

# ANIMAL RIGHTS EXTREMISM AS JUSTIFICATION FOR RESTRICTING ACCESS TO GOVERNMENT RECORDS

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## I. THE ANIMAL RIGHTS MOVEMENT AND OPEN RECORDS LAWS

The Freedom of Information Act (FOIA) and state open records laws have long been instrumental in shedding light on issues of public concern. Using these laws, journalists and others have obtained the Central

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Intelligence Agency's "torture memos,"<sup>1</sup> uncovered information about New York's air quality after the 2001 collapse of the World Trade Center,<sup>2</sup> and publicized the Federal Bureau of Investigation (FBI) investigations into feminist groups in the 1970s,<sup>3</sup> among countless other issues. In the animal rights and animal welfare movements, activists have likewise used FOIA and state open records laws for their own ends.<sup>4</sup> This section first discusses the purpose and general structure of FOIA and state open records laws, and then looks at how animal rights and animal welfare activists have used these laws in pursuing their causes.

### *A. The Federal Freedom of Information Act and State Open Records Laws*

FOIA was enacted in 1966<sup>5</sup> with the goal of "ensur[ing] an informed citizenry, vital to the functioning of a democratic society, [was able to] to check against corruption and to hold the governors accountable to the governed."<sup>6</sup> To that end, FOIA imposes a disclosure obligation on each government "agency"—a term that includes departments and agencies within the executive branch but excludes the courts and legislatures.<sup>7</sup> Unless an exemption applies, each agency must "make available to the public" its "records."<sup>8</sup>

1. See Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. TIMES (Aug. 29, 2009), [http://www.nytimes.com/2009/08/30/world/30intel.html?\\_r=0](http://www.nytimes.com/2009/08/30/world/30intel.html?_r=0); see also *Senate Torture Report—FOIA*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/cases/senate-torture-report-foia> (last updated Jan. 21, 2016).

2. Anthony DePalma, *New Docs Detail How Feds Downplayed Ground Zero Health Risks*, PROPUBLICA (Sept. 8, 2011, 3:30 PM), <https://www.propublica.org/article/new-docs-detail-how-feds-downplayed-ground-zero-health-risks>.

3. *Women Activists Called 4-Year Target of Hoover*, N.Y. TIMES (Feb. 7, 1977), <http://www.nytimes.com/1977/02/07/archives/women-activists-called-4year-target-of-hoover.html>.

4. See generally Sarah Lyall, *Animal-Rights Suits Opening Up Research Panels*, N.Y. TIMES (Aug. 22, 1989), <http://www.nytimes.com/1989/08/22/nyregion/animal-rights-suits-opening-up-research-panels.html?pagewanted=all> (discussing the rise of using state open records laws to force universities to disclose details of animal experiments).

5. Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2012)).

6. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (first citing STAFF OF H.R. COMM. ON GOV'T OPERATIONS & STAFF OF S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFO. ACT & AMENDMENTS OF 1974, at 38 (Comm. Print 1975); and then citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975)).

7. 5 U.S.C. § 552(f)(1) (2012) ("'agency' . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.").

8. *Id.* § 552(a); see also *id.* § 552(f)(2)(A)–(B) ("'record' . . . includes any information that would be an agency record subject to the requirements of this section when maintained

FOIA's disclosure obligation does not turn on the particular purpose for which a record is sought, but rather on the nature of record and the record's relationship to FOIA's overarching goal of transparency.<sup>9</sup> In keeping with this goal, the ability to obtain records does not generally depend on who is seeking them; rather, agencies must generally make records available to any person.<sup>10</sup>

FOIA does not, however, authorize disclosure of any and all government records; rather, it contains nine enumerated exemptions.<sup>11</sup> Most relevant here, FOIA's personal privacy exemption exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>12</sup> In determining whether this exemption applies to these types of files, the court uses a balancing test, weighing the interest of protecting an individual's private affairs from unnecessary public scrutiny against the interest of the public in the preservation of the public's right to governmental information.<sup>13</sup> In *U.S. Department of Justice v. Reporters Committee for Freedom of Press*, for instance, the Supreme Court found that the disclosure of FBI rap sheets to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under FOIA's personal privacy exemption.<sup>14</sup>

Yet in line with FOIA's principle of broad disclosure, FOIA's nine exemptions are interpreted narrowly.<sup>15</sup> Accordingly, "[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>16</sup> Further, even if an exemption may

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by an agency in any format, including an electronic format; and any information maintained for an agency by an entity under Government contract, for the purposes of records management."'). With similar goals, in 1972 Congress enacted the Federal Open Meetings Law, which generally opens agency meetings to the public. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. (2012)).

9. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771–72 (1989) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

10. 5 U.S.C. § 552(a)(3)(A); *see also* U.S. Dep't of Justice, *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> (last visited Nov. 4, 2016) ("Generally any person—United States citizen or not—can make a FOIA request.").

11. 5 U.S.C. § 552(b)(1)–(9).

12. *Id.* § 552(b)(6).

13. *Rose v. Dep't of the Air Force*, 495 F.2d 261, 269–70 (2d Cir. 1974) (quoting *Getman v. NLRB*, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971)).

14. 489 U.S. at 751, 780 (quoting 5 U.S.C. § 552(b)(7)(C)).

15. *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001) (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

16. Memorandum on Freedom of Information Act, 3 C.F.R. § 337 (2010) ("All agencies should adopt a presumption in favor of disclosure . . ."). This and other principles in this memorandum, which President Obama issued on his first day in office, have since been codified in FOIA. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538

apply, an agency generally has discretion to disclose requested information.<sup>17</sup> The U.S. Attorney General has thus encouraged the heads of the executive departments and agencies “to make discretionary disclosures of information” and “not withhold records merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.”<sup>18</sup> And President Obama has similarly cautioned against withholding information “merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”<sup>19</sup>

While FOIA does not cover state or local governments, every state in the country now has its own, analogous “open records law.”<sup>20</sup> Like the federal act, these state laws have a presumption in favor of disclosure,<sup>21</sup> though some state open records laws take into consideration the identity of the requestor and whether the request is for commercial, political, or litigation purposes.<sup>22</sup> State open records laws also carve out exemptions to the disclosure requirement, with many including a privacy exemption similar to the exemption under FOIA.<sup>23</sup> But while FOIA has only nine enumerated exceptions,<sup>24</sup> some states have significantly more, with Iowa,

(2016) (to be codified at 5 U.S.C. § 552).

17. Notably, while the government may waive certain exemptions, it cannot waive an individual’s privacy right without the prior written consent of “the individual to whom the record pertains.” 5 U.S.C. § 552a(b) (2012). The interest at issue in the privacy exemption belongs to the individual, rather than the agency. *Amuso v. Dep’t of Justice*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009) (citing *Reporters Comm. For Freedom of Press*, 489 U.S. at 763–65).

18. Memorandum from Eric Holder, Attorney Gen., U.S. Dep’t of Justice, *The Freedom of Information Act 1* (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

19. 3 C.F.R. § 337 (2010).

20. REPORTERS COMM. FOR FREEDOM OF THE PRESS, *FEDERAL OPEN GOVERNMENT GUIDE* 6 (10th ed. 2009), <http://www.rcfp.org/rcfp/orders/docs/HOW2FOI.pdf>; *see also Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/open-government-guide> (compiling links to state open records and open meetings laws). States also have analogous open meetings laws, which generally allow access to government meetings. *See, e.g.*, N.Y. PUB. OFF. LAW. § 103(a) (McKinney Supp. 2016) (“Every meeting of a public body shall be open to the general public . . .”).

21. SOPHIE WINKLER, *NAT’L ASS’N OF CTYS., OPEN RECORDS LAWS: A STATE BY STATE REPORT* 7 (2010); *see, e.g.*, *Papadopolous v. State Bd. of Higher Educ.*, 494 P.2d 260, 265 (Or. Ct. App. 1972) (“Freedom of information is now, by statute, the rule and secrecy is the exception.” (quoting *Wellford v. Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970))).

22. WINKLER, *supra* note 21, at 6. *See also, e.g.*, IND. CODE § 5-14-3-3(f) (Supp. 2015) (“[L]ists of names and addresses . . . [of certain individuals] may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes.”).

23. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1163, n.154–59 (2002) (noting that Pennsylvania’s and Ohio’s open records laws do not contain privacy exemptions).

24. 5 U.S.C. § 552(b)(1)–(9) (2012).

for instance, exempting sixty-seven categories of records.<sup>25</sup>

### *B. Animal Advocates Use Open Records Laws*

Animal rights groups have routinely used FOIA and state open records laws to investigate animal mistreatment, generate public awareness of animal welfare issues, and gather information for lawsuits, among other ends. As early as the 1980s, for instance, activists used FOIA to uncover information on a Cornell University study, in which large doses of barbiturates were given to cats and then abruptly withdrawn; following protests, the study was eventually terminated.<sup>26</sup> Around the same time, animal rights groups and activists similarly used New York's Freedom of Information Law to seek information on animal experiments at Stony Brook University.<sup>27</sup> More recently, the national animal welfare organization Animal Legal Defense Fund (ALDF) has used state open records laws to investigate the New York City Police Department's enforcement of laws relating to New York City's carriage horses<sup>28</sup> and to seek documents on the City of Chicago Animal Care and Control's treatment of sheltered cats and dogs,<sup>29</sup> while the Humane Society of the United States (HSUS) has sought information from animal agriculture facilities.<sup>30</sup>

Among the most common targets of open records requests are research institutions conducting experiments on animals. The National Association for Biomedical Research (NABR), a national, nonprofit organization that advocates for the use of animals in biomedical research,<sup>31</sup> estimates that in 2015 animal rights groups submitted 265 FOIA requests to the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) and 128 requests

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25. IOWA CODE § 22.7 (2015).

26. Colin Norman, *Cat Study Halted Amid Protests*, 242 SCIENCE 1001, 1001–02 (1988).

27. Lyall, *supra* note 4.

28. Shayna Jacobs & Ginger Adams Otis, *Judge Orders NYPD to Release Records Relating to Horse Carriage Industry*, N.Y. DAILY NEWS (Apr. 28, 2014, 12:47 PM), <http://www.nydailynews.com/new-york/nypd-ordered-release-records-horse-carriages-article-1.1771594>; *see also* Animal Legal Def. Fund v. N.Y. Police Dep't, No. 101655/2013 (N.Y. Sup. Ct. N.Y. Cty. Apr. 29, 2014) (ordering disclosure of NYPD documents).

29. *Chicago Animal Control Sued for Withholding Records*, ANIMAL LEGAL DEF. FUND (Jan. 23, 2014), <http://aldf.org/press-room/press-releases/chicago-animal-control-sued-for-withholding-records/>.

30. *See, e.g.*, Humane Soc'y of U.S. v. Empire State Dev. Corp., 863 N.Y.S. 2d 107, 112 (App. Div. 2008) (ordering foie gras producer to produce redacted documents regarding finances and operating history).

31. *About NABR*, NAT'L ASS'N FOR BIOMEDICAL RES., <http://www.nabr.org/about/> (last visited Nov. 4, 2016).

to the National Institute of Health.<sup>32</sup>

The significant number of records requests directed at research institutions is not surprising. For one, unlike many private institutions that use animals, research institutions' records *can* often be subject to requests. In particular, under the Animal Welfare Act, if a research facility purchases or transports live animals in commerce or obtains public funding, it is required to submit an annual report to APHIS providing details about the facility's animal use.<sup>33</sup> At the state level, many research institutions at state-funded universities likewise have disclosure obligations.<sup>34</sup> For instance, in *Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York*, the New York Court of Appeals found that the State University of New York (SUNY) qualified as an "agency" under New York's Freedom of Information Law, because it was a "governmental entity performing a governmental or proprietary function for the state";<sup>35</sup> accordingly, records regarding the sourcing of dogs and cats from a SUNY research facility were subject to disclosure.<sup>36</sup>

In addition, open records laws provide one of the few ways for the public to get insight into animal treatment in labs, as research laboratories are often located in windowless rooms<sup>37</sup> or basements,<sup>38</sup> and kept

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32. NAT'L ASS'N FOR BIOMEDICAL RESEARCH, FY15: ANIMAL RIGHTS FOIA REQUESTS (2016), <http://www.nabr.org/wp-content/uploads/2016/05/FY2015-FOIA-Report-Final.pdf>; see generally Associated Press, *Activists Seek Animal Testing Records from Texas A&M*, KSL.COM (July 20, 2015, 2:21 PM), <https://www.ksl.com/?sid=35584869> (discussing how among more notable recent requests, activists have used freedom of information laws to uncover documents relating to animal experiments being conducted at Texas A&M).

33. 9 C.F.R. § 2.36 (2016).

34. See generally *Citizens for Alts. to Animal Labs, Inc. v. Bd. of Trs. of the State Univ. of N.Y.*, 703 N.E.2d 1218 (N.Y. 1998) (discussing how the State University of New York as a state level research institution was subjected to disclosure policies regarding their facility's animal use).

35. *Id.* at 1220 (citing *Encore Coll. Bookstores, Inc. v. Auxiliary Servs. Corp.*, 663 N.E.2d 302, 306 (N.Y. 1995)).

36. *Id.* at 1221 (citing *Encore Coll. Bookstores, Inc.*, 663 N.E.2d at 302). But see *Students for Animals v. Rector of the University of Virginia*, which found that the University of Virginia's Animal Research Committee was not subject to State's open meetings law, as "organizations" subject to the law did not include "subordinate, dependent groupings of individuals who are charged with carrying out a part of the mission of a parent body." 12 Va. Cir. 247, 248-49 (1988); *Stoll v. N.Y. State Coll. of Veterinary Med. at Cornell Univ.*, 723 N.E.2d 65, 69 (N.Y. 1999) (finding that New York State College of Veterinary Medicine at Cornell, a "statutory college," was not an "agency" under New York's Freedom of Information Law).

37. PHYSICIANS COMM. FOR RESPONSIBLE MED., PROBLEMS ASSOCIATED WITH ANIMAL EXPERIMENTATION, <http://www.pcrm.org/sites/default/files/pdfs/research/research/Problems-Associated-with-Animal-Experimentation.pdf>.

38. Ashley P. Taylor, *Lab Animals Drowned in Basements During This Hurricane—And*

locked.<sup>39</sup>

## II. ANIMAL RIGHTS EXTREMISM AS JUSTIFICATION FOR CRIMINAL LAWS

While most animal welfare and animal rights activists make their case lawfully, using legal tools like FOIA and state open records laws, a fringe group of so-called animal “extremists” have employed illegal tactics to further their ends.<sup>40</sup> This section discusses how, during the past few decades, the threat of such tactics has been used to justify federal and state criminal laws against such “extremists.”

### A. The “Radical Fringe Element” of the Animal Rights Movement

Human concern with animal suffering has long been associated with a broader principle of nonviolence. Jainism, one of India’s oldest religions, prohibits the killing of animals as part of a broader religious duty of *ahimsa*, or nonviolence.<sup>41</sup> Pythagoras, one of the most prominent early advocates of vegetarianism,<sup>42</sup> saw nonviolence toward animals as a hallmark of an earlier time when “[p]eace filled the world”; it was only the “futile brain [that] / [e]nviied the lions’ diet” who “paved the way for crime.”<sup>43</sup>

The principle of nonviolence remains at the core of today’s animal welfare and animal rights movements.<sup>44</sup> Not surprisingly, People for the

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*It’s Happened Before*, DISCOVER MAG.: 80BEATS (Nov. 2, 2012), <http://blogs.discovermagazine.com/80beats/2012/11/02/lab-animals-drowned-in-basements-during-this-hurricane-and-its-happened-before/#.V4KNTfkrKHs>.

39. *Laboratory Animal Facilities*, PENNSTATE ANIMAL RESOURCE PROGRAM, <http://www.research.psu.edu/arp/animal-facilities.html> (last visited Nov. 4, 2016).

40. *Animal Rights Enterprise Terrorism Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Brett McIntosh, Deputy Assistant Att’y Gen., United States Dep’t of Justice) [hereinafter *2006 AETA Hearing*].

41. Christopher Chapple, *Nonviolence to Animals in Buddhism and Jainism*, in INNER PEACE, WORLD PEACE: ESSAYS ON BUDDHISM AND NONVIOLENCE 49–51 (Kenneth Kraft ed., 1992). More recently, the animal rights lawyer and scholar Gary Francione has written that veganism and the principle of *ahimsa* “are inseparable.” See, e.g., Gary L. Francione, *Ahimsa and Veganism*, JAIN DIGEST, Winter 2009, at 9, 10, reprinted in ANIMAL RTS: THE ABOLITIONIST APPROACH, <http://www.abolitionistapproach.com/media/pdf/Ahimsa.pdf>.

42. Ovid, at least, describes Pythagoras as the “first to ban / As food for men the flesh of living things.” OVID, *METAMORPHOSES* 354 (Oxford University Press ed., A.D. Melville trans. 1986) (c. 8 B.C.E.).

43. *Id.* at 355.

44. As the animal rights philosopher Tom Regan has stated, the animal rights movement is part of “the human rights movement. The same philosophy that insists upon and defends the rights of nonhuman animals also insists upon and defends the rights of human beings.” Tom Regan, *The Philosophy of Animal Rights*, CULTURE & ANIMALS FOUND., <http://www.cultureandanimals.org/pop1.html> (last visited Nov. 4, 2016).

Ethical Treatment of Animals (PETA), perhaps the most well-known animal rights organization, “maintains a creed of nonviolence and does not advocate actions in which anyone, human or nonhuman, is injured.”<sup>45</sup> Similarly, the HSUS, the nation’s largest animal protection organization,<sup>46</sup> decrees on its website that violence “undermines the core ethic we espouse” and does “fundamental damage to the credibility of the humane movement.”<sup>47</sup>

Yet in the early 1970s a small “animal liberation” movement within the animal rights community emerged—a movement that, though rarely violent in the traditional sense of the word, viewed illegal direct action tactics as “the only effective means to lead to the end of animal exploitation.”<sup>48</sup> The most prominent of these animal liberation groups, the Animal Liberation Front (ALF), was founded in Britain in the mid-1970s with the stated aim of pursuing illegal actions and economic sabotage against industries who profit from animal exploitation.<sup>49</sup> The ALF estimates that, in the three decades following its first United States action in 1979,<sup>50</sup> it and similar groups engaged in around 1353 direct actions in the United States, against research labs, pet stores, farms, and other businesses that use animals.<sup>51</sup>

Leaders within the animal rights movement have criticized such

45. *Does PETA Advocate the Use of Violence?*, PEOPLE FOR ETHICAL TREATMENT ANIMALS, <http://www.peta.org/about-peta/faq/does-peta-advocate-the-use-of-violence/> (last visited Nov. 4, 2016).

46. *About Us*, HUMANE SOCIETY U.S., [http://www.humanesociety.org/about/?credit=web\\_id93480558](http://www.humanesociety.org/about/?credit=web_id93480558) (last visited Nov. 4, 2016).

47. *Statement on Nonviolence*, HUMANE SOCIETY U.S., [http://www.humanesociety.org/about/policy\\_statements/statement\\_on\\_nonviolence.html](http://www.humanesociety.org/about/policy_statements/statement_on_nonviolence.html) (last visited Nov. 4, 2016) (“Any tactic or strategy involving violence toward people undermines the core ethic we espouse. Such tactics are ethically wrong and do fundamental damage to the credibility of the humane movement. Since The HSUS was founded in 1954, we have never engaged in or supported any form of violence done in the name of protecting animals.”).

48. *History of the Animal Liberation Front*, ANIMAL LIBERATION FRONT, [http://www.animalliberationfront.com/ALFront/Premise\\_History/ALF\\_History.htm](http://www.animalliberationfront.com/ALFront/Premise_History/ALF_History.htm) (last visited Nov. 4, 2016); see also DARA LOVITZ, MUZZLING A MOVEMENT: THE EFFECTS OF ANTI-TERRORISM LAW, MONEY, AND POLITICS ON ANIMAL ACTIVISM 45 (2010). I am indebted to Ms. Lovitz’s book for its discussion of the animal liberation movement and for sources in this section.

49. *History of the Animal Liberation Front*, *supra* note 48.

50. The first known U.S.-based ALF action was the 1979 release of a cat, two dogs, and two guinea pigs at New York University Medical Center. PETER DANIEL YOUNG, ANIMAL LIBERATION FRONT: COMPLETE DIARY OF ACTIONS, THE FIRST 30 YEARS, at x (2010); see also Am. Psychological Soc’y, *Report to Congress on the Extent and Effects of Domestic and International Terrorism in Animal Enterprises*, 36 PSYCHOLOGIST 207, 252 & 258 n.16 (1993).

51. YOUNG, *supra* note 50, at 1.



actions as not just theoretically unsound but also practically ineffective.<sup>52</sup> And even critics of the movement have largely acknowledged animal liberationists as a “fringe elements” within the movement.<sup>53</sup> Further, despite having been called by the FBI as one of today’s “most serious domestic [terrorism] threats,”<sup>54</sup> these groups expressly focus their actions on property damage, not violence against persons.<sup>55</sup> Thus, in a 2005 Senate hearing on animal rights extremism, Senator Frank Lautenberg of New Jersey cautioned that it was important to “keep things in perspective”: while “the Oklahoma City bombing killed 168 people[,] [t]he attacks of 9/11 killed 3,000,” and “[s]ince 1993, there have been at least 5 fatal attacks on doctors who performed legal abortions. . . . To date, not a single incident of so-called environmental terrorism has killed anyone.”<sup>56</sup>

Moreover, in recent years animal liberation groups have been responsible for just a handful of actions.<sup>57</sup>

### *B. Criminal Laws Emerge, Targeting the Radical Fringe*

As the animal liberation movement developed, a series of federal

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52. See GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION?* 82 (2010). As Francione notes, “If you destroy five slaughterhouses, and the demand for meat remains the same, the demand will be met, and new slaughterhouses will be built (or existing ones expanded).” *Id.* at 82–83.

53. Matthew Harwood, *When Animal Rights Activists Attack*, *GUARDIAN* (Mar. 13, 2009, 4:00 PM), <https://www.theguardian.com/commentisfree/cifamerica/2009/mar/13/california-animal-research-violence>.

54. *Eco-Terrorism Specifically Examining the Earth Liberation Front and the Animal Liberation Front: Hearing Before the S. Comm. on Environment and Public Works*, 109th Cong. 11 (2005) (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation) [hereinafter *Eco-Terrorism Hearing*].

55. Notably, the ALF includes as one of its four guidelines “to take all necessary precautions against harming any animal, human and non-human.” *About ALF: The ALF Credo and Guidelines*, ANIMAL LIBERATION FRONT, [http://www.animalliberationfront.com/ALFront/alf\\_credo.htm](http://www.animalliberationfront.com/ALFront/alf_credo.htm) (last visited Nov. 4, 2016). The FBI likewise has acknowledged that animal rights extremists do not, as a general matter, carry out violent attacks against people. *What are Known Violent Extremist Groups? Domestic Extremist Ideologies: Animal Rights Extremists and Environmental Extremists*, FEDERAL BUREAU OF INVESTIGATION, <https://cve.fbi.gov/whatare/?state=domestic> (follow “Animal Rights and Environmental Extremists” hyperlink) (last visited Nov. 4, 2016).

56. See *Eco-Terrorism Hearing*, *supra* note 54, at 6–7 (statement of Sen. Frank Lautenberg, Member, S. Comm. on Environment and Public Works).

57. In 2014 the ALF claimed responsibility for fewer than twenty incidents in the country. *Actions Reported to Bite Back*, ANIMAL LIBERATION FRONT, <http://www.animalliberationfront.com/ALFront/Actions-USA/BitebackReports2014.htm> (last visited Nov. 4, 2016). For that same year, the FBI estimated over 1.1 million violent crimes. *FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2014: VIOLENT CRIME* (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime/violent-crime/violent-crime.pdf>.

criminal laws directed at animal extremists were introduced.<sup>58</sup> In 1989 Representative Charles Stenholm introduced to Congress the Farm Animal and Research Facilities Protection Act (FARFPA).<sup>59</sup> Targeting the “minority on the fringe of [the] animal rights movement,”<sup>60</sup> the bill sought to impose fines and/or imprisonment on persons who damaged or destroyed an animal facility or any animal or property in or on an “animal facility” without the owner’s consent and with the intent to disrupt or damage the enterprise conducted at the facility.<sup>61</sup>

While the original bill died in committee,<sup>62</sup> Senator Heflin later introduced a similar bill, which passed in August 1992 as the Animal Enterprise Protection Act of 1992 (AEPA).<sup>63</sup> AEPA created a crime of “animal enterprise terrorism”: a federal offense, punishable by fine and/or imprisonment for up to one year, to intentionally cause physical disruption to the functioning of an animal enterprise<sup>64</sup> by intentionally stealing, damaging, or causing the loss of, any property used by the animal enterprise resulting in damages over ten thousand dollars.<sup>65</sup> Like

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58. See generally *Animal Rights, Activism vs. Criminality: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 74 (2004) (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation) [hereinafter *Activism vs. Criminality*] (discussing the possible use of the Animal Enterprise Terrorism Act for prosecution of people involved in animal rights extremism).

59. *H.R. 3270 (101st): Farm Animal and Research Facilities Protection Act of 1990*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/101/hr3270> (last visited Nov. 4, 2016).

60. *Farm Animal and Research Facilities Protection Act of 1989: Hearing on H.R. 3270 Before the Subcomm. on Dep’t Operations, Research, and Foreign Agric. of the H. Comm. on Agric.*, 101st Cong. 22 (1990) (statement of Rep. Charles W. Stenholm, Member, Subcomm. on Dep’t Operations, Research, and Foreign Agric. of the Comm. on Agric.).

61. Farm Animal and Research Facilities Protection Act of 1989, H.R. 3270, 101st Cong. sec. 1, §§ 1484(a)–(b), 1485(a)(1)–(2) (1989).

62. *H.R. 3270 (101st): Farm Animal and Research Facilities Protection Act of 1990*, *supra* note 59.

63. *S. 544 (102nd): Animal Enterprise Protection Act of 1992*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/102/s544> (last visited Nov. 4, 2016). In 2002, AEPA was amended to heighten criminal penalties for animal enterprise terrorism. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, sec. 336, § 43(a), 116 Stat. 594, 681 (codified as amended at 18 U.S.C. § 43(a) (2012)).

64. Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, sec. 2, § 43(a)(2), (b)(1)–(2), 106 Stat. 928, 928. AEPA defined “animal enterprise” as “(A) a commercial or academic enterprise that uses animals for food or fiber production, agriculture, research, or testing; (B) a zoo, aquarium, circus, rodeo, or lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences.” *Id.* at sec. 2, § 43(d)(1)(A)–(C).

65. *Id.* at sec. 2, § 43(a)(1)(A), (b)(2)(A). AEPA also provided that a violator of the law could be required to make restitution “for the reasonable cost of repeating any experimentation that was interrupted or invalidated as a result of the offense,” as well as “the loss of food production or farm income reasonably attributable to the offense.” *Id.* at sec. 2, §

FARFPA before it, AEPA was a criminal law aimed at criminal actors; it targeted “expressions of extremism on behalf of animal rights” from a “radical fringe element,”<sup>66</sup> rather than acts of the animal rights community generally.<sup>67</sup>

Over a decade after AEPA was passed, animal rights extremists remained a concern of federal lawmakers; one to be addressed by criminal laws.<sup>68</sup> In fact, a 2004 Senate hearing expressly sought to delineate “legitimate animal rights activism” from “fringe activists” engaged in illegal acts.<sup>69</sup> Thus, while one U.S. Attorney testified about the lack of federal criminal statutes to address animal extremism, he cautioned that animal advocates using lawful means “should not be confused with individuals involved in animal enterprise terrorism.”<sup>70</sup> An FBI official at the hearing likewise advocated responding to animal extremism through heightened criminal penalties.<sup>71</sup> Moreover, while noting that prior to attacks the ALF often “obtain[ed] proprietary or confidential information about intended victim companies,” he stated that the ALF did so “through theft or from sympathetic insiders.”<sup>72</sup> FOIA and open records laws were not discussed.<sup>73</sup>

In 2006 Congress passed the Animal Enterprise Terrorism Act

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43(c)(1)–(2). Finally, AEPA imposed up to ten years of imprisonment on persons causing serious bodily injury and up to life imprisonment on persons causing death. *Id.* at sec. 2, § 43(b)(1)–(2).

66. PATTI STRAND, REPORT TO CONGRESS ON THE EXTENT AND EFFECTS OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES 2, 4 (1996).

67. Indeed, AEPA specifically provided for “any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise.” Animal Enterprise Protection Act sec. 2, § 43(d)(3)(B).

68. See *Activism vs. Criminality*, *supra* note 58, at 1 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary).

69. *Id.* at 1–2 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary).

70. *Id.* at 132, 134 (statement of McGregor W. Scott, U.S. Attorney, E. Dist. of Cal., Sacramento, Cal.).

71. *Id.* at 4 (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation).

72. *Id.* at 72 (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation); see also *Eco-Terrorism Hearing*, *supra* note 54, at 40 (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation) (“[T]he existing statutes may need refinements to make them more applicable to current animal rights/eco-extremist actions and to give law enforcement more effective means to bring criminals to justice.”).

73. See *Activism vs. Criminality*, *supra* note 58.

(AETA),<sup>74</sup> which broadened AEPA<sup>75</sup> and strengthened its criminal penalties.<sup>76</sup> Testimony supporting the law similarly noted the need for prosecuting “animal rights extremists,” while acknowledging that such extremists comprised only a minority of the animal rights movement.<sup>77</sup>

Outside of the federal sphere, more than half the states have also enacted criminal laws targeting “animal enterprise terrorism” or similar acts.<sup>78</sup> For instance, Georgia’s Farm Animal, Crop and Research Facilities Protection Act provides that a person commits a criminal offense if

without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.<sup>79</sup>

Other state laws—often called “ag gag” laws<sup>80</sup> or “whistleblower suppression” laws—subject a person to penalties if they enter an animal facility without the owner’s consent.<sup>81</sup> In North Dakota, for instance, if “without the effective consent of the owner,” a person enters “an animal facility and use[s] or attempt[s] to use a camera, video recorder, or any other video or audio recording equipment,” they are subject to a Class C

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74. Animal Enterprise Terrorism Act, Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified as amended at 18 U.S.C. § 43 (2012)). Notably, in the fifteen years from AEPA’s passage in 1992 until it was amended by the AETA in 2006, only two known cases are known to have been brought under the statute: *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009); *United States v. Young*, No. 98-CR-91-X-1, 2005 U.S. Dist. LEXIS 37146 (W.D. Wis. Aug. 30, 2005).

75. While AEPA penalized any person who intentionally causes “physical disruption” to an animal enterprise, AETA deemed it a crime for any person to “intentionally damage[] or cause[] the loss of not just any real or personal property . . . used by an animal enterprise” but also of “any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.” *Compare* Animal Enterprise Protection Act sec. 2, § 43(d)(3)(B), *with* Animal Enterprise Terrorism Act sec. 2, § 43(a)(2)(A).

76. Animal Enterprise Terrorism Act sec. 2, § 43(b).

77. *See 2006 AETA Hearing*, *supra* note 40, at 5–6 (statement of Brett McIntosh, Deputy Assistant Att’y Gen., United States Dep’t of Justice). But see *2006 AETA Hearing*, *supra* note 40, at 16 (statement of Michele Basso, Assistant Professor, Dep’t. of Physiology, Univ. of Wis.), discussed below.

78. LOVITZ, *supra* note 48, at app. C (State Chart of Laws Protective of Animal Enterprises).

79. GA. CODE ANN. § 4-11-32(a)(1) (2013).

80. *See, e.g.*, Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES: OPINIONATOR (Apr. 26, 2011, 9:29 PM), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

81. *See* GA. CODE ANN. § 4-11-32(a)(1); N.D. CENT. CODE §12.1-21.1-.03 (2012).

felony.<sup>82</sup> As of March 2016, such bills have been introduced in around half the states, and passed in seven.<sup>83</sup>

### III. THE THREAT OF ANIMAL RIGHTS EXTREMISM IS USED TO RESTRICT ACCESS TO GOVERNMENT RECORDS

As noted above, the threat of animal rights extremism has been used to justify federal and state criminal laws targeting these extremists.<sup>84</sup> But this threat has also been used to justify restrictions on the broader public's right to access records relating to animals.<sup>85</sup> This section first examines the perception of open records laws as increasing the risk of animal rights terrorism. It then discusses two state laws that specifically limit access to certain animal-related records and that were expressly introduced to address the threat of animal rights extremism. Finally, it examines how federal and state courts have both viewed and weighed the public's right to animal-related government records against the risk that disclosing records poses a public safety threat.

#### A. Open Records Laws and the Threat of Animal Rights Extremists

Federal lawmakers have largely drawn a line between the illegal tactics used by those on the fringe of the animal rights movement and the lawful means used by the majority.<sup>86</sup> Yet other groups, including some state lawmakers, have viewed the legal tool of open records laws as closely linked to—and sometimes a precursor to—such illegal tactics.<sup>87</sup>

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82. N.D. CENT. CODE §§ 12.1-21.1-.02(6), 12.1-21.1-.04.

83. See, e.g., *Ag-Gag Legislation by State*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.aspc.org/animal-protection/public-policy/ag-gag-legislation-state> (last visited Nov. 4, 2016).

84. Notably, such laws—and their alleged justifications—have garnered significant criticism from a variety of fronts and on various grounds. See, e.g., Dara Lovitz, *Animal Lovers and Tree Huggers Are the New Cold-Blood Criminals?: Examining the Flaws of Ecoterrorism Bills*, 3 J. ANIMAL L. 79 (2007); Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1347 (2015); Cody Carlson, *How State Ag-Gag Laws Could Stop Animal-Cruelty Whistleblowers*, ATLANTIC (Mar. 25, 2013), <http://www.theatlantic.com/politics/archive/2013/03/how-state-ag-gag-laws-could-stop-animal-cruelty-whistleblowers/273962/>.

85. See Lovitz, *supra* note 84, at 84–85.

86. See generally *Activism vs. Criminality*, *supra* note 58, at 1 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary) (“[E]xamine the issue of when legitimate animal rights activism crosses over into illegal criminal acts.”).

87. For an overview of this issue in North Carolina, see Ryan C. Fairchild, *Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2133, 2144 (2013). Fairchild explains, “Animal researchers are another group often targeted by public records requesters, to the point that the researchers' trade organization has released documents specifically to educate researchers on how to respond to such requests.” *Id.* at 2130, n.70.

This perception has been longstanding, particularly among those conducting research on animals.<sup>88</sup> As animal rights activists in the 1980s sought access to research records from the State University of New York at Stony Brook, for instance, the president of the university noted that “[t]here are segments of the animal-rights movement that are truly frightening to us. We’re very concerned about giving access to these extremist groups that would increase the likelihood that our faculty would be harassed, or the fruits of their work would be destroyed.”<sup>89</sup> According to the president, “radical animal-rights demonstrators ha[d] issued death threats and harassed researchers, based on information obtained at animal-care committee meetings.”<sup>90</sup> Furthermore, at the 2006 congressional hearing regarding AETA, a researcher at the University of Wisconsin Madison Medical School similarly drew a connection between animal rights extremists and the wider availability of public information.<sup>91</sup> According to her testimony, “follow[ing] a Freedom of Information Act request for [her] animal use,” her home address had been “circulating through an animal rights chat group,” and animal rights activists had then allegedly engaged in harassing tactics.<sup>92</sup>

There remains today a common view that “[a]t a minimum, the release of the names and addresses of individual [researchers] increase[s] the risk that they will be used by groups intent on harassment, consequently increasing the hazards to [researchers] and their families.”<sup>93</sup> The professional organization Society for Neuroscience, for instance, notes that “animal rights activists are increasingly using public information requests under the federal FOIA and state open records laws to identify” researchers and posting these researchers’ names to websites that “often encourage harassment of [principal investigators] and sometimes facilitate or suggest the use of violence.”<sup>94</sup> Similarly, the Federation of American Societies for Experimental Biology warns that animal rights extremists can “use freedom of information requests to obtain intelligence on an organization’s animal research activities for

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88. See generally Lyall, *supra* note 4 (discussing the rise of using state open records laws to force universities to disclose details of animal experiments).

89. *Id.*

90. *Id.*

91. 2006 AETA Hearing, *supra* note 40, at 15 (statement of Michele Basso, Assistant Professor, Dep’t. of Physiology, Univ. of Wis.).

92. *Id.* at 14–15.

93. Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public’s Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417, 453–54 (1994).

94. NAT’L ASS’N FOR BIOMEDICAL RESEARCH, RESPONDING TO FOIA REQUESTS: FACTS AND RESOURCES 1.

future targeted action.”<sup>95</sup>

The animal research advocacy group NABR (discussed above) likewise cautions that information obtained through open records requests is used “to request baseless investigations, seek criminal charges for alleged animal cruelty and ask for enforcement actions to be taken for alleged issues involving noncompliance” and to “encourage harassment.”<sup>96</sup> NABR has even issued a guide for research institutions and researchers to address “the growing use of [FOIA] requests by animal rights extremists who increasingly use FOIA-sourced information to target scientists for harassment or violence.”<sup>97</sup> While warning that researchers should always comply with the law, the guide details how to identify requests that may come from animal advocates, along with the types of documents often sought by activists.<sup>98</sup>

### *B. Oregon and Utah Restrict Access to Certain Animal Research Records Under Their Open Records Laws*

Citing the risk from animal rights extremists, two states have introduced, and passed, amendments to their open records laws that exempt certain animal research-related records from disclosure.<sup>99</sup>

#### *1. Oregon’s Public Records Law Exemption for Animal Researchers*

Oregon Health & Science University (OHSU) is home to the Oregon National Primate Research Center (ORPRC), one of seven federally-funded National Primate Research Centers in the United States.<sup>100</sup> The ORPRC houses nearly 5000 macaques and baboons<sup>101</sup> to conduct

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95. FED’N OF AM. SOC’YS FOR EXPERIMENTAL BIOLOGY, THE THREAT OF EXTREMISM TO MEDICAL RESEARCH 10 (2010), <https://www.faseb.org/Portals/2/PDFs/opa/2014/Animal%20Extremism%20Report%20Final.pdf>.

96. *NABR Presents Inaugural Ranking of State Open Records Laws*, NAT’L ASS’N FOR BIOMEDICAL RES. (Nov. 18, 2014), <http://www.nabr.org/nabr-presents-inaugural-ranking-of-state-open-records-laws/>.

97. Press Release, Nat’l Ass’n for Biomedical Research et al., Biomedical Research Groups Provide Science Community with Guide on Complying with Information Requests (Jan. 14, 2010), <http://www.faseb.org/portals/2/Content/FOIA%20Guide%20joint%20press%20release.1.14.10.pdf>.

98. See RESPONDING TO FOIA REQUESTS: FACTS AND RESOURCES, *supra* note 94, at 3–4.

99. NAT’L ASS’N FOR BIOMEDICAL RESEARCH, FOIA IN YOUR STATE, at ii, 96, 117 (2014).

100. *About ONPRC*, OR. HEALTH & SCI. U., <http://www.ohsu.edu/xd/research/centers-institutes/onprc/about/index.cfm> (last visited Nov. 4, 2016).

101. *Our Monkeys*, OR. HEALTH & SCI. U., <http://www.ohsu.edu/xd/research/centers-institutes/onprc/caring/monkeys.cfm> (last visited Nov. 4, 2016).

research on diseases, neuroscience and other issues.<sup>102</sup> In 2001, OHSU's Hillsboro unit was accused of various animal abuses, though after an "exhaustive on-site review" the USDA found no evidence for these allegations.<sup>103</sup>

Two years later, following extensive protests of the university's animal testing,<sup>104</sup> Oregon introduced a law exempting from Oregon's Public Records Law "[t]he name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science University that is conducted using animals other than rodents."<sup>105</sup> The bill passed, despite some opposition.<sup>106</sup> In particular, one State Senator opposing the bill noted that the exemption was unique in "allow[ing] the names of individuals to be exempted from public records disclosure";<sup>107</sup> indeed, police officers could not withhold their names from disclosure.<sup>108</sup> Notably too, Oregon law already had an exemption protecting individuals' home addresses, personal telephone numbers, and email addresses.<sup>109</sup>

While the bill was introduced as a temporary measure,<sup>110</sup> the bill's sunset period was subsequently extended, and eventually made permanent,<sup>111</sup> based on the alleged continued threat from animal rights

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102. *Science at ONPRC*, OR. HEALTH & SCI. U., <http://www.ohsu.edu/xd/research/centers-institutes/onprc/scientific-discovery/index.cfm> (last visited Nov. 4, 2016).

103. *USDA Clears Oregon Regional Primate Research Center*, OR. HEALTH & SCI. U. (Jan. 12, 2001), [http://www.ohsu.edu/xd/about/news\\_events/news/2001/01-12-usda-clears-oregon-regio.cfm](http://www.ohsu.edu/xd/about/news_events/news/2001/01-12-usda-clears-oregon-regio.cfm).

104. *Lawyers at OHSU*, WILLAMETTE WEEK (May 27, 2003), [http://www.wweek.com/portland/article-2105-lawyers\\_at\\_ohsu.html](http://www.wweek.com/portland/article-2105-lawyers_at_ohsu.html).

105. OR. REV. STAT. § 192.501(30) (2015).

106. H. JOURNAL, 72nd Leg. Assemb., Reg. Sess. 114 (Or. 2003).

107. *Id.*

108. *Id.*

109. OR. REV. STAT. § 192.445(1) (2015) ("An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, [or] personal telephone number . . . of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, [or] personal telephone number . . . remains available for public inspection.")

110. *See* S. 262, 73rd Leg. Assemb., Reg. Sess. (Or. 2005).

111. *See* S. 386, 78th Leg. Assemb., Reg. Sess. (Or. 2015); H. COMM. ON GEN. GOV'T & CONSUMER PROT., STAFF MEASURE SUMMARY, S. 392, 76th Leg. Assemb., Reg. Sess. (Or. 2011) [hereinafter S. 392 STAFF MEASURE SUMMARY]; S. COMM. ON RULES, STAFF MEASURE SUMMARY, H.R. 3094 B, 75th Leg. Assemb., Reg. Sess. (Or. 2009) [hereinafter H.R. 3094 B STAFF MEASURE SUMMARY].



extremists.<sup>112</sup> In support of the 2005 bill, for instance, the provost of OHSU stated that the bill was “aimed at protecting researchers from harassment by animal-rights advocates,”<sup>113</sup> whose “[a]ctivism ha[d] escalated in recent years to include intimidation and violence against scientists and their families.”<sup>114</sup> When the sunset provision was further extended, the bill summary similarly noted that the bill was intended to protect OHSU researchers conducting medical research on animals, who “face serious threats from extreme animal rights groups.”<sup>115</sup> According to the summary, there had been “over 50 separate incidents of home harassment targeted at these researchers.”<sup>116</sup> The 2011 bill was justified on similar grounds, because “[t]he university asserts that extremists seek the names of individual researchers in order to frighten them at their homes.”<sup>117</sup>

Notably, the American Civil Liberties Union (ACLU) of Oregon repeatedly opposed these bills, though ultimately unsuccessfully.<sup>118</sup>

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112. H.R. 3094 B STAFF MEASURE SUMMARY, *supra* note 111.

113. James Mayer, *Political Notebook: Bill Extends Protection of Animal Researchers*, OREGONIAN, Feb. 22, 2005, at B04, reprinted in ACCESS WORLD NEWS, <http://infoweb.newsbank.com/resources/doc/print?p=AWNB&docrefs=news/1087267DCA5860C1> (last visited Nov. 4, 2016).

114. *Id.*

115. H.R. 3094 B STAFF MEASURE SUMMARY, *supra* note 111.

116. *Id.*

117. S. 392 STAFF MEASURE SUMMARY, *supra* note 111.

118. See Memorandum from David Fidanque & Andrea R. Meyer, ACLU of Or., to Or. State Senate (June 13, 2013), <http://archive.acluor.org/legislature/2003legislature/HB3093B-Engstatementfinal.htm>, which notes that the bill would “restrict public access to a broad range of information related to animal research at Oregon Health & Sciences University even” if that information has no relation to public safety. See also *Hearing on H.R. 3094 Before the S. Judiciary Comm.*, 75th Leg. Assemb., Reg. Sess. (Or. 2009) (written testimony of Andrea Meyer, Legislative Dir., ACLU of Or.), [http://www.aclu-or.org/sites/default/files/Testimony onOHSUPublicRecordsHB3094.pdf](http://www.aclu-or.org/sites/default/files/Testimony%20onOHSUPublicRecordsHB3094.pdf); *Hearing on S. 262 Before the S. Judiciary Comm.*, 73d Leg. Assemb., Reg. Sess. (Or. 2005) (written testimony of Andrea Meyer, Legislative Dir., ACLU of Or.) [hereinafter *Hearing on S. 262*], [http://archive.acluor.org/archive/Leg\\_2005/pdf/Leg\\_2005\\_sb262\\_t.pdf](http://archive.acluor.org/archive/Leg_2005/pdf/Leg_2005_sb262_t.pdf) (“OHSU continues to provide information about its own researchers on its web site, including individual photographs, allowing people not only to identify the research activities but the researchers themselves.”); Fact Sheet, Vote “NO” on SB 392, ACLU of Or., [http://www.aclu-or.org/sites/default/files/ACLU\\_OR\\_FS\\_SB392.pdf](http://www.aclu-or.org/sites/default/files/ACLU_OR_FS_SB392.pdf). Notably though, when the bill was made permanent in 2015, a representative from the ACLU of Oregon simply commented, “We’re still not crazy about it . . . . But it appears [OHSU is] being more responsive to the watchdogs.” Aaron Mesh, *OHSU Poised to Get Permanent Exemption to Records Law for Animal Researcher*, WILLAMETTE WEEK (Mar. 11, 2015), <http://www.wweek.com/portland/blog-32935-ohsu-poised-to-get-permanent-exemption-to-records-law-for-animal-researchers.html>.

## 2. *Utah's Access to Research Workers' Personal Information Bill*

Five years after the Oregon bill was introduced, in March 2008, Utah State Senator Gregory S. Bell introduced the Access to Research Workers' Personal Information Bill.<sup>119</sup> Like the Oregon bill, the Utah bill amended the state's open records law—the Government Records Access and Management Act (GRAMA)—to exempt that “the name, home address, work addresses, and telephone numbers of an individual that is engaged in, or that provides goods or services for, medical or scientific research that is (a) conducted within the state system of higher education, . . . and (b) conducted using animals.”<sup>120</sup> The bill became effective in May 2008.<sup>121</sup>

Also like the Oregon bill, the exemption was deemed “necessary to keep the addresses and phone numbers of animal researchers private for their own personal safety,”<sup>122</sup> due to a “very disturbing trend” in which animal rights activists had “become very aggressive” in “harassing” animal researchers.<sup>123</sup> Yet, the actual connection between the records request and the harassment was unclear.<sup>124</sup> For instance, according to a representative of the activist group Utah Primate Freedom, the names and addresses of researchers were not found using FOIA requests.<sup>125</sup>

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119. S. 113, 57th Leg, 2008 Gen. Sess. (Utah 2008) (codified at UTAH CODE ANN. § 63G-2-305(52) (LexisNexis Supp. 2016)).

120. *Id.*

121. *See S.B. 113 Access to Research Workers' Personal Information: Status*, UTAH STATE LEGISLATURE, <http://le.utah.gov/~2008/bills/static/SB0113.html> (last visited Nov. 4, 2016).

122. Alison Schmidt, *Utah House Passes Bill to Conceal Names of Animal Researchers*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Feb. 29, 2008), <http://www.rcfp.org/browse-media-law-resources/news/utah-house-passes-bill-conceal-names-animal-researchers>.

123. Senate Floor Video, Day 15: Second Reading of Access to Research Workers' Personal Information, S. 113 2008 Gen. Sess. (Utah 2008), UTAH STATE LEGISLATURE (Feb. 4, 2008), [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=8736&meta\\_id=422887](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=8736&meta_id=422887) (statement of Sen. Gregory S. Bell) [hereinafter Statement of Sen. Gregory S. Bell]; *see* Rochelle McConkie, *Senate Passes Bill to Conceal Animal Researchers*, DAILY UTAH CHRON. (Feb. 6, 2008, 12:00 AM), <http://dailyutahchronicle.com/2008/02/06/senate-passes-bill-to-conceal-animal-researchers/> (“The bill was drafted in effort to prevent animal protestors from the organization Utah Primate Freedom ‘harassing’ U researchers and demonstrating in front of their homes.”).

124. Statement of Sen. Gregory S. Bell, *supra* note 123.

125. *Id.*

### 3. *Even Without Legislative Exemptions, Animal Rights Extremism Is Used to Restrict Access to Records*

Yet even absent statutory exemptions expressly dealing with animal research facilities, the threat of animal terrorism is still often used to restrict or deny access to animal-related records, particularly in the research context. For instance, in 2002, citing security concerns, “the USDA in February removed from its Animal Care Division’s Web site annual inspection reports of research facilities,”<sup>126</sup> though access to these reports is once again available.<sup>127</sup>

However, there is little insight in the extent to which such grounds are used, as individuals denied an open records request—even wrongly—may simply leave the denial unchallenged.<sup>128</sup> Under FOIA, for instance, a person denied records must first exhaust administrative remedies;<sup>129</sup> yet only a fraction of FOIA requests denied based on exemptions are even appealed: for instance, in 2015 only around 171 appeals were made of the 2544 that the APHIS denied.<sup>130</sup>

Even so, when such denials are challenged, courts have generally rejected the possible threat of harassment or violence by *some* groups to warrant denial of access to records by *all* requesters.<sup>131</sup>

In particular, courts have generally been willing to order disclosure of information other than individuals’ names.<sup>132</sup> In *Marino v. University of Florida*, the University of Florida had produced records relating to

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126. R. Scott Nolen, *Animal Protection Groups, Research Community Dispute Web Postings*, AM. VETERINARY MED. FOUND. JAVMA NEWS (Nov. 1, 2002), <https://www.avma.org/News/JAVMANews/Pages/021115g.aspx>.

127. See generally *Annual Reports: Inspection Reports Search*, U.S. DEP’T AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV.—ANIMAL CARE, <https://acis.aphis.edc.usda.gov/orids/f?p=116:205:0::NO> (last visited Nov. 4, 2016).

128. See Appeals Received, Processed and Pending by the U.S. Dep’t of Agriculture in 2015, FOIA.GOV, <https://www.foia.gov/data.html> (last visited Nov. 4, 2016) (select “Appeals” under “Select Report”; select “Show List of Agencies” under “Select Agency” and then select “Department of Agriculture”; select “Select Components” under “Select Agency”, select “Clear”, and then select “APHIS” and follow “Set” hyperlink; select “FY 2015” under “Select Fiscal Year”; follow “Create Report” hyperlink).

129. See 5 U.S.C. § 552a(g)(1) (2012).

130. See FOIA.GOV, *supra* note 128.

131. See generally *Marino v. Univ. of Fla.*, 107 So. 3d 1231 (Fla. Dist. Ct. App. 2013) (holding that the University’s argument that there might be physical threats due to their locational information being made public is not enough to warrant an exemption from disclosure); *In Def. of Animals v. Nat’l Insts. of Health*, 543 F. Supp. 2d 83, 106 (D.D.C. 2008) (holding that the mere possibility of privacy threats is not enough to warrant an exemption from disclosure).

132. *Marino*, 107 So. 3d at 1233.

thirty-three non-human primates kept by the University, but had redacted the locations of the primates' housing.<sup>133</sup> The trial court upheld the redactions based on the University's testimony that limiting access to these primate facilities was part of the University's security system and thus fell under certain "security system" exemptions to Florida's Public Records Act.<sup>134</sup> Without weighing in on the public policy issues, a Florida appellate court found that the location of animal research facilities did not fall under the exemptions.<sup>135</sup> The University's argument that "the nature of the public activities occurring at the facilities subjects them to physical threats" was not compatible with the liberal construction of the Act in favor of open government and the narrow exemptions from disclosure.<sup>136</sup>

In *In Defense of Animals v. National Institutes of Health*, an animal welfare organization sought records from a federal research facility relating to chimpanzees kept there.<sup>137</sup> The Agency redacted information on the facility's daily inventory of animals and the locations of the animals, among other information.<sup>138</sup> Citing FOIA's privacy exemption, the Agency claimed "[i]ndividuals with intent to harm animal care workers would be able to target the location with the greatest concentration of workers if this information is released."<sup>139</sup> The court, however, rejected the claim: "[O]nly the speculative potential of a privacy invasion without any degree of likelihood" was not enough to justify the exemption.<sup>140</sup>

Similarly, in *Jurewicz v. U.S. Department of Agriculture*, the D.C. Circuit upheld the USDA's decision to release to the HSUS certain information about the sales and revenue of licensees' dog breeders and dealers.<sup>141</sup> Notably, the USDA had dismissed licensees' "concern about alleged harassment incited" by the HSUS as unwarranted given the nature

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133. *Id.* at 1232.

134. *Id.*

135. *Id.* at 1234.

136. *Id.* at 1233 (citing *Tribune Co. v. Pub. Records*, 493 So. 2d 480, 483 (Fla. Dist. Ct. App. 1986)). But see *Mississippi State University v. PETA, Inc.*, which deals with a request by PETA for similar animal testing records from Mississippi State University, the Mississippi Supreme Court found the entirety of the forms exempt from disclosure, as containing confidential proprietary and trade secrets information. Notably, in arguing for non-disclosure, the University claimed that such information "could be used by PETA to identify specific researchers . . . and to harass or annoy [them]." 992 So. 2d 595, 596, 602 (Miss. 2008) (alteration in original).

137. 543 F. Supp. 2d at 88.

138. *Id.*

139. *Id.* at 106.

140. *Id.* at 107 (quoting *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002)).

141. 741 F.3d 1326, 1329 (D.C. Cir. 2014).

of the information sought and because the licensees' involvement in the industry was a matter of public knowledge.<sup>142</sup>

Likewise, in *Progressive Animal Welfare Society v. University of Washington*, the court upheld redactions of names and other personal information, on the grounds that “the nondisclosure of those portions [was] necessary to prevent harassment as defined under the anti-harassment statute.”<sup>143</sup> Yet while “acknowledg[ing] that some ‘animal rights’ activists have acted improperly and, on occasion, illegally,” the court found that the “protective measures of the anti-harassment statute provide a powerful shield against harassment as well as a sword against harassers.”<sup>144</sup> Rather than restricting FOIA, “[t]he anti-harassment statute sends a clear message that threats, harassment and intimidation will not be tolerated.”<sup>145</sup>

Recently too, in *American Farm Bureau Federation v. U.S. Environmental Protection Agency*, plaintiff animal agriculture trade groups sued the Environmental Protection Agency to prevent the release of certain information about Concentrated Animal Feeding Operations (“CAFOs”) in Minnesota and Iowa.<sup>146</sup> The plaintiffs asserted that farmers had “receive[d] threatening letters and telephone calls from extreme animal rights activists” and were “likely to be further victimized as a result” if the Agency disclosed the information.<sup>147</sup> The court denied the challenge on standing grounds, noting that the location of CAFOs was already easily available on the internet and that incidents by activists had taken place years before any FOIA request.<sup>148</sup>

In keeping with Oregon and Utah bills, however, many courts have continued to withhold the names of researchers from record requests. For instance, in *Students for the Ethical Treatment of Animals, Inc. v. Huffines*, the North Carolina Court of Appeals ordered disclosure of certain information in applications for approval of animal research projects at the University of North Carolina at Chapel Hill.<sup>149</sup> The University had claimed, among other things, that withholding the

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142. *Id.* at 1332–33.

143. 884 P.2d 592, 604 (Wash. 1994).

144. *Id.* at 606 (first citing WASH. REV. CODE § 4.24.580 (1994); and then citing WASH. REV. CODE § 4.24.570(1)) (relying on state statutes that provide for injunctive relief from harassment).

145. *Progressive Animal Welfare Soc’y*, 884 P.2d at 606.

146. No. 13-1751 ADM/TNL, 2015 U.S. Dist. LEXIS 9106, at \*3–4 (D. Minn. Jan. 27, 2015).

147. *Id.* at \*7–8, \*12.

148. *Id.* at \*11, \*13–14.

149. *Students for the Ethical Treatment of Animals, Inc. v. Huffines*, 399 S.E.2d 340, 341, 344 (N.C. Ct. App. 1991).

information was necessary “to insure the safety and security of the researcher[s],” who “fear disclosure of their projects would result in violence against them and their staff.”<sup>150</sup> While not allowing redaction of the entire application “because of the researcher’s fear of violence and harassment,” the court allowed redaction of the researchers’ names and other identifying information.<sup>151</sup>

Similarly, in *American Society for Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York*, the American Society for the Prevention of Cruelty to Animals sought documents from New York’s Stony Brook University regarding its research on live vertebrate animals.<sup>152</sup> Despite the University’s claim that releasing such information would have a “chilling effect” due to “fears of retaliation” and harassment, and the threat of “break-ins, thefts and arson at animal laboratory facilities,” the court ordered disclosure of information on the procedures used.<sup>153</sup> But citing New York’s exemption for documents that “if disclosed would endanger the life or safety of any person,” the court allowed the redaction of the researchers’ names and other identifying information.<sup>154</sup>

In *In Defense of Animals v. Oregon Health Sciences University*, the court upheld the University’s decision to withhold the names of animal researchers under Oregon’s conditional exemption, balancing the public’s interest in disclosure against the University’s interest in nondisclosure.<sup>155</sup> Although the University gave no evidence that the group seeking records had any illegal goals, University researchers testified that they felt “‘threatened by the rhetoric’ of animal rights groups” generally and that there was a “generalized concern” at the primate center about “harassment” and “threats to safety by various animal rights groups.”<sup>156</sup> In contrast, the court found that there was no significant interest in disclosing researchers’ names.<sup>157</sup>

More recently, in 2014, a Connecticut court ordered a state health center to disclose the names and grant numbers of researchers who conducted experiments on animals and had been reported for failing to

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150. *Id.* at 342.

151. *Id.* at 342, 344.

152. 556 N.Y.S.2d 447, 449–50 (Sup. Ct. Suffolk Cty. 1990).

153. *Id.* at 450, 452.

154. *Id.* at 450–51 (citing N.Y. PUB. OFF. LAW § 87(2)(f) (McKinney 1988)).

155. 112 P.3d 336, 347 (Or. Ct. App. 2005) (citing *Springfield Sch. Dist. No. 19 v. Guard Publ’g Co.*, 967 P.2d 510, 512 (Or. Ct. App. 1998)).

156. *Id.* at 348–49.

157. *Id.* at 349.

comply with animal welfare guidelines.<sup>158</sup> The mere fact that there had been “numerous incidents nationwide . . . of violence, threats of violence and harassment directed at individual researchers, their families, homes and property” was insufficient to make disclosure a “safety risk” within the meaning of Connecticut’s open records exemption.<sup>159</sup> The court further noted that the identities of the researchers were already publicly available.<sup>160</sup> In June 2016, however, the Connecticut Supreme Court reversed the judgment and remanded the case to the State’s Freedom of Information Commission to apply a different standard of review in reviewing the lower administrative agency’s determination that disclosure of the redacted information would create a safety risk.<sup>161</sup>

Some courts, however, have ordered disclosure of names.<sup>162</sup> Indeed, two decades after *American Society for Prevention of Cruelty to Animals*, a different New York trial court found that the Freedom of Information Law’s life-safety exemption<sup>163</sup> and personal privacy exemption<sup>164</sup> did not bar disclosure of various animal research records from a public hospital.<sup>165</sup> Noting that the researchers’ activities in areas involving the use of animals gave rise to a diminished expectation of privacy and that their identities had been disclosed in the petition, the court also ordered disclosure of information identifying the researchers, though permitted redaction of their contact information.<sup>166</sup> A “history of violence by extremists” and a “general awareness of violence against animal researchers” were insufficient to establish a connection between disclosing the records and criminality.<sup>167</sup>

Similarly, in *State ex rel. Thomas v. Ohio State University*, an attorney requested, under Ohio’s Public Records Act, records from the

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158. *PETA, Inc. v. Freedom of Info. Comm’n*, No. HHBCV146023464S, 2014 Conn. Super. LEXIS 3143, at \*1–2, \*10–11, \*22 (Super. Ct. Dec. 18, 2014), *rev’d*, 139 A.3d 585 (Conn. 2016).

159. *PETA, Inc.*, 2014 Conn. Super. LEXIS 3143, at \*7–8, \*10 (citing CONN. GEN. STAT. § 1-210(b)(19) (Supp. 2014)).

160. *PETA, Inc.*, 2014 Conn. Super. LEXIS 3143, at \*17.

161. 139 A.3d at 594.

162. *Physicians Comm. for Responsible Med. v. Hogan*, No. 439-10, 2010 N.Y. Misc. LEXIS 5446, at \*7, \*39 (N.Y. Sup. Ct. Albany Cty. Nov. 3, 2010).

163. N.Y. PUB. OFF. LAW § 87(2)(f) (McKinney Supp. 2016) (“[S]uch agency may deny access to records or portions thereof that if disclosed could endanger the life or safety of any person.”).

164. N.Y. PUB. OFF. LAW § 87(2)(b) (“[S]uch agency may deny access to records or portions thereof that if disclosed would constitute an unwarranted invasion of personal privacy . . .”).

165. *Hogan*, 2010 N.Y. Misc. LEXIS 5446, at \*16–17, \*24.

166. *Id.* at \*19–20, \*23–24, \*35 n.10.

167. *Id.* at \*8, \*10–11.

University of Ohio relating certain animal research scientists.<sup>168</sup> While disclosing some records, the University redacted names and work addresses, which it deemed “necessary to protect the personal privacy and safety of the individual scientists.”<sup>169</sup> The Supreme Court of Ohio compelled release of this information, however, noting that

while there is a concern that criminal conduct might result from the release of names and work addresses of animal research scientists . . . , the “answer is that criminal conduct should be punished by criminal sanctions” or that the General Assembly should consider a personal privacy exemption similar to those in FOIA, rather than resolving the matter through judicial expansion of the constitutional rights to privacy and academic freedom to forbid their disclosure.<sup>170</sup>

### CONCLUSION

The threat of animal rights extremism has been routinely used to justify the need for federal and state criminal laws.<sup>171</sup> But even assuming this threat rightly warrants such laws—a debated issue—such a justification is less compelling in the context of restricting open records laws. As an initial matter, while groups like the Federation of American Societies for Experimental Biology have warned that extremists “can use freedom of information requests to obtain intelligence on an organization’s animal research activities for future targeted action,”<sup>172</sup> it is unclear what, if any, connection in fact exists between open records laws and such extremism. Indeed, as the ACLU of Oregon noted in its statements against Oregon’s law, much of the information exempted from disclosure under the law had already been made publicly available.<sup>173</sup>

More generally, unlike federal and state criminal laws, restrictions on access to government records, like the statutory exemptions in Oregon and Utah, do not target a small group—that is, those who violate the law.<sup>174</sup> Rather, they deny access to records to the public generally, including animal activists, journalists, academic researchers, and

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168. 643 N.E.2d 126, 128 (Ohio 1994).

169. *Id.*

170. *Id.* at 249 (quoting *State ex rel. Beacon Journal Publ’g Co. v. City of Akron*, 640 N.E.2d 164, 173 (Ohio 1994) (Douglas, J., dissenting)).

171. *See Activism vs. Criminality*, *supra* note 58, at 2–3 (statement of John Lewis, Deputy Assistant Dir., Fed. Bureau of Investigation).

172. THE THREAT OF EXTREMISM TO MEDICAL RESEARCH, *supra* note 95, at 10.

173. *Hearing on S. 262*, *supra* note 118 (written testimony of Andrea Meyer, Legislative Dir., ACLU of Or.).

174. OR. REV. STAT. § 192.501(30) (2015); UTAH CODE ANN. § 63G-2-305(52) (LexisNexis Supp. 2016).



others.<sup>175</sup> Such a result is in tension with open records laws' goals of government transparency.

And, operating together with criminal laws, open records restrictions may serve as a particularly strong barrier toward transparency. In particular, where some states' ag-gag laws already criminalize the undercover filming of animal enterprises,<sup>176</sup> restricting open records laws further forecloses an otherwise legal alternative to gather information about individuals and organizations that use animals.

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175. *Id.*

176. *See, e.g.*, N.D. CENT. CODE §§ 12.1-21.1-.02(6), 12.1-21.1-.04. (2012).