jurisdictional grant defies the basic principle of

statutory construction that each clause in a statute should be given effect.

Second, the district court's approach reads the statute in a way that thwarts Congress's clear intent to provide robust judicial review for FOIA violations. The district court's interpretation renders the agency's affirmative disclosure obligations essentially advisory by collapsing them into the agency's separately enumerated obligation to produce records to an individual upon request. Under such an approach, judicial review of the very reading room obligations Congress viewed as critically important is effectively barred. Like plaintiffs in this case, requesters under such a regime may be forced to wait months or years to obtain stale government records that should have been immediately accessible under the affirmative disclosure obligation.

Third, nationwide precedent has reaffirmed the broad equitable powers the district courts retain to enforce FOIA obligations. The Ninth Circuit has similarly recognized the district court's broad remedial powers under FOIA. Interpreting the judicial review provision of FOIA to encompass the power to order an agency to make records "available

for public inspection" as required by the statute is the only reading that comports with this precedent.

And finally, the district court mistakenly followed the flawed reasoning of the sole decision to address this question: the D.C. Circuit's decision in *Citizens for Responsibility and Ethics in Washington v. Department of Justice*. ER0025 (citing *CREW v. DOJ*, 846 F.3d 1235, 1243-44 (D.C. Cir. 2017) (hereinafter "*CREW*"). That decision fails to carry persuasive weight, as it skirts the statutory construction issues that are at the heart of this case and makes clear that the D.C. Circuit felt itself bound by earlier, somewhat orthogonal precedent.

In the alternative, if this Court accepts the district court's cramped construction of FOIA's remedial provision, it should hold that the requested relief is available under the APA. The production of records directly to the plaintiff is not an "adequate alternative remedy" because it fails to provide any method of requiring the government to comply with its legal obligations. Indeed, production to the plaintiff is a wholly different kind of remedy than posting records for the public, and one that does not remedy the injuries the plaintiffs have alleged in this case, for which only public release will provide a remedy.

Finally, regardless of the plaintiffs' possible remedies under FOIA—and separate from the question of whether the records are required to be posted under the reading room provision—the agency's policy decision to block public access to the databases can be reviewed under the APA's arbitrary and capricious standard. Contrary to the district court's conclusion, FOIA provides no mechanism to review the rationality of the agency's final decision to change its disclosure policy, which is thus subject to independent review under the APA.

STANDARD OF REVIEW

The district court granted defendants' motion to dismiss because it concluded that FOIA did not authorize the relief the plaintiffs requested and that, as a matter of law, plaintiffs had an adequate alternative remedy under FOIA, precluding APA review. This Court applies a de novo standard of review to a district court's decision to grant a motion to dismiss and to questions of statutory interpretation. *See Outdoor Media Grp. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007); *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1047 (9th Cir. 2007).

ARGUMENT

I. Under FOIA's judicial review provision, the district court has the power to order an agency to comply with its affirmative disclosure obligations.

FOIA empowers a district court to "enjoin the agency from withholding agency records," 5 U.S.C. § 552(a)(4)(B). Plaintiffs in this case requested an injunction directing APHIS to make certain records publicly available on an ongoing basis as required by FOIA's reading-room provision. ER0302, at ¶ 57. In substance, therefore, Plaintiffs seek an order "enjoin[ing] the agency from withholding agency records" from public inspection. 5 U.S.C. § 552(a)(4)(B). By the plain reading of the judicial review provision, plaintiffs' requested relief falls easily within the district court's broad remedial authority. *See Barnhard v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). As described below, however, even if this Court were to find the district court's remedial authority under FOIA ambiguous, foundational principles of statutory construction as well as the decisions of the Supreme Court and of this Court compel a conclusion that the requested relief falls within FOIA's jurisdictional grant.

A. FOIA's judicial review provision contains two separate clauses, each of which must be given effect.

"It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). Here, FOIA 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." 5 U.S.C. § 552(a)(4)(B) (emphasis added). The use of the conjunctive "and" separates two distinct clauses, each of which must be given effect. The second clause allows a court to order production of records to the particular plaintiff. The first clause's broader language indicates that district courts have the power to issue injunctive relief beyond a narrow order requiring production to the plaintiff, allowing courts to remedy other types of FOIA violations such as the failure to disclose to the public at large.

In construing a statute with both a general and specific term, courts cannot interpret the general term to be limited in meaning by the more specific term as that would render the general term superfluous.

In *Ali v. Federal Bureau of Prisons*, the Supreme Court considered an exemption from the Federal Tort Claims Act's waiver of sovereign immunity that applied to certain actions undertaken by "any officer of customs or excise or any other law enforcement officer." 552 U.S. 214, 218 (2008). The Court characterized this statutory scheme as encompassing a general term, "any other law enforcement officer," paired with a specific term, "any officer of customs or excise." *Id.* at 225. It rejected, however, the argument that the general term should be limited to the meaning of the specific term, in part because it "threatens to render 'any other law enforcement officer' superfluous because it is not clear when, if ever" the general term would be given effect. *Id.* at 226-27.

Here, similarly, construing FOIA as authorizing the district court to order only "the production of any agency records improperly withheld from the complainant," renders superfluous the first, more general, clause of the remedial provision. *See* 5 U.S.C. § 552(a)(4)(B). The statute must thus be read to also authorize courts to "enjoin the agency from withholding agency records" with any injunctive order necessary to compel the agency to comply with its disclosure obligations under FOIA,

including the statutory requirement that records be "made available for public inspection." *Id.* § 552(a)(2), (a)(4)(B).

The district court recognized the statutory construction problem inherent in its holding—acknowledging that its reading of the statute rendered the first clause inoperable—but incorrectly concluded that the plaintiffs' reading of the general provision rendered the second, more specific, provision superfluous. *See* ER0025 ("If, as plaintiffs argue, the first provision, giving the courts the power to 'enjoin [an] agency from withholding agency records,' gives courts unlimited power to craft injunctive relief, the more specific, and seemingly limited language, of the second provision would be meaningless.").

On the contrary, it is well accepted that reading a general provision broadly does not render a related specific provision superfluous, even if it might otherwise be contained within the boundaries of the general provision. The Court in *Ali* addressed and dismissed this same concern, explaining: "Congress may have simply intended to remove any doubt that officers of customs or excise were included in 'law enforcement officer[s].'" 552 U.S. at 226. In another case, the Supreme Court noted that certain "technically unnecessary"

examples contained in a federal labor statute may have been "inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)." *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990).

Similarly, here, FOIA's more specific grant of authority in the second clause of FOIA's judicial review provision may have been "intended to remove any doubt" about the range of the court's authority. *See Ali*, 552 U.S. at 226. At the time FOIA was enacted in 1966, the common method for agencies to distribute records to the public was to place them in "paper-based collections known as 'Reading Rooms,' thereby compelling citizens to visit an agency's records collection in person." Dep't of Justice, *Department of Justice Guide to the Freedom of Information Act: Proactive Disclosures*, 12 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. Congress might have therefore been concerned that if a requester sued over the denial of a request and the district court issued a broad order to "enjoin the agency from withholding agency records," the agency could have frustrated the plaintiff's interest by placing the requested documents in a distant reading room. For that

reason, Congress may well have felt it should further specify that the district court could order the agency to produce the records directly to the plaintiff, including the "technically unnecessary clause" in an abundance of caution. Accordingly, both clauses of FOIA's judicial review provision can—and must—be given effect.

B. A restricted reading of FOIA's judicial review provision undermines Congress's objectives.

Not only would a limited construction of FOIA's judicial review provision render one of its two clauses inoperable, but it would also thwart the central policy objectives of the statute. As Judge Learned Hand declared, "it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.), *aff'd*, 326 U.S. 404 (1945); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

FOIA's statutory objective to ensure an informed citizenry is well established. As the Supreme Court has observed, "FOIA is often explained as a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004). Moreover, the Supreme Court has recognized on multiple occasions the centrality of the "affirmative portion of the Act." *NRLB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153. The Court has said this provision "represents a strong congressional aversion to 'secret (agency) law'" and cautioned against construing exemptions to apply to these particularly important documents. *Id.* Indeed, FOIA's "indexing and reading-room rules indicate that the *primary objective* [of the statute] is the elimination of 'secret law.'" *Reporters Comm.*, 489 U.S. at 772 n.20 (quoting Easterbrook, Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act, 9 J. Legal Studies 775, 777 (1980)) (emphasis added).

And judicial review is essential to furthering FOIA's objectives. As the Supreme Court has explained, FOIA was enacted as a "revision" of a

public-disclosure provision that previously existed in the APA, but which "[fell] far short of its disclosure goals." *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973), *superseded by statute as recognized in Robbins Tire*, 437 U.S. at 226-27. The provision was ineffective because it included "no remedy . . . [for] a citizen who ha[d] been wrongfully denied access to the Government's public records." H.R. Rep. No. 89-1497, at 5 (1966). Congress fixed the problem by adding to FOIA a "judicially enforceable public right to secure . . . information from possibly unwilling official hands." *Mink*, 410 U.S. at 80. Congress provided for de novo review to ensure "that the ultimate decision as to the propriety of the agency's action is made by the court . . . ." *Id.* at 100 (quoting S. Rep. No. 89-813 (1965) and H.R. Rep. No. 89-1497 (1966)).

If the only available relief under FOIA is a narrow order to produce particular records to the plaintiff, as the district court here concluded, then agencies' obligations are effectively collapsed into one: to produce records to individual parties after a specific request. That reading eviscerates judicial review of agency's obligations to affirmatively post certain records without a predicate request, rendering the reading room provisions as precatory as the former APA

disclosure provision that FOIA was intended to replace. Such a conclusion plainly fails to effectuate Congress's purpose in enacting FOIA of providing judicially enforceable obligations to disclose records.

Indeed, Congress carefully crafted a multifaceted obligation under FOIA, notably *beginning* the statute with affirmative obligations, and only then providing for a request-and-response mechanism that applies to all other records. As the Department of Justice has explained, section (a)(2) mandates an ongoing, continual obligation to post records without a specific request from a member of the public, Dep't of Justice, *Department of Justice Guide to the Freedom of Information Act: Proactive Disclosures*, 12 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. Given the ongoing, continual obligation, only an injunction mandating that an agency post records falling within the reading room provisions can remedy a section (a)(2) violation.

In fact, if a district can only order an agency to produce records to the plaintiff, another portion of section (a)(2) is rendered a nullity. In the one part of FOIA that requires agencies to create certain records, rather than just make extant records available, section (a)(2) requires

agencies to publish an index of all reading room materials made available. *See* 5 U.S.C. § 552(a)(2); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 n.7 (1980) ("Congress has imposed some very limited record-creating obligations with regard to indexing under the FOIA.") An order to produce certain records to a plaintiff could never remedy a violation of the indexing requirement. Unnaturally limiting the district court's remedial powers to encompass only the second clause of a two-clause jurisdictional grant would thus effectively write other, substantive provisions out of the statute and severely frustrate Congress's aims in enacting the statute.

C. The Supreme Court and the Courts of Appeals agree that FOIA authorizes broad equitable relief.

Courts have recognized that section 552(a)(4)(B) vests courts with broad equitable authority. In *Renegotiation Board v. Bannercraft Clothing Company*, the Supreme Court considered whether the district court had jurisdiction under FOIA to enjoin other, non-FOIA administrative proceedings pending resolution of a FOIA claim for records alleged to be related to those proceedings. 415 U.S. 1, 9 (1974). The Court considered whether, because FOIA expressly authorizes district courts to "compel the production of agency records improperly

withheld," Congress intended this provision "to be the exclusive enforcement method" under FOIA. *Id.* at 18. But the Supreme Court rejected the suggestion that section 552(a)(4)(B)'s express grant of authority implicitly limited the inherent equity powers of the district court:

> 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 [section] 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.

Id. at 19-20 (internal citations omitted). Following this reasoning, the Supreme Court admitted the possibility that, in an appropriate case, a remedy under FOIA could include enjoining the agency from continuing *a wholly separate proceeding* to which documents requested under FOIA pertain. *Id.* at 20. While such an injunction was not appropriate in that case, the Supreme Court was willing to entertain a remedy categorically different than an order requiring production of records to a particular

plaintiff and far beyond even an order requiring the agency to make records available for public inspection, the relief requested in this case. *See id.*

Relying on *Bannercraft*, this Court has likewise broadly construed the district court's remedial powers under FOIA. In *Long v. U.S. Internal Revenue Service*, this Court considered the propriety of a district court's refusal to issue a permanent injunction "prohibiting [the agency] from withholding the same type of documents in the future." 693 F.2d 907, 909 (9th Cir. 1982). This court quickly rejected "the IRS' contention that the district court lacks authority to grant the requested injunctive relief." *Id.* Rather, this Court held that "[i]n utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate," and further concluded that "an injunction may be framed to bar future violations that are likely to occur." *Id.* Thus, the Ninth Circuit has approved of a remedy that goes beyond simple production of disputed records to the plaintiff, relying on *Bannercraft*'s holding that "Congress did not intend to limit the court's exercise of its inherent equitable powers where consistent with the FOIA." *Id.* (citing *Bannercraft*, 415 U.S. at 19).

In fact, this Court has consistently found FOIA's jurisdictional provision to authorize the district courts to issue a wide variety of equitable relief beyond a narrow order to produce records to the plaintiff. For example, the Ninth Circuit has ordered an agency to waive otherwise-applicable processing fees associated with a FOIA request because "disclosure of the information [was] in the public interest," under 5 U.S.C. § 552(a)(4)(A)(iii). *Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 54 (9th Cir. 1997). In another case, this Court suggested that a court could order the agency to perform an additional search were the plaintiff to show that an agency's search for records was inadequate. *See Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770-72 (9th Cir. 2015); *see also Lane v. U.S. Dep't of Interior*, 523 F.3d 1128, 1139 (9th Cir. 2008) (noting that the district court "directed the government to search for additional documents" at a particular location and affirming the district court's subsequent determination that the additional search, as actually conducted, was adequate). This approach is consistent with the practice of the D.C. Circuit and the district courts within the Ninth Circuit to order additional searches as a remedy under FOIA. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007)

(ordering an agency to conduct an additional search for records); *Nat'l Res. Def. Council v. U.S. Dep't of Def.*, 388 F. Supp. 2d 1086, 1109 (C.D. Cal. 2005) (same).

These same cases demonstrate the fallacy of the district court's view that the sanctions provision[7] of FOIA "reaffirm[s] that courts are limited to ordering agencies to produce documents to particular complainants." ER0025-26. Following the District Court's reasoning would mean that the *only* relief a court may provide under FOIA is to order an agency to produce records to a complainant. But as these cases demonstrate, courts, including the Supreme Court, the Ninth Circuit, and the D.C. Circuit on whose precedent the district court relied, have all interpreted their authority under section 552(a)(4)(B) much more broadly. If the District Court were correct that its equitable powers under section 552(a)(4)(B) extend no further than its authority to take

---

[7] Section 552(a)(4)(F) of FOIA authorizes disciplinary action against employees found responsible for arbitrary and capricious decisions not to release information "whenever the court orders the production of any agency records improperly withheld from the complainant."

disciplinary action under section 552(a)(4)(F), then it would mean that all of the courts ordering searches, fee waivers, and other remedies, were acting without authority.

Interpreting the judicial review provision of FOIA as excluding authority to order an agency to comply with the specific mandate to affirmatively disclose certain particularly important records under the reading room provision would fly in the face of a long line of precedent. These cases demonstrate a consensus about the broad equitable powers of the district court to remedy FOIA violations.

D. The case on which the district court relied was wrongly decided.

In the only decision to have reached the question presented to this Court, the D.C. Circuit wrongly decided that a district court does not have the power under FOIA to order the public disclosure of records subject to FOIA's reading room requirements. *See CREW* 846 F.3d at 1243. This Court, of course, is not bound by the D.C. Circuit's decision in *CREW*. For the reasons stated above, and because of several flaws exhibited by the opinion itself, the Ninth Circuit should not follow the D.C. Circuit's misguided approach.

First, and most importantly, the decision in *CREW* did not address the statutory construction of the judicial review provision's first clause, granting district courts jurisdiction to "enjoin the agency from withholding agency records." *See id.* at 1244. The D.C. Circuit's decision in *Kennecott Utah Copper Corporation v. U.S. Department of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996), on which *CREW* relied, also did not address the statutory argument. In fact, as the district court in this case noted, the *Kennecott* court only "implicitly" rejected the textual argument raised, and the *CREW* court did not address it, considering itself bound by *Kennecott*. ER0025. These decisions therefore do not provide persuasive authority on the most crucial inquiry in this case.

Second, *CREW* acknowledges the breadth of remedial powers that Congress conferred upon the district courts in FOIA cases, yet fails to offer any rationale for its conclusion that the power does not extend to the authority to order an agency to comply with the reading room requirements. *See CREW*, 846 F.3d at 1241-42. The *CREW* court approved of remedies such as ordering an additional search or enjoining the agency from engaging in certain pattern and practice violations of the statute. *See id.* at 1242. Such remedies are obvious exercises of the

court's broad equitable authority; at the least, they certainly do not fall in the category of ordering production to the plaintiffs. Yet the *CREW* court failed to distinguish the broad equitable relief of which it approved and the relief of public disclosure sought by the plaintiffs.

Third, although it considered itself bound by *Kennecott*, the *CREW* court did not consider the distinction between the obligations in *Kennecott*—publication in the Federal Register—and the obligations in *CREW*—affirmative disclosure in an electronic reading room. *See id.* at 1244. Whether the court has jurisdiction as part of its power to "enjoin the agency from withholding agency records" to enforce an (a)(1) requirement to publish records specifically in the Federal Register is not necessarily the same inquiry as whether the court has jurisdiction to enforce an (a)(2) requirement to "make available" a record for public inspection. Thus, the *CREW* court's conclusion that it was bound by *Kennecott* is suspect.

And finally, *Kennecott* itself exhibited flawed reasoning. To begin, its holding renders superfluous the first of the two clauses in FOIA's judicial review provision for the reasons discussed above. Moreover, when it was considering the second clause—allowing the court to order

the agency to produce records to the plaintiff—the *Kennecott* Court admitted that "'[p]roduction' could mean either providing the document to an individual or broadcasting it to the broader public." 88 F.3d at 1203. Yet, the court settled on what it admitted was a "strange" result that the statute could mandate agencies publish certain records in the Federal Register without providing the courts the power to order the same. *Id.* at 1202-03.

There is no compelling reason for this Court to reproduce the D.C. Circuit's "strange" result, reached without acknowledging the most important statutory construction considerations. *Cf.* 2A Sutherland Statutory Construction § 45:12 (7th ed.) ("A golden rule of statutory interpretation instructs that, when one of several possible interpretations of an ambiguous statute produces an unreasonable result, that interpretation should be rejected in favor of another which produces a reasonable result."). In short, the D.C. Circuit's precedent in the *CREW* decision is not persuasive authority on which this Court should rely; it not only exhibits flawed reasoning, but also fails to consider the central arguments at issue in this case.

II. Alternatively, if FOIA does not permit the district court to order an agency to comply with its reading room obligations, then the APA does.

The APA provides judicial review of "every final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The "central purpose" of this cause of action was to "provide[] a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Indeed, the Supreme Court has described this provision as embodying a "basic presumption of judicial review to one suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (internal quotation marks omitted). This presumption dictates that the APA's "generous review provisions must be given a hospitable interpretation." *Id.* at 140-41 (internal quotation marks omitted).

As such, exceptions to APA review are to be construed narrowly. Only upon a "clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141. Indeed, the Supreme Court has noted that section 704's bar to judicial

review when there is an "adequate remedy" elsewhere was "merely a restatement of the proposition that '[]one need not exhaust administrative remedies that are inadequate.'" *Bowen*, 487 U.S. at 902 (quoting K. Davis, Administrative Law, § 26:11, p. 468 (2d ed. 1983)).

Of course, it is well recognized that the APA will not be construed so as to "duplicate" any "special and adequate review procedures" that are provided in other statutes. *Id.* at 903. But as this Court has explained, to have an adequate alternative remedy, there must be "a forum in which the claim for relief can be heard." *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1100 (9th Cir. 1990). If this Court were to confine FOIA's judicial review provision to the remedy of production directly to plaintiffs, it would also have to conclude, as the district court did, that there is no jurisdiction to hear the plaintiffs' claim for relief under FOIA. *See* ER0005. And if a court does not have jurisdiction to

hear the plaintiffs' claim for relief under FOIA, then there is no alternative forum in which plaintiffs can seek such relief.[8]

Moreover, the relief the plaintiffs seek—an order mandating that the government comply with its reading room obligations—is the only form of relief that adequately remedies the violation of FOIA's affirmative obligation to post certain records without waiting for a request. As described in greater detail below, the "alternative relief" the district court found to preclude APA review is, in practice, no relief at all. *See* ER0029. This "alternative" remedy, consisting of an order requiring production of the documents directly to the plaintiff, in effect collapses the obligation to post certain records publicly into the separate obligation under FOIA to produce records to an individual upon request. But the precedent of the Supreme Court and this Court makes clear that an alternative remedy is not adequate unless it permits plaintiffs to seek an injunction requiring the government to comply with its legal

---

[8] Neither the government nor the plaintiffs contend that any statutory scheme other than FOIA or the APA could provide the requested relief.

obligations, here, the affirmative disclosure requirements. Indeed, production to plaintiffs fails to address plaintiffs' demonstrated injuries in this case, further underscoring its inadequacy.

A. Production to individual litigants under FOIA does not constitute an adequate alternative remedy that precludes review under the APA.

An alternative remedy can be adequate only if it provides a method by which the plaintiff can seek injunctive relief that would require the government to cease the unlawful action that is directly causing harm. If FOIA does not allow a court to order the agency to comply with FOIA's affirmative disclosure obligations to make the disputed records publicly available, then the plaintiffs are entitled to seek this injunctive relief under the APA.

In the seminal case addressing the adequacy of alternative remedies, Massachusetts brought an APA suit for declaratory and injunctive relief, asking the district court to set aside a federal agency's "disallowance" decision not reimburse the state for a certain type of expense under the Medicaid program. *Bowen*, 487 U.S. at 887-88. The Supreme Court rejected the agency's argument that APA relief was barred by what the agency alleged was an adequate alternative remedy:

Massachusetts could sue for money damages in claims court to compensate for the wrongfully withheld reimbursements. *Id.* at 905. The Court concluded that an action for money damages in the claims court was not an adequate alternative remedy because the claims court "does not have the general equitable powers of a district court to grant prospective relief." *Id.* The equitable power of the District Court would allow it to order the government to comply with its legal obligation to reimburse qualified expenses under Medicaid. *Id.*

Similarly, the Ninth Circuit's decision in *Tuscon Airport Authority v. General Dynamics Corporation* recognized that plaintiffs must be able to seek an injunction ordering the government to comply with its legal obligations. 136 F.3d 641 (9th Cir. 1998). There, a private contractor that fulfilled World War II defense contracts brought an APA claim for an injunction requiring the government to defend it—per the terms of the parties' contract—against subsequent environmental lawsuits that arose out of the contracted activities. *Id.* at 643-44. Although the company may have been able to obtain "monetary indemnification" from the government for any judgments against it in the claims court, that alternative remedy was deemed inadequate. *Id.*

Such an action would not reimburse the litigation costs incurred in defending the suits, nor could the claims court "grant the equitable relief that [the plaintiff] seeks." *Id.* at 645. Important to the court's conclusion was that the contractor had been sued four times and was facing "countless suits" that "may continue to arise in the future." *Id.* at 645-46. The "ongoing relationship between the parties" necessitated a forum in which the contractor could seek prospective relief requiring the government to fulfill its legal obligations, not just one-off relief for each injury that might arise.

In both *Bowen* and *Tuscon Airport Authority*, the key to an adequate remedy was the ability to seek injunctive relief to require the government to meet its legal obligation where the government's action—or inaction—was the direct cause of the plaintiff's harm. If injunctive relief to stop the unlawful behavior were not a crucial part of adequate relief, the Court in *Bowen* would have determined that Massachusetts could simply bring regular suits to recoup the Medicaid reimbursements. But, as the court recognized, that relief is inadequate, especially in light of the "complex ongoing relationship between the parties." *Bowen,* 487 U.S. at 905 & n.41. In short, where the

government's violation of the law is directly causing the plaintiffs' injury, and particularly where there is a clear ongoing and repetitive dispute between the parties, prospective relief mandating the government meet its legal obligations must be available.

By contrast, the nonbinding cases out of the D.C. Circuit that the district court relied on are inapposite. ER0028-29 (citing *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) and *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 WL 187386 (N.D. Cal. Jan. 16, 2014) (relying on D.C. Circuit precedent for its conclusion)). In these cases, the plaintiffs sought to have a federal agency enforce a law against a third-party state agency; both of these cases involved an attempt to stop a federal agency from providing federal funds to allegedly discriminating state entities under Title VI of the Civil Rights Act. *See Women's Equity Action League*, 906 F.2d at 750-51; *Garcia*, 2014 WL 187386, at *13. However, in each case, the plaintiffs had an available private right of action against the state agency directly causing their injuries, and thus the courts concluded there could be no parallel action under the APA against the federal agency for failing to adequately enforce the law against that same third party. *See Women's*

Equity Action League, 906 F.2d at 750-51; *Garcia*, 2014 WL 187386 at *13. Importantly, in each case, the direct action against the one causing harm—the discriminating state entity—was considered an adequate alternative because the plaintiffs could seek complete relief, including injunctive relief requiring the discriminating entity to comply with the law.[9] *See Women's Equity Action League*, 906 F.2d at 750-51; *Garcia*, 2014 WL 187386 at *13.

This case is not comparable to *Women's Equity Action League* and *Garcia*. There is no third-party wrongdoer; the agency is not an intermediary or an enforcer. Rather, the agency is the very party directly causing the harms of which plaintiffs complain by its unlawful actions. Thus, plaintiffs here are in a similar position to the plaintiffs in

[9] In fact, in some of these cases the alternative remedial options against the third party directly causing the harm were actually more expansive than those that would be available against the government in an APA suit. *See, e.g.*, *Council of and for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1532 (D.C. Cir. 1983) (noting that in an action against the government for failure to enforce, the only remedy would be withholding federal funds, whereas an action against the third party directly causing the harm could also result in injunctive relief to stop the discriminatory practices); *Garcia*, 2014 WL 187386, at *13 (same).

Tuscon Airport Authority, and *Bowen* before it, under which an alternative remedy is inadequate if it does not provide a means for seeking an injunction requiring the government to abide by its legal obligations.

Thus, plaintiffs must have an available forum to seek an injunction requiring the government to comply with its legal obligations, namely, the requirement to make certain records available "for public inspection." 5 U.S.C. § 552(a)(2). If the only remedy available under FOIA for a reading room violation is an order to produce records directly to the plaintiffs, then FOIA does not authorize the only relief that could be considered adequate under *Tucson Airport Authority* and *Bowen*. Indeed, an injunction ordering the government to abide by its reading room obligations is the only remedy that can address the harm in the context of the parties' ongoing and complex relationship. ER0062-64, at ¶¶ 7-11, ER0190-91, at ¶¶ 3-6, ER0206-08, at ¶¶ 2-8, ER0273-76, at ¶¶ 2-4, 7-10 (detailing the plaintiffs' regular use of the records).

The structure of FOIA confirms the inadequacy of relief under the district court's reading of FOIA's judicial review provision, because providing such limited relief essentially makes precatory the reading

room obligations Congress concluded were so important. The very essence of section 552(a)(2) is that agencies must provide certain records to the public without individuals having to make a request for them. *See* Dep't of Justice, *Department of Justice Guide to the Freedom of Information Act: Proactive Disclosures*, 12 (July 23, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf. (explaining that section 552(a)(2) "requires agencies to not only maintain, but also to continuously update, the records" subject to disclosure."); *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 756 (D.C. Cir. 1978) ("The materials encompassed by paragraph (2) are automatically available for public inspection; no demand is necessary."). If a district court can order only that an agency produce records to a particular individual, then, in essence, the agency's obligation is reduced to responding to an individual request, the same obligation it has under section (a)(3). That is, requiring an individual to request records be produced directly to the requester makes the agency's affirmative obligation to disclose under section (a)(2) merely advisory. A remedy that has the effect of eliminating an agency's obligations under

a provision of FOIA can hardly be said to be adequately remedying an agency's violation of that same provision.

B. An order to produce records only to the plaintiffs does not remedy plaintiffs' informational injury here.

The government's claim that an order to produce records directly to the plaintiffs is an adequate alternative remedy fails for the independent reason that it does not address the informational injury pled by the plaintiffs. Indeed, an alternative remedy cannot be said to be adequate if it fails to address the plaintiff's injury. *See Bowen*, 487 U.S. at 905. In this case, plaintiffs have demonstrated informational injuries that can only be remedied by production of the disputed records to the public at large.

Specifically, many of the initiatives championed by plaintiffs in their past and ongoing work depend not on plaintiffs' access to the databases, but the *public's* access to the databases. For example, ALDF brought a lawsuit against Chicago-area pet store chain Furry Babies, Inc., alleging that the chain violated consumer protection laws by assuring its customers that it did not obtain puppies from unscrupulous dog breeders known as "puppy mills." ER0062-63, at ¶ 8. ALDF entered into a settlement agreement requiring Furry Babies to, among other

things, check the APHIS databases monthly to ensure the breeders that supply its dogs do not have certain serious AWA violations noted on their most recent inspection report. ER0062-63, at ¶ 8. Thus, if Furry Babies—not ALDF—is unable to access the databases, it directly harms ALDF's vested interest in securing a key change to Furry Babies' business practices. Production of records to ALDF in this case will not remedy the harm ALDF suffers in this regard.

CAPS, for its part, has worked to enact a series of local ordinances that rely on *public* access to the APHIS databases for compliance and enforcement. ER0207-08, at ¶ 6. For example, CAPS worked to enact an ordinance in New York City that requires retail pet stores to keep the last two inspection reports for the breeder of each animal it offers for sale in the store for review by the prospective purchaser, and to provide them to the purchaser with the actual sale. ER0207-08, at ¶ 6; ER0214. This ordinance and others like it—all passed following intensive advocacy effort by CAPS—also require pet shops not to sell animals obtained from breeders with certain listed AWA violations on the most recent inspection reports. ER0207-08, at ¶ 6; ER0214. Another such ordinance, this time in Orland Park, Illinois, requires the now-defunct

USDA database website link to be posted in pet stores so that consumers themselves can investigate the breeders that sourced the animals they are considering purchasing. ER0207-08, at ¶ 6; ER0263. Without public access—for pet shops, consumers, and local law enforcement—these local legal requirements CAPS worked to have adopted are rendered ineffective. Disclosure of the records to CAPS does not remedy this injury.

Thus, contrary to the district court's ruling, production to the plaintiffs in this case cannot remedy many of the central injuries plaintiffs allege. If FOIA's remedy is narrowly construed, it provides no adequate alternative remedy in this case.

III. The government's decision to change its disclosure policy can be challenged as arbitrary and capricious under the APA, there being no other mechanism for review.

The agency here had a longstanding policy of posting the disputed records and made a final decision on February 3, 2017, to change that policy. ER0287, at ¶ 2. The agency implemented its decision concurrent with its announcement. ER0287, at ¶ 2, ER 0296, at ¶ 38. Irrespective of whether the agency has failed make publicly available certain records in accordance with FOIA's reading room requirements, the agency's

policy decision on February 3, 2017 constitutes an independent final agency action that cannot be undertaken arbitrarily. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (final agency action is one "by which rights or obligations have been determined, or from which legal consequences will flow" (internal quotation marks omitted)). Contrary to the conclusion of the district court, and regardless of the construction of FOIA's judicial review provision, FOIA provides no mechanism to review the rationality of the agency's policy decision.

The Supreme Court has interpreted FOIA as a "disclosure" statute, and nothing more. In *Chrysler Corporation v. Brown*, the Court was faced with a company that wanted to challenge an agency's *decision to disclose*—rather than a refusal to disclose—records to a third party who had requested them under the statute. 441 U.S. 281 (1979). Even though this action seemed related to the agency's disclosure obligations under FOIA, the Court held that the statute, "[b]y its terms, . . . demarcates the agency's obligation to disclose; it does not foreclose disclosure." *Id.* at 292. Thus, the only available review mechanism for the legality and rationality of the agency's decision to release records was under the APA. *Id.*

Here, too, FOIA's reading room provisions delineate what must be made "available for public inspection" but does not in any way govern how or why an agency, once it has posted information for the public, may decide to remove that information from the public sphere. The justification for the agency's policy change is not reviewable under FOIA. *See id.* at 291-92.

Moreover, the Court counseled that an alternative remedy is not adequate if the remedy offers only "doubtful and limited relief." *Bowen*, 487 U.S. at 901. Here, the government has asserted that none of the records at issue actually fall within FOIA's affirmative disclosure obligations. ER0023. While plaintiffs, of course, vigorously assert the contrary, the government cannot have it both ways. If the reading room obligations were not at issue, there would be no question that the APA would provide an available avenue for relief. For example, if an agency routinely posted third-party information to its website that was not the subject of frequent FOIA requests—data on climate change, for example—the agency's decision to stop posting that information is a final agency action that must have a rational basis.

The distinct nature of the review available under the APA underscores that FOIA does not provide any remedy for an agency's poorly reasoned decision to remove records from the public domain. The APA provides that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. That is, the APA provides a review of the agency's reasons for making a final decision, and here, the agency's "commitment to transparency," for example, does not provide a rational reason for blocking access to two databases that had long been posted for public use. ER0282, at ¶ 2, ER0303-04, at ¶¶ 68-70.

Moreover, agency's actions that violate its own regulations—as APHIS's actions did—would fail APA review. *See United States v. Caceres*, 440 U.S. 741,753-54 (1979) (explaining that the proper method to challenge an agency's violation of its own regulation is an action under the APA seeking "invalidation of the agency action"). USDA regulations provide only one condition under which the agency may remove frequently requested records that have already been made available for public inspection: "Agencies may remove a record from this

access medium when the appropriate official determines that it is unlikely there will be substantial further requests for that document." 7 C.F.R. § 1.4(f). There has never been any argument, much less evidence, that such a finding was ever made. Nor could there be, given the public logs indicating frequent requests across all categories of disputed records. USDA, APHIS, *FOIA Logs* (modified Aug. 1, 2017), https://www.aphis.usda.gov/aphis/resources/foia/ct_foia_logs.

The decision to remove the databases from the public sphere is thus a distinct final agency action. Regardless of whether the records in the databases are subject to FOIA's reading room requirements, are arguably subject to them, or could never be subject to them, the agency's final policy decision on February 3, 2017, to remove public access to its two databases is reviewable under the APA.

CONCLUSION

Because the district court has jurisdiction to hear plaintiffs' FOIA and APA claims, the judgment below should be reversed.

DATED: February 2, 2018

By: /s/ *Margaret B. Kwoka*

Margaret B. Kwoka
mkwoka@law.du.edu
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave
Denver CO 80208
Tel: 303.871.6275/ Fax:
303.871.6378

Christopher Berry
cberry@aldf.org
Matthew Liebman
mliebman@aldf.org
ANIMAL LEGAL DEFENSE FUND
525 E. Cotati Ave.
Cotati, CA 94931
Tel: 707.795.2533/Fax:
707.795.7280

Attorneys for Plaintiffs-Appellants

Lindsey E. Dunn
John S. Rossiter
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105-3204
Tel: 415.344.7000/ Fax:
415.344.7050
JRossiter@perkinscoie.com
LDunn@perkinscoie.com

Attorneys for Plaintiff-Appellant Animal Legal Defense Fund

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned certifies that there are no known related cases pending in this Court.

Date: February 2, 2018

/s/ *Margaret B. Kwoka*
Margaret B. Kwoka

Attorney for Appellants Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Date: February 2, 2018

/s/ *Margaret B. Kwoka*
Margaret B. Kwoka

Attorney for Appellants Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 2, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: February 2, 2018

s/ *Margaret B. Kwoka*
Margaret B. Kwoka

Attorney for Appellants Animal Legal Defense Fund, Stop Animal Exploitation Now, Companion Animal Protection Society, and Animal Folks.

ADDENDUM

The Freedom of Information Act, 5 U.S.C. § 552

(a) Each agency shall make available to the public information as follows:

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> > (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
> >
> > (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
> >
> > (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
> >
> > (D) 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; and
> >
> > (E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected

thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

> (2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> >
> > (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
> >
> > (C) administrative staff manuals and instructions to staff that affect a member of the public;
> >
> > (D) copies of all records, regardless of form or format—
> >
> > > (i) that have been released to any person under paragraph (3); and
> > >
> > > (ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
> > >
> > > (II) that have been requested 3 or more times; and
> >
> > (E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications

means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. 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.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in

accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

…

(4) (B) On 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, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

Administrative Procedures Act

5 U.S.C. § 704, Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706, Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law;
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

United States Department of Agriculture FOIA Regulations

7 C.F.R. 1.4, Public access to certain materials

(a) In accordance with 5 U.S.C. 552(a)(2), each agency within the Department shall make the following materials available for public inspection and copying (unless they are promptly published and copies offered for sale):

> (1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (2) Those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register;
>
> (3) Administrative staff manuals and instructions to staff that affect a member of the public;
>
> (4) Copies 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. Agencies shall decide on a case by case basis whether records fall into this category, based on the following factors:
>
> > (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.

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) Records encompassed within paragraphs (a)(1) through (a)(5) of this section created on or after November 1, 1996, shall be made available to the public by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.

(c) Each agency of the Department shall maintain and make available for public inspection and copying current indexes providing identifying information regarding any matter issued, adopted or promulgated after July 4, 1967, and required by paragraph (a) of this section to be make available or published. Each agency shall publish and make available for distribution copies of such indexes and supplements to such indexes at least quarterly, unless it determines by notice published in the Federal Register that publication would be unnecessary and impracticable. After issuance of such notice, each agency shall provide copies of any index upon request at a cost not to exceed the direct cost of duplication.

(d) Each agency is responsible for preparing reference material or a guide for requesting records or information from that agency. This guide shall also include an index of all major information systems, and a description of major information and record locator systems.

(e) Each agency shall also prepare a handbook for obtaining information from that agency. The handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. The handbook should be available on paper and through electronic means, and it should identify how a requester can access agency Freedom of Information Act annual reports. Similarly, the annual reports should refer to the handbook and how to obtain it.

(f) It is appropriate to make frequently requested records available in accordance with paragraph (a)(4) of this section in situations where public access in a timely manner is important, and it is not intended to

apply where there may be a limited number of requests over a short period of time from a few requesters. Agencies may remove a record from this access medium when the appropriate official determines that it is unlikely there will be substantial further requests for that document.