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February 6, 2017

VIA ELECTRONIC AND U.S. MAIL

Sean O'Neil
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**RE: NOTICE OF VIOLATION OF COURT ORDER AND
INTENT TO ENFORCE AND/OR REOPEN LAWSUIT**

Dear Mr. O'Neil,

Pursuant to the Joint Stipulation of Dismissal of Civil Action No. 05-0197, *The Humane Society of the United States v. United States Department of Agriculture* ("Order"), we are writing to notify you of USDA's violations of the terms of that agreement, and the Court's accompanying order. If the violations discussed below are not cured immediately, we will move to enforce the Stipulation and Order, and/or reopen the lawsuit.

USDA's abrupt decision on February 3, 2017 to "remove from its website inspection reports, regulatory correspondence, research facility annual reports, and enforcement records that have not received final adjudication" for facilities regulated under the Animal Welfare Act ("AWA") and the Horse Protection Act, is a clear violation of the above referenced agreement and order, and also contrary to sound public policy and the letter and purpose of the Freedom of Information Act Amendments of 2016 and 1996. *Updates to APHIS' Website Involving Animal Welfare Act and Horse Protection Act Compliance Information*, USDA (Feb. 3, 2017), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/184e0d0> (last visited Feb. 6, 2017).

In particular, with regard to annual reports submitted to the agency by animal research facilities for fiscal year 2009-2013, USDA agreed and the Court ordered the agency:

to electronically post all annual reports (with the exception of any accompanying Column E Explanations), regardless of the number of animals reported, or the fact that no animals were reported by a reporting entity, on or before March 31 of the calendar year following the year in which the annual reports are required to be submitted to USDA.

Order, Section A(3)(a). Column E Explanations were then to be posted by a certain date as soon as they had been processed. *Id.* at Section A(3)(b)-(d). Additionally, with respect to 2009-2013 reports, the Stipulation and Order provides:

All annual reports will be electronically posted by USDA in a manner that allows any website viewer to determine which institutions that were required to submit a report for a given fiscal year did not do so. USDA's website will also allow any viewer to determine which institutions that were required to submit a report for the previous fiscal year are no longer registered and therefore not required to submit a report for the given fiscal year.

Id. at Section A(3)(e). In clear violation of these provisions, USDA scrubbed every single one of the above-referenced annual reports from its website¹ without seeking leave of the court or providing any advance notice to HSUS.

This action not only violates the Stipulation and Court Order, but also flies in the face of sound public policy by undermining governmental transparency and undercutting efforts to enforce the Animal Welfare Act. The records removed from USDA's website relate to violations of the most basic animal welfare standards for some 9,000 regulated facilities. Existing USDA databases and records that were once readily available to the public are now hidden from public view. The only available access is by way of unnecessary and time-consuming bureaucratic written FOIA requests, which make it far more challenging for the public to know whether animals are being properly cared for in regulated facilities, including, but not limited to, research labs, pet breeding facilities, zoos, and aquariums.

¹ *Animal Welfare Enforcement Actions*, USDA (last modified Feb. 3, 2017), <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions> (last visited Feb. 6, 2017).

The precipitous removal of these records was also apparently done without any consideration of the detrimental impact it will have on state and local law enforcement, including the administration of several current state laws that are entirely dependent on both business owners and consumers having ready access to the online database that housed inspection reports for roadside zoos, circuses, puppy mills, and research laboratories. *See, e.g.*, Va. Code Ann. § 3.2-6511.1 (restricting pet shops from procuring puppies from sources with certain AWA violations based on USDA inspection reports and enforcement records); N.J. Stat. Ann. § 56:8-95.1 (same); Md. Code Ann., Bus. Reg. § 19-702.1 (same); Ariz. Rev. Stat. Ann. § 44-1799.10 (same).

The suppression of such data also makes it virtually impossible for HSUS and other animal welfare organizations to exercise their First Amendment right to petition the government for changes and revisions to current USDA policies and regulations. *See, e.g., USDA Urged to Improve Care Standards for Puppy Mill Dogs*, HSUS (Sept. 21, 2015), http://www.humanesociety.org/news/press_releases/2015/09/usda-care-standards-pm-dogs-092115.html (citizen petition urging USDA to strengthen AWA regulations related to commercial dog breeding facilities, which was substantiated in part by inspection reports previously available on USDA's website) (last visited Feb. 6, 2017); *Monkey Business at Labs and Roadside Zoos Must End*, HSUS (Apr. 20, 2015), <http://blog.humanesociety.org/wayne/2015/04/hsus-legal-petition-monkeys.html> (citizen petition requesting USDA improve regulatory standards for ensuring that primates in labs, zoos, and exotic pet breeding facilities have their social and cognitive needs cared for, which relied heavily on data now removed from USDA's website) (last visited Feb. 6, 2017).

Without real-time public access to the records and databases previously available on USDA's website, many of the state, local, and industry efforts taken to improve animal welfare over the last decade are now unworkable. Moreover, future efforts to improve state and local enforcement and industry self-policing of Animal Welfare compliance will be severely compromised.

It also appears that the agency's decision violates the FOIA Improvement Act of 2016 and the Electronic Freedom of Information Act Amendments of 1996 ("E-FOIA"), which provide that federal agencies "shall make available for public inspection and copying" by "electronic means" "copies of all records" that have "been released to any person . . . [and which] the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D) & (E); *see also* 7 C.F.R. § 1.4(a)(4). The Amendments further provide that the agency should maintain a publicly available index of all such information. *Id.* USDA is required to make decisions about which records must be made available by electronic means by

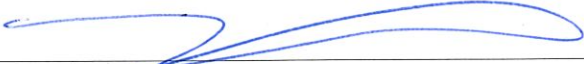
considering "[p]revious experience with similar records," the "characteristics of the records," and the "identity and number of requesters" including the existence of "widespread media, historical, academic, or commercial interest" in the records. 7 C.F.R. § 1.4(a)(4). Accordingly, given the public's previous and repeated requests to access these records, the agency's history of releasing them, and the fact that a presumption of regular access has been incorporated into several state and local laws, we believe that the agency's decision to remove the abovementioned records from its website is unlawful.

As you will recall, the Complaint in *Humane Society of the United States v. United States Department of Agriculture* raised a claim under the E-FOIA amendments concerning electronic access to records, but our client agreed to dismiss that claim, without prejudice to reopening, in exchange for the public access assurances provided in the Stipulation and Order. Unless USDA takes immediate steps to satisfy its obligations under the Court's Order and the FOIA, we intend to take enforcement action and/or reopen the case.

Section D of the Stipulation and Court Order requires that we provide you with notice of any violation, and that upon receipt of such notification, "the parties will engage in good faith discussions in an effort to resolve the dispute. If the parties are unable to do so within thirty days, an appropriate motion may be filed seeking enforcement of the conditions of dismissal." This letter provides notice that HSUS is exercising its rights under Section D, and intends to take further action unless USDA agrees to reconsider this bizarre reversal of the agency's longstanding policy concerning AWA enforcement documentation.

We look forward to discussing this matter with you, and remain willing to work cooperatively towards an amicable resolution of the serious violations outlined in this notice.

Sincerely,



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Enclosure