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Secrets, Secrets Are No Fun: Issues of Publication Under the FOIA Reading Room Provision

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SECRETS, SECRETS ARE NO FUN: ISSUES OF PUBLICATION UNDER THE FOIA READING ROOM PROVISION

Abstract: What do teenagers, the Central Intelligence Agency, and the Coca-Cola Company have in common? Secrets. Social movements for less government secrecy have led to the implementation of mechanisms that ensure public distribution of information. One of these mechanisms is the Freedom of Information Act (FOIA). President Lyndon B. Johnson, when signing the FOIA, stated that “freedom of information is so vital that only the national security, not the desire of public officials or private collectors, should determine when it must be restricted.” It is therefore unsurprising that the FOIA provides a judicial remedy for when information has been improperly withheld. There have been, however, contradictory rulings as to the scope of that judicial relief. On August 29, 2019, the U.S. Court of Appeals for the Ninth Circuit, in *Animal Legal Defense Fund v. U.S. Department of Agriculture*, held that the judicial remedy that the FOIA provides to complainants empowers district courts to order federal agencies to publish records subject to the reading room provision of the FOIA online. In doing so, the court expanded the anti-secrecy efforts of the FOIA as intended. This Comment argues that, unlike the contrary decision of the U.S. Court of Appeals for the District of Columbia, the Ninth Circuit’s holding is aligned with the overarching goals of the FOIA.

INTRODUCTION

The Cold War ushered in an era of mistrust and secrecy.¹ The government kept vital information away from the public, and that did not go unnoticed.²

¹ See S. DOC. NO. 105-2, at A-40 (1997) (describing the type of information regarding communism in the United States and possible Soviet Union attacks that the government purposely never revealed to the public).

² See *Freedom of Information at 40*, NAT’L SEC. ARCHIVE (July 4, 2006), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/index.htm> [<https://perma.cc/9CUJ-BLTN>] (noting the considerable amount of press coverage regarding Congressman John Moss’s FOIA hearings). One of the repercussions of the United States’ entry into World War II and the communist fears that followed was that the government kept a lot of military-related information secret. Michael R. Lemov & Nate Jones, *John Moss and the Roots of the Freedom of Information Act: Worldwide Implications*, 24 SW. J. INT’L L. 1, 7–8 (2018) (discussing how World War II and subsequent anti-communist rhetoric curbed the amount of information available to the public). Congressman John Moss found the increasing secrecy to be a big problem and spoke of this cause to the government and the public. *Id.* at 12. The result of his urgings was the creation of the Special Subcommittee on Government Information. *Id.* at 12–13. This body that Congressman Moss chaired held numerous hearings that involved federal agencies, con-

Those in various sectors of public life, ranging from newspaper editors to scientists, therefore supported Congressman John Moss's push for the introduction of the Freedom of Information Act (FOIA).³ Ultimately, Congress passed the FOIA to reduce government secrecy, a problem that years of unchecked and imprudent withholding of records only exacerbated.⁴ Empowering the judiciary to force disclosure in such situations therefore served as a significant aspect of the FOIA.⁵ The question remained, however: to what degree and to what extent should the judiciary be involved in the divulgence of information as required by the FOIA?⁶

This is a question that has caused a split in opinion between the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Ninth Circuit.⁷ In 2019, in *Animal Legal Defense Fund v. U.S. Department of Agriculture*, the Ninth Circuit held that the FOIA authorizes district courts to force federal agencies to publish records subject to the reading room provision online.⁸ This decision directly challenged the D.C. Circuit's 2017 holding in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice* that district courts do not have the authority to mandate that federal agencies publish such reading room records online.⁹

This Comment examines the rationale behind the Ninth Circuit's decision and its implications on the effect of the FOIA.¹⁰ Part I of this Comment gives an overview of the FOIA and the factual and procedural background of *Animal*

gresspeople, and President Johnson on the bill that would later become the Freedom of Information Act (FOIA). See *id.* at 13–14 (detailing the process preceding the FOIA's eventual passing).

³ Lemov & Jones, *supra* note 2, at 13–14.; *Freedom of Information Act, HISTORY* (Aug. 21, 2018), https://www.history.com/topics/1960s/freedom-of-information-act#section_1 [<https://perma.cc/PR5B-49KT>].

⁴ H.R. REP. NO. 89-1497, at 26–27 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2422–23.

⁵ See *id.* at 22–23, 26, 1996 U.S.C.C.A.N. at 2418–19, 2422 (noting the weaknesses of the Administrative Procedure Act (APA) and describing the robust improvements of the FOIA, including a citizen's appeal to the U.S. district courts).

⁶ See *id.* at 30, 1996 U.S.C.C.A.N. at 2426 (presenting a specific judicial remedy for “aggrieved person[s]” to initiate a court proceeding whereby the district court examines anew the context and reasoning behind an agency's decision to withhold information).

⁷ Compare *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 869 (9th Cir. 2019) (holding that the FOIA judicial remedy provision does apply to the online publication of records subject to the reading room provision), with *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (concluding that the FOIA judicial remedy does not apply to the online publication of records subject to the reading room provision).

⁸ *Animal Legal Def. Fund*, 935 F.3d at 869. Subsection (a)(2) of the FOIA requires agencies to make available for “public inspection and copying” certain types of records including final opinions, policy statements and interpretations, and administrative staff manuals. 5 U.S.C. § 552(a)(2).

⁹ See *Animal Legal Def. Fund*, 935 F.3d at 874–75 (declining to follow the D.C. Circuit's 2017 holding in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice* and instead concluding that that district courts have the power to mandate that federal agencies publish requisite reading room records online for the public).

¹⁰ See *infra* notes 14–106 and accompanying text.

Legal Defense Fund.¹¹ Part II discusses the reasoning behind the Ninth Circuit's decision in *Animal Legal Defense Fund*, as well as the D.C. Circuit's contrary reasoning in *Citizens for Responsibility & Ethics in Washington*.¹² Finally, Part III argues that the Ninth Circuit correctly interpreted the provision in light of legislative intent and statutory purpose.¹³

I. AN OVERVIEW OF THE FOIA AND THE JUDICIAL REMEDY IT AFFORDS

Enacted in 1966, the FOIA sought to address issues of agency secrecy and public access to government records.¹⁴ In 2019, in *Animal Legal Defense Fund v. U.S. Department of Agriculture*, the U.S. Court of Appeals for the Ninth Circuit meticulously dissected the statute's words in search of an interpretation of the reading room provision that best comported with legislative intent.¹⁵ To understand why, it is necessary to examine the history and purpose of the FOIA, its amendments, and the ways in which courts have interpreted its subsections.¹⁶ Section A of this Part introduces the FOIA and its purpose.¹⁷ Section B delves into the judicial remedy the FOIA provides and analyzes its construal in jurisprudence.¹⁸ Finally, Section C describes how the Ninth Circuit's decision in *Animal Legal Defense Fund* breaks from previous decisions concerning the FOIA's judicial remedy.¹⁹

A. Introduction to the FOIA's Purpose and Function

Before the FOIA's introduction, the Special Subcommittee on Government Information held various probative hearings discussing the decisions of executive agencies to withhold information from the public.²⁰ Although pro-

¹¹ See *infra* notes 14–54 and accompanying text.

¹² See *infra* notes 55–89 and accompanying text.

¹³ See *infra* notes 90–106 and accompanying text.

¹⁴ See S. REP. NO. 88-1219, at 10 (1964) (noting that § 3 (“public information”) of the APA was “of little or no value to the public in gaining access to records of the Federal Government” and instead was actually frequently used as authority for withholding information).

¹⁵ See *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 935 F.3d 858, 869–70 (9th Cir. 2019) (analyzing both parties’ arguments regarding the language of the reading room provision using various statutory interpretation principles).

¹⁶ See *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (stating that, when a court seeks to understand the meaning behind certain statutory language, it should first assume that Congress employed that language to advance its specific goals).

¹⁷ See *infra* notes 20–33 and accompanying text.

¹⁸ See *infra* notes 34–42 and accompanying text.

¹⁹ See *infra* notes 43–54 and accompanying text.

²⁰ H.R. REP. NO. 93-876, at 123–24 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6268–69. The Special Subcommittee on Government Information is a subcommittee of the House Committee on Oversight and Reform that has “legislative and oversight jurisdiction over: the federal civil service; whistleblower protections; the U.S. Postal Service; government management and accounting measures; the economy, efficiency, and management of government operations and activities; government reorganiza-

posed as a revision to section three of the Administrative Procedure Act (APA), the FOIA passed as a standalone bill to require ease of disclosure in the face of constant withholding.²¹ In fact, the U.S. Supreme Court has noted that the FOIA should serve as a tool to aid the public in acting as a check against government obscurity.²² At its foundation, the FOIA created a statutory public right to federal government records, subject to certain exceptions, as a means of ensuring transparency and promoting efficiency.²³

To achieve this purpose, the FOIA mandates that agencies act both proactively and reactively regarding the disclosure of information.²⁴ Although the FOIA contains thirteen subsections, subsection (a) primarily governs an agency's duties.²⁵ Subsection (a)(1), the "publishing provision," requires that agencies make certain information, such as agency organization descriptions and general agency policies, public in the *Federal Register*.²⁶ Subsection (a)(2), termed the

tion; intergovernmental affairs, including with state and local governments; federal information technology security, acquisition policy, and management; and federal property." *Government Operations*, HOUSE COMM. ON OVERSIGHT & REFORM, <https://oversight.house.gov/subcommittees/government-operations-116th-congress> [<https://perma.cc/6TS9-QJ2E>].

²¹ H.R. REP. NO. 89-1497, at 25, 33 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2418, 2429. The APA previously governed the dissemination of information to the public. H.R. REP. NO. 93-876, at 123-24, as reprinted in 1974 U.S.C.C.A.N. at 6268-69. The APA established minimum procedures for federal agencies regarding the promulgation of rules and regulations for the purpose of, among other things, ensuring that the public remain updated on agency ongoings, as well as encouraging active participation in the rule revision process. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

²² See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA 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.").

²³ See generally 5 U.S.C. § 552 (outlining requirements for executive agencies to make certain information available to the public).

²⁴ See *id.* § 552(a)(1)-(a)(3) (requiring agencies to both publish information and respond to requests for information). The crux of the FOIA is public access to federal records. See S. REP. NO. 88-1219, at 11 (1966) (describing how the FOIA, as proposed, moves away from ambiguous phrases that agencies consistently employed to withhold records from the public). This is not to say, however, that the public is entitled to records of any kind. See 5 U.S.C. § 552(b)(1)-(b)(9) (detailing nine types of documents that are exempt from disclosure under the FOIA). The FOIA lists multiple categories of information that remain exempt from disclosure including: (1) information classified as secret for the sake of national security; (2) purely internal personnel rules; (3) information that another statute has classified as exempt; (4) trade secrets and other privileged business information; (5) privileged communication between or among agencies; (6) information that if disclosed would invade someone's personal privacy; (7) compilations of certain information produced for law enforcement purposes; (8) information regarding the monitoring of financial institutions; and (9) geological information regarding wells. *Id.*

²⁵ 5 U.S.C. § 552. A government agency is a body that, through congressional authority, has the ability to create legislation that has the force of law. *Agency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁶ 5 U.S.C. § 552(a)(1). The *Federal Register* is the official federal journal that contains agency rules, proposed federal rules, public notices, and other important executive documents. *About the Federal Register*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/the-federal-register/about.html> [<https://perma.cc/N3AB-KXK8>].

“reading room provision,” mandates that agencies make specific categories of information, including final opinions, policy statements and interpretations, and administrative staff manuals, available for “public inspection and copying.”²⁷

To address the technological disconnect in records availability and access, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (EFOIA) modifying the reading room provision.²⁸ The EFOIA not only created a fourth category of information to be made available under the reading room provision—frequently requested records—but also required that agencies make the information they disclose available electronically.²⁹ This particular amendment thereby created what the government has deemed “electronic reading rooms.”³⁰ Agencies often adhere to this requirement by creating electronic reading rooms on their websites and placing applicable records on it for public review.³¹

Though the reading room provision has gained importance, subsection (a)(3), the “request provision,” remains the most widely used provision of the FOIA.³² The request provision provides that the public may request records,

²⁷ 5 U.S.C. § 552(a)(2); *FOIA Guide, 2004 Edition: FOIA Reading Rooms*, U.S. DEP’T JUST. (May 2004), <https://www.justice.gov/oip/foia-guide-2004-edition-foia-reading-rooms> [<https://perma.cc/ZGV4-7JKG>].

²⁸ See H.R. REP. NO. 104-795, at 11–12 (1996), as reprinted in 1996 U.S.C.C.A.N. 3448, 3454–55 (describing the access-related issues that Congress hoped to address through the Electronic Freedom of Information Act Amendments of 1996 (EFOIA)); Presidential Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 32 WEEKLY COMP. PRES. DOC. 1949 (Oct. 2, 1996) (describing the implementation and purpose of the EFOIA). By the end of the twentieth century, most agencies were rapidly moving away from paper records and toward digital databases. H.R. REP. NO. 104-795, at 12. Reviewing requested information on paper became less efficient than undertaking an electronic search and review. *Id.* Congress viewed these types of potential changes as the solution to problems that still persisted, such as increasing backlogs of unanswered requests. *Id.*

²⁹ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231 (1996) (codified at 5 U.S.C. § 552). It is largely up to the discretion of the agencies to determine which records are “frequently requested records,” but generally, frequently requested records are those that will likely be requested multiple times. *FOIA Counselor Q&A: “Frequently Requested” Records*, U.S. DEP’T JUST. (Sept. 27, 2002), <https://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records> [<https://perma.cc/4BSP-KGEW>].

³⁰ *FOIA Counselor Q&A*, *supra* note 27.

³¹ See *id.* (noting the presence of dedicated “FOIA sites” on the internet for federal agencies).

³² See *Fiscal Year 2019 FOIA Data Available*, U.S. DEP’T JUST. (Mar. 4, 2020), <https://www.justice.gov/oip/blog/fiscal-year-2019-foia-data-available> [<https://perma.cc/SJU8-XADC>] (noting that FOIA requests have exceeded 800,000 in the last three years consecutively). This is unsurprising given the varying demographics that make use of the request provision. See Amelia Brust, *2018 Sees Record Number of FOIA Requests, Information Seekers Change*, FED. NEWS NETWORK (Jun. 7, 2019), <https://federalnewsnetwork.com/open-datatransparency/2019/06/2018-sees-record-number-of-foia-requests-information-seekers-change/> [<https://perma.cc/HT4F-ZVJB>] (noting a shift from news organizations seeking information through FOIA requests to individual citizens). Journalists and news media organizations consistently put forth requests for records. See, e.g., David McCraw, *How the Times Uses FOIA to Obtain Information the Public Has a Right to Know*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/02/reader-center/foia-freedom-of-information-public-records.html> [<https://perma.cc/C23P-WQBM>] (discussing how the New York Times has continuously sought in-

subject to certain limitations, and that agencies must provide those records in the specific manner requested so long as they are readily able to do so.³³

B. A FOIA Solution to a Disclosure Problem: Judicial Review

Because the APA, the FOIA's predecessor, did not have a suitable method for the public to compel withheld information, secrecy remained the norm.³⁴ It is therefore unsurprising that the FOIA provided for redress in anticipation of wrongful agency withholding.³⁵ Subsection (a)(4)(B), the "judicial remedy provision," gives federal district courts the ability to prevent an agency from withholding records and to order their production.³⁶ U.S. district courts have the power to review alleged improper withholdings *de novo* to examine the appropriacy of the agency's decision.³⁷ There is general agreement that the judicial remedy provision vests the judiciary with power to provide actual relief to complainants.³⁸ It is less clear, however, which types of records invoke the judicial remedy.³⁹

formation through the statute and how it challenges agency decisions to withhold information as often as it sees fit). There has also been an increase in individual requesters seeking information, such as family histories and Equal Employment Opportunity Commission charge files. Brust, *supra*.

³³ 5 U.S.C. § 552(a)(3). Under this provision, those seeking records can submit a request to the respective agency for any record in the format they desire. *Id.* The request must be in writing, or, for some agencies, electronic, and must "reasonably describe" which records are being requested. *Id.*; *How Do I Make a FOIA Request?*, FOIA.GOV, <https://www.foia.gov/how-to.html> [<https://perma.cc/Q3CN-65S5>]. There are, however, certain types of records that are exempt from disclosure and, as a result, each agency must interpret the scope of the request in light of those exemptions. *FOIA Update: OIP Guidance: Determining the Scope of a FOIA Request*, U.S. DEP'T JUST. (Jan. 1, 1995), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-determining-scope-foia-request> [<https://perma.cc/U2TP-H48W>].

³⁴ See H.R. REP. NO. 89-1497, at 26 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2422 (describing the shortcomings of the APA, including overly used limitations on who could request information and broad exemptions that agencies could misuse to improperly withhold information).

³⁵ See *id.* at 22–23, 1966 U.S.C.C.A.N. at 2418–19 (detailing the major changes that FOIA made to the APA, including a citizen's appeal to the U.S. district courts).

³⁶ See 5 U.S.C. § 552(a)(4)(B) (authorizing district courts to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant").

³⁷ H. REP. NO. 89-1497, at 30, as reprinted in 1966 U.S.C.C.A.N. at 2426. To review a decision *de novo* is to not defer to the lower court's findings and instead to review the matter anew. *Appeal de novo*, BLACK'S LAW DICTIONARY, *supra* note 25. Although *de novo* review is one of the stricter standards of review, courts have reversed FOIA decisions at a rate lower than expected, suggesting that the purpose behind judicial review has not been fulfilled. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002) (explaining that analysis of FOIA cases revealed only an estimated 10% reversal rate when the rate should be closer to 50%).

³⁸ See *Ray v. Turner*, 587 F.2d 1187, 1193 (D.C. Cir. 1978) (emphasizing that the FOIA's inclusion of *de novo* review for withheld records contradicts the view that a court's power to order production is limited, even when the government asserts an exemption, because the information concerns national security); *Thorstad v. Cent. Intel. Agency*, 494 F. Supp. 500, 504 (S.D.N.Y. 1979) (providing an example of a district court calling an agency's assertion of an exemption into question to complete

For instance, in 1996, in *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, the U.S. District Court for the District of Columbia held that district courts do not have the power to order the publication of records that fall under the publishing provision.⁴⁰ The court acknowledged that its decision implied that Congress did not intend to provide courts with the ability to order document publication.⁴¹ More recently, in 2017, the D.C. Circuit held the same for records that fall under the reading room provision in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*.⁴²

C. Factual Background and Procedural History of Animal Legal Defense Fund v. U.S. Department of Agriculture

In 2019, in *Animal Legal Defense Fund v. U.S. Department of Agriculture*, the Ninth Circuit opined on the scope of the FOIA's judicial remedy.⁴³ The plaintiffs, who represent multiple nonprofit organizations focused on improving the treatment of animals, sought to obtain certain records from the Animal and Plant Health Inspection Service (APHIS).⁴⁴ In accordance with the

a thorough *de novo* review for the complainant as to whether he has a right to the information); H.R. REP. NO. 89-1497, at 30, *as reprinted* in 1966 U.S.C.C.A.N. at 2426 (noting that the availability of judicial review should deter improper withholding).

³⁹ Compare *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 869 (9th Cir. 2019) (holding that the judicial remedy provision does apply to records subject to the reading room provision of the FOIA), with *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that the judicial remedy provision does not apply to records subject to the reading room provision of the FOIA).

⁴⁰ 88 F.3d 1191, 1202 (D.C. Cir. 1996). In *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, decided by the U.S. Court of Appeals for the District of Columbia in 1996, the plaintiff, a copper company, sought certain damage-related regulations under the Comprehensive Environmental Response, Compensation, and Liability Act and the Clean Water Act from the U.S. Department of the Interior. *Id.* at 1200–01. The plaintiff asked the district court to order the Department of the Interior to publish the regulations onto the *Federal Register* in accordance with the publishing provision of the FOIA. *Id.* at 1201. The U.S. District Court for the District of Columbia held that it did not have the authority to order such publication under the FOIA and ruled in favor of the government. *Id.* The plaintiff appealed the decision to the U.S. Court of Appeals for the District of Columbia. *Id.*

⁴¹ *Id.* at 1202–03. The court did, however, accept that the judicial remedy generally pertains to information requests for records subject to each of the applicable FOIA subsections, specifically the publishing, reading room, and request provisions. *Id.* at 1202 (citing *Am. Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969)). Although this evaluation came from the D.C. Circuit itself in 1969 in *American Mail Line, Ltd. v. Gulick*, the court was interpreting a different version of the statute in that case. See *Kennecott*, 88 F.3d at 1202 (discussing the judicial remedy's applicability to various categories of information under the FOIA); *Am. Mail Line*, 411 F.2d at 701 (discussing the FOIA as it existed in 1969, in which the request provision also contained the language detailing the judicial remedy).

⁴² See 846 F.3d 1235, 1243 (D.C. Cir. 2017) (holding that the judicial remedy provision does not apply to records subject to the reading room provision of the FOIA).

⁴³ *Animal Legal Def. Fund*, 935 F.3d at 869.

⁴⁴ *Id.* at 864. APHIS is in charge of administering the Animal Welfare Act for the U.S. Department of Agriculture and, through such undertakings, produces “annual reports, inspection reports,

reading room provision, APHIS placed frequently requested records on the FOIA reading room portion of its website after completing its own internal review and redaction procedures.⁴⁵ At one point, however, the agency removed the records to address what it believed to be an inadequate review procedure.⁴⁶ The agency later decided that it would not repost certain documents.⁴⁷

The plaintiffs challenged the agency's decision, arguing that the reading room provision required APHIS to post all of the documents at issue online.⁴⁸ They requested that the U.S. District Court for the Northern District of California prohibit APHIS from withholding the records and order it to make them available online.⁴⁹ The district court denied the plaintiffs' motion for a preliminary injunction, holding that they may seek injunctive relief in obtaining the records for their personal use but not in compelling an agency to make the documents publicly available.⁵⁰ Subsequently, the district court granted APHIS's motion to dismiss and concluded that federal district courts cannot order agencies to publish records subject to the reading room provision onto their electronic reading rooms.⁵¹

The plaintiffs appealed the district court's decision to the Ninth Circuit.⁵² The Ninth Circuit reversed, thereby creating a circuit split.⁵³ It took a broad approach, conducting textual interpretation and examining statutory construction to hold that the judicial remedy provision affords district courts the power to order agencies to publish records onto their electronic reading rooms.⁵⁴

official warning letters, pre-litigation settlement agreements and administrative complaints," all of which the plaintiffs sought. *Id.* at 863–64.

⁴⁵ *Id.* at 864.

⁴⁶ *Id.* APHIS was concerned that its review system did not sufficiently protect and redact personal information. *Id.*

⁴⁷ *Id.* Although it did not detail the specific issues that preceded this decision not to repost the documents at issue, the Department of Agriculture partially justified the records' removal and review with reasons of privacy concerns. *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. 17-CV-00949, 2017 WL 3478848 (N.D. Cal. Aug. 14, 2017), *aff'd in part, rev'd in part and remanded*, 935 F.3d 858 (9th Cir. 2019).

⁴⁸ *Animal Legal Def. Fund*, 935 F.3d at 864.

⁴⁹ *Id.* at 865.

⁵⁰ *Animal Legal Def. Fund*, 2017 WL 3478848, at *2–3 (emphasis added). Generally, an injunction is a court order enjoining or stopping some action. *See Injunction*, BLACK'S LAW DICTIONARY, *supra* note 25. A preliminary injunction occurs merely when the court issues such an injunction before it has decided the outcome of a case. *See Preliminary Injunction*, BLACK'S LAW DICTIONARY, *supra* note 25. When a party is seeking an injunction, he or she is seeking injunctive relief. *See Injunctive Relief*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunctive_relief [<https://perma.cc/YG2A-TPXS>].

⁵¹ *Animal Legal Def. Fund*, 2017 WL 3478848, at *2–3.

⁵² *Animal Legal Def. Fund*, 935 F.3d at 866.

⁵³ *Id.*

⁵⁴ *See id.* at 869–71 (analyzing the statutory language of the reading room provision using interpretive tools including *noscitur a sociis* and the rule against surplusage, as well as the structure of the FOIA).

II. A JUDICIAL SPLIT OVER A JUDICIAL REMEDY

There is disagreement over the scope of the judicial remedy that the FOIA provides in the context of the publication of electronic reading room records.⁵⁵ In 2017, in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, the U.S. Court of Appeals for the District of Columbia concluded that the judicial remedy should be available for individual reprieve alone.⁵⁶ In 2019, in *Animal Legal Defense Fund v. U.S. Department of Agriculture*, the U.S. Court of Appeals for the Ninth Circuit disagreed, noting that the D.C. Circuit's decision made the reading room provision an aspiration rather than a mandate.⁵⁷ Section A of this Part discusses the D.C. Circuit's approach in *Citizens for Responsibility & Ethics in Washington*.⁵⁸ Section B explains the analysis that the Ninth Circuit undertook in *Animal Legal Defense Fund*.⁵⁹

A. Scope of the FOIA's Judicial Remedy According to the D.C. Circuit

When the D.C. Circuit decided *Citizens for Responsibility & Ethics in Washington*, no circuit court had ruled on the scope of the judicial remedy provision.⁶⁰ In *Citizens for Responsibility & Ethics in Washington*, the D.C. Circuit held that the judicial remedy provision did not authorize district courts to order the online publication of reading room records.⁶¹ The court, although acknowledging that the judicial system vests district courts with broad equita-

⁵⁵ Compare *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 869 (9th Cir. 2019) (concluding that the FOIA judicial remedy provision empowers district courts to order the online publication of records subject to the reading room provision), with *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (concluding that the FOIA judicial remedy does not empower district courts to force the online publication of records subject to the reading room provision).

⁵⁶ *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1243.

⁵⁷ *Animal Legal Def. Fund*, 935 F.3d at 874–75 (declining to adhere to the D.C. Circuit's prior decision in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*).

⁵⁸ See *infra* notes 60–72 and accompanying text.

⁵⁹ See *infra* notes 73–89 and accompanying text.

⁶⁰ See *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1243 (holding that the FOIA judicial remedy does not empower district courts to order the online publication of records subject to the reading room provision); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1202 (D.C. Cir. 1996) (holding that the FOIA's judicial review remedy does not apply to records subject to the publishing provision).

⁶¹ *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1243. In *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, decided by the D.C. Circuit in 2017, the documents at issue were the opinions of the Office of Legal Counsel (OLC). *Id.* at 1239. *Citizens for Responsibility & Ethics in Washington* (CREW), a nonprofit seeking to protect the public's ability to stay abreast of government officials' actions, requested that the OLC publish its opinions online in accordance with the reading room provision of the FOIA, but the OLC did not comply with this request. *Id.* CREW sought injunctive relief from the U.S. District Court for the District of Columbia, asking that the court order OLC to publish the documents online for the public. *Id.* at 1240.

ble power, stated that there are confines to that power.⁶² Having previously introduced one such confine in *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, the court merely restated its rationale to establish another here.⁶³ In concluding that district courts may not order agencies to publish documents to their electronic reading rooms, the court adopted its earlier reasoning from *Kennecott*.⁶⁴ It distinguished between a district court ordering an agency to provide such documents to the specific plaintiff and a district court ordering an agency to make such documents publicly available.⁶⁵ In both decisions, the D.C. Circuit implied that such authority would be outside the scope of the provision's intent.⁶⁶

In coming to this conclusion, the court rejected the plaintiff's plea to interpret *Kennecott* narrowly.⁶⁷ Because *Kennecott* involved the publishing provision, the plaintiff argued that the court should interpret *Kennecott* as applying only to matters involving that provision, rather than to those that involve the reading room provision, like in *Citizens for Responsibility & Ethics in Washington*.⁶⁸ The D.C. Circuit disagreed, stating that *Kennecott* interpreted the scope of the judicial remedy provision as a whole.⁶⁹ The plaintiff also argued that the court's *Kennecott* decision stemmed from a focus on the second clause of the judicial remedy provision alone, which speaks to the withholding of records from "the complainant."⁷⁰ In other words, the plaintiff argued that the court in *Kennecott* did not evaluate authority under the first clause, which forces the production of documents generally.⁷¹ The D.C. Circuit rejected this as well, again implying that the *Kennecott* decision assessed the judicial remedy provision in its entirety.⁷²

B. The Ninth Circuit's Rationale for the Animal Legal Defense Fund Ruling

In 2019, in *Animal Legal Defense Fund*, the Ninth Circuit held that district courts have the power to mandate that federal agencies publish requisite reading

⁶² *Id.* at 1241–42.

⁶³ *Id.* at 1243. In 1996, in *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, the U.S. District Court for the District of Columbia denied the organization's requests for injunctive relief against the federal agency and for the court to order the government to publish the documents at issue onto the *Federal Register* in compliance with the publishing provision of the FOIA. 88 F.3d at 1201–02. The district court denied *Kennecott*'s request, and the D.C. Circuit affirmed. *Id.* at 1202.

⁶⁴ *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1243.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1244.

⁷⁰ 5 U.S.C. § 552(a)(4)(B).

⁷¹ *Citizens for Resp. & Ethics in Wash.*, 846 F.3d at 1244.

⁷² *Id.*

room records online for the public.⁷³ For the Ninth Circuit, careful examination of the text of the judicial remedy provision revealed two separate phrases: (1) the withholding of records on the one hand and (2) the production of records on the other.⁷⁴ The court reasoned that together, they confer broad power onto district courts.⁷⁵ The Ninth Circuit's textual analysis involved ensuring that parts of the judicial remedy provision were not rendered redundant.⁷⁶ The court rejected APHIS's argument that the language of the judicial remedy provision provides for one single power: to prohibit the withholding of records and force their release to the complainant.⁷⁷ The Ninth Circuit noted that adopting such a view would remove the particular words from their surrounding context, an act that would work against common statutory interpretation canons.⁷⁸

The structure of the FOIA provided additional evidence in support of the Ninth Circuit's conclusion.⁷⁹ The court noted that APHIS's argument—that the

⁷³ *Animal Legal Def. Fund*, 935 F.3d at 869.

⁷⁴ *Id.* at 870–71. Although the decision did not turn on this discussion, nor did the court come to a conclusion on the matter, the D.C. Circuit in *Kennecott* conducted a similar analysis of the text of the judicial remedy regarding the “production” of documents. *See* 88 F.3d 1191, 1203 (D.C. Cir. 1996) (analyzing the use of “production” in the judicial remedy provision through statutory intent and dictionary definitions). Specifically, the D.C. Circuit only briefly forayed into whether the legislature used the term “publication” broadly such that it could include “production,” instead focusing on the remainder of the provisional language regarding whom the records were improperly withheld from. *Id.*

⁷⁵ *Animal Legal Def. Fund*, 935 F.3d at 869–70.

⁷⁶ *Id.* at 870–71. This principle of construction, known as the rule against surplusage, dictates that courts interpret statutory text in a manner that ensures that each word is operative and not made superfluous. Valerie C. Brannon, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, (2018); *see* 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2019) (describing how courts effectuate the maxim that each statutory word be given effect as to align with legislative intent). The U.S. Supreme Court has continually employed this policy of disfavoring redundancy in deciding issues of statutory meaning. *See, e.g.,* *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) (noting that the Court must ensure that it gives effect to all provisions contained within the statute in interpreting the “Failure-to-Vote Clause” of the National Voter Registration Act).

⁷⁷ *Animal Legal Def. Fund*, 935 F.3d at 870.

⁷⁸ *Id.* at 869–70. The court specifically discussed the familiar maxim of *noscitur a sociis* that translates to “it is known from its associates” and declares that courts may understand words using the meaning of those around them. 82 C.J.S. Statutes § 439 (2020). For the Ninth Circuit, use of the word “to” twice in close proximity of each other in the text of the judicial remedy provision's declaration that district courts have jurisdiction “to enjoin . . . and to order” indicates that both have similar meanings in that they each provide a certain authority. *See Animal Legal Def. Fund*, 935 F.3d at 870 (noting the significance of the double “to” usage in the statute's description of the judicial remedy); 82 C.J.S. Statutes § 439 (describing how related words in a statute provide context and meaning for each other). The other interpretation principle that the court emphasized was that of plain meaning, which merely puts forth that courts ought to attach meaning to a statute in accordance with the ordinary and clear meaning of its text. *Animal Legal Def. Fund*, 935 F.3d at 869–70; *see* *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (stating that courts must find statutory meaning in the language of the act and subsequently enforce the plain meaning).

⁷⁹ *Animal Legal Def. Fund*, 935 F.3d at 871–72. *See generally* *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in

judicial remedy only allows district courts to order agencies to produce reading room records personally to requesters—ignores the deliberate separation of the request and reading room provisions.⁸⁰ Further, although the FOIA does state that complainants who made “requests” under the provisions of FOIA have exhausted their administrative remedies, the court refused to hold that this language imposes a requirement that an individual make a request for reading room records to qualify for relief.⁸¹ The legislature did not include the requirement of an individual request in the judicial remedy provision.⁸² The court reasoned that this proves that legislators expected some form of judicial interference with agency action or inaction under the reading room provision.⁸³ To reach these conclusions, the court examined the provision in light of the statute as a whole, a common process known as the whole Act rule.⁸⁴

Lastly, the Ninth Circuit examined its own precedent, as well as that of the U.S. Supreme Court, supporting its holding.⁸⁵ For example, in 1974, in *Renegotiation Board v. Bannerkraft Clothing Co.*, the Supreme Court held that the judicial review remedy is not the exclusive equitable remedy available for handling FOIA disclosure issues.⁸⁶ The Court reasoned that district courts, as

isolation is often clarified by the remainder of the *statutory scheme . . .*” (emphasis added)). The Ninth Circuit emphasized the linear nature of the statute. *Animal Legal Def. Fund*, 935 F.3d at 871. First, the FOIA presents obligations for the agencies via the publishing, reading room, and request provisions. 5 U.S.C. § 552(a)(1)–(3). It then lays out remedies for if and when those obligations are unfulfilled, including: the judicial review remedy, investigation by the Office of the Special Counsel, and a U.S. Attorney General and Director of the Office of Government Information Services review of the quantity of records produced. 5 U.S.C. § 552(a)(4)(B), (a)(4)(F), (e)(1)(Q).

⁸⁰ See *Animal Legal Def. Fund*, 935 F.3d at 872 (noting that blending the request provision into the reading room provision, as APHIS essentially argued, “collapses an agency’s affirmative responsibility to post certain records (identified in the statute by Congress) into an agency’s responsibility to respond to requests for copies of documents” and subsequently would exacerbate issues of request accumulation that were already present and which Congress hoped the provision would prevent).

⁸¹ *Id.*

⁸² *Id.* In the Ninth Circuit’s view, omission of an individual request prerequisite was more than likely purposeful. See *id.* (noting the lack of such a prerequisite in the relevant statutory language); 82 C.J.S. § 386 (stating that courts assume that if words are not present in the statute, the legislature purposefully did not include them and that courts therefore cannot try to bring them into the statute).

⁸³ *Animal Legal Def. Fund*, 935 F.3d at 871 n.15.

⁸⁴ See *id.* at 871 (noting that the structure of the FOIA and the language of the judicial remedy provision come together to express the type of authority that district courts hold regarding a disclosure issue). The whole Act rule provides that courts are to interpret statutory text in light of the whole legislation and legislative purpose. See *Richards v. United States*, 369 U.S. 1, 11 (1962) (explaining that “a section of a statute should not be read in isolation from the context of the whole Act” and that “in fulfilling our responsibility in interpreting legislation, ‘we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.’” (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956))).

⁸⁵ *Animal Legal Def. Fund*, 935 F.3d at 873–74.

⁸⁶ See *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19–20 (1974) (holding that the judicial remedy prescribed in the FOIA is not the exclusive remedy for FOIA cases). In 1974, in *Renegotiation Board v. Bannerkraft Clothing Co.*, the U.S. Supreme Court opined on the respondent’s request for certain records pertinent to its renegotiation of government defense contracts from the

courts of equity, have broad power.⁸⁷ The Ninth Circuit understood the Supreme Court's decision to allow for the compulsion of reading room record publication through the judicial remedy provision.⁸⁸ The court also cited its own decision in *Long v. IRS* to emphasize that district courts serve as the disciplinarians of FOIA disclosure issues and, as such, must have this power.⁸⁹

III. THE NINTH CIRCUIT JUSTLY PRIORITIZED LEGISLATIVE INTENT IN DECLARING READING ROOM RECORDS SUBJECT TO THE JUDICIAL REMEDY PROVISION

It is clear that the policy behind the FOIA favors increasing disclosure rather than minimizing it through the use of narrow exceptions.⁹⁰ What the U.S.

petitioner, the Renegotiation Board, in accordance with the FOIA. *Id.* at 4–5. The Renegotiation Board did not answer the request. *Id.* at 5. As a result, the respondent sought relief from the U.S. District Court for the District of Columbia and asked that the court stop the Renegotiation Board from withholding the requested material, as well as that it stop the then-current renegotiation process until it received the documents. *Id.* at 6. The Renegotiation Board argued that the district court did not have the power under FOIA to prevent continuation of the renegotiation proceedings. *Id.* at 17. Specifically, the Renegotiation Board argued that the only judicial enforcement power the court had was to order the production of the requested documents. *Id.* The Supreme Court rejected this argument. *Id.* at 19–20.

⁸⁷ See *id.* at 20 (opining that the FOIA does not indicate that Congress intended to limit the power of district courts in the context of § 225(a)). There is a distinction between cases in which monetary relief is sought and cases in which monetary compensation is inadequate. See *Court of Equity*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/court_of_equity [<https://perma.cc/9DBS-MNJJ>] (defining court of equity). Where monetary compensation is inadequate, equity proves for a more appropriate remedy, like an injunction. *Id.*; see 30A C.J.S. Equity § 18 (2020) (describing the use of equitable remedies).

⁸⁸ *Animal Legal Def. Fund*, 935 F.3d at 873.

⁸⁹ *Id.* at 873–74 (citing *Long v. IRS*, 693 F.2d 907, 908 (9th Cir. 1982)). In 1982, in *Long v. IRS*, the U.S. Court of Appeals for the Ninth Circuit opined on the appellants request to the agency for certain documents that the agency purposefully withheld until the appellants filed a FOIA claim. 693 F.2d at 908. Although the IRS ultimately produced the documents after the FOIA lawsuit filing, the appellants sought an injunction from the U.S. District Court for the Western District of Washington to prohibit the IRS from the delaying the production of the records. *Id.* The district court denied the relief, and the Ninth Circuit reversed, noting that the FOIA places power in the hands of the courts to effectuate its goal of full disclosure. *Id.* at 909. Therefore, it is imperative for the courts to keep that goal in mind when making a decision regarding alleged improper withholding under the FOIA. *Id.*

⁹⁰ See S. REP. NO. 89-813, at 38 (1965) (noting that when refusing to produce information under the FOIA's predecessor agencies justified such withholdings with the phrases "requiring secrecy in the public interest" and "required for good cause to be held confidential" and providing that the purpose of FOIA was to do away with those phrases and promote disclosure). The U.S. Supreme Court has even spoken on the legislative intent behind the FOIA when analyzing its provisions, reasoning that "[t]he affirmative portion of the Act . . . represents a strong congressional aversion to 'secret (agency) law,'; and represents an affirmative congressional purpose to require disclosure of documents that have 'the force and effect of law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (citations omitted). Even in discussing the nine exemptions that the FOIA allows to be free from disclosure, the Court has made sure to specifically state that those exemptions should not come to outweigh the main goal of the FOIA: transparency. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Court of Appeals for the District of Columbia failed to acknowledge in its focus on individual relief was that Congress enacted the FOIA for the benefit of the *public*.⁹¹ Therefore, courts should construe each provision in a manner that most benefits the public.⁹²

Although each amendment to the FOIA aimed to improve its practical effects, the availability of agency records remains a problem.⁹³ In order for the affirmative disclosure requirement of the reading room provision to effectuate

⁹¹ See *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (emphasis added) (reasoning that the scope of the FOIA's judicial remedy provision extends to injuries committed against individual complainants and not to those committed against the public); see also David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 n.204 (2010) (noting that the passage of the FOIA has not only led the American public to rely on its ability to allow them access to government material but has also spurred the introduction of other disclosure-related laws in lower governmental spheres in the United States and other countries).

⁹² See *EPA v. Mink*, 410 U.S. 73, 80 (1973) (highlighting that the FOIA was "broadly conceived" to minimize government secrecy and therefore includes a "judicially enforceable *public* right" that should aid that goal by favoring access). It is common for courts, when interpreting a statute, to work off of the presumption that the legislature sought to effectuate an outcome that favors the public. 82 C.J.S. Statutes § 379 (2020).

⁹³ See H.R. REP. NO. 110-45, at 6-7 (2007) (detailing the Freedom of Information Act Amendments of 2007 that, among other things, ensured the availability of fee waivers of less "traditional" journalists, mandated the assigning of tracking numbers for delayed document requests, and expanded upon requirements that agencies had to report information about FOIA denials and agency response logistics); H.R. REP. NO. 104-795, at 11, 18-19 (1996), as reprinted in 1996 U.S.C.C.A.N. 3448, 3454, 3461-62 (introducing and summarizing the EFOIA that, among other things, mandated the electronic disclosure of information when records are maintained electronically or when reasonable and eliminating the use of "exceptional circumstances" as an excuse for delay in production in order to facilitate timely agency responses); 132 CONG. REC. H9497-98 (1986) (stating the components of the Anti-Drug Abuse Act of 1986 that included amendments to FOIA, such as limiting the amount of fees that agencies may charge requesters for document production and introducing new fee waiver opportunities); H.R. REP. NO. 94-880, pt. 1, at 1, 9 (1976), as reprinted in 1976 U.S.C.C.A.N. 2183, 2183, 2190-91 (1976) (detailing the 1976 Amendment to FOIA, known as the "Government in the Sunshine Act," that made agency meetings and deliberations available to the public, subject to certain exemptions such as matters related to national defense or foreign policy and trade secret information); H.R. REP. NO. 93-876, at 122, 125-29 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6268, 6271-74 (describing the multiple substantive changes that the 1974 amendment made to improve the functioning of FOIA's provisions including). The changes that the 1974 amendment made included: (1) requiring publication of indices that detail the type of information available from agencies; (2) softening the standard for how a request for information should detail the records sought; (3) mandating certain response times for agencies to produce records or file a responsive pleading; (4) allowing for the recovery of attorney's fees for parties that are successful in litigation regarding disclosure; (5) authorizing courts that review a FOIA appeal *de novo* to review the documents in camera to decide whether the agency may withhold them from the plaintiff; (6) mandating that agencies produce annual reports detailing their withholdings; and (7) expanding on what type of entity is considered an agency for the purposes of FOIA disclosure. *Id.* Even in light of these amendments, the National Security Archive conducted an audit in 2002 of 165 federal agencies and found that only about 40% had updated their electronic reading room frequently and had a notable number of records. *Most Agencies Falling Short on Mandate for Online Records*, NAT'L SEC. ARCHIVE (Mar. 13, 2015), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB505/> [<https://perma.cc/B9YC-4UMX>].

the kind of change that Congress intended, it must have a remedy.⁹⁴ This is especially true in light of how important the information often is to plaintiffs.⁹⁵ The U.S. Court of Appeals for the Ninth Circuit recognized this.⁹⁶

In contrast to the D.C. Circuit's analysis, the Ninth Circuit's approach reflected a well-known statutory interpretation principle known as the whole Act rule.⁹⁷ The whole Act rule emphasizes that courts should interpret statutory language not as lone provisions, but in the context of the legislation as a whole.⁹⁸ And the FOIA in its entirety purports to enforce transparency, an issue that has become increasingly prevalent.⁹⁹ The D.C. Circuit's decision, on the

⁹⁴ See H.R. REP. NO. 104-795, at 11, as reprinted in 1996 U.S.C.C.A.N. at 3454 (noting that under FOIA, agencies must keep up to date with the technological advances that the internet brought on to facilitate the use of online resources for government records). Without a remedy, the trend of unkempt electronic reading rooms and lackadaisical online disclosure will continue. See *Most Agencies Falling Short on Mandate for Online Records*, supra note 93 (listing several "E-Delinquent" federal agencies that have barely taken action to fulfill their online disclosure requirements under FOIA); *Agencies Violate Law on Online Information*, NAT'L SEC. ARCHIVE (Mar. 12, 2007), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB216/index.htm> [<https://perma.cc/BS45-N4AF>] (noting that even as of 2007, only 21% of agencies had posted the requisite records under the reading room provision onto their websites).

⁹⁵ See, e.g., *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 865 (9th Cir. 2019) (describing how vital the APHIS records are to the plaintiffs, including the Animal Legal Defense Fund's use of online reading room documents in bringing suits when there is an issue of animal welfare and in seeking license revocations from the Department of Agriculture for noncompliant facilities, each of which require timely access to information to be successful).

⁹⁶ See *id.* at 868 (explaining that the types of problems created by APHIS's lack of public disclosure caused the type of "'informational' injur[y]" to the plaintiffs that the reading room provision was designed to prevent).

⁹⁷ Compare *id.* at 870–72 (interpreting the language of the reading room provision in light of the surrounding context as well as the structure of the whole FOIA), with *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 846 F.3d 1235, 1243 (D.C. Cir. 2017) (denying the existence of a public remedy for improperly withheld reading rooms because of a focus on the word "complainant" in the FOIA). Recently, the Second Circuit agreed with this approach and adopted the Ninth Circuit's reasoning when deciding whether the U.S. District Court for the Southern District of New York had the authority to order the Board of Immigration Appeals (BIA) to publish certain decisions onto its electronic reading room. See *N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, No. 19-3248-CV, 2021 WL 401269, at *14 (2d Cir. Feb. 5, 2021) (holding that the FOIA's judicial remedy authorizes district courts to order the BIA to publish its unpublished decisions onto the agency's electronic reading room).

⁹⁸ See *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (emphasizing that a foundational principle that courts follow when determining the meaning of a statute is to interpret the statutory language in its context and within the whole framework of the legislation); *Richards v. United States*, 369 U.S. 1, 11 (1962) (analyzing the Federal Tort Claims Act and noting that courts should analyze each part of a statute in light of the Act's context and intent rather than single out specific language); Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2406–07 (2020) (noting how fundamental it has become for courts to consider the policy behind a statute when interpreting its language).

⁹⁹ See Jason Paladino, *The Pentagon's War on Transparency*, PROJECT ON GOV'T OVERSIGHT (Dec. 5, 2019), <https://www.pogo.org/analysis/2019/12/the-pentagon-war-on-transparency/> [<https://perma.cc/FYV7-Q6ZD>] (analyzing the issues of disclosure under President Trump's administration and noting that: (1) information withholding doubled between 2014 and 2018; (2) assertions of FOIA

other hand, would leave no judicial recourse for failing to adhere to reading room requirements, a move that undermines the push for maximum public disclosure that is at the core of the FOIA.¹⁰⁰

Although the Ninth Circuit's *Animal Legal Defense Fund v. U.S. Department of Agriculture* decision is promising for citizens' ability to easily review records, another amendment to the FOIA may serve that purpose better.¹⁰¹ For example, despite the fact that one of the main goals of the EFOIA was the efficient use of FOIA resources, agencies' refusal to adhere to reading room requirements has led to an increase in unnecessary resource expenditure and continued lack of responsiveness.¹⁰² Rather than clogging up district and circuit courts with more requests for injunctive relief, Congress should take matters into its own hands.¹⁰³ In fact, the reading room provision should expressly state the availability of judicial relief with language that reads, for instance: "electronic publication of requisite records may be ordered in accordance with subsection (a)(4)(B)," the judicial remedy provision.¹⁰⁴ Further, such a statutory amendment should require updated and adequate electronic reading rooms, providing for substantive consequences for disobedient agencies.¹⁰⁵ This would advance the goal of disclosure and hold the government accountable.¹⁰⁶

exemptions in agencies' record denials increased to its highest percentage in five years; and (3) the government concealed information that it should have disclosed to the public such as information regarding troop deployment).

¹⁰⁰ See *Animal Legal Def. Fund*, 935 F.3d at 875 (noting that the D.C. Circuit's decision in *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice* rendered courts unable to enforce the reading room provision, thereby making it a "dead letter"); *FOIA Update: Policy Guidance: Attorney General's Memo on FOIA*, U.S. DEP'T JUST. (Jan. 1, 1981), <https://www.justice.gov/oip/blog/foia-update-policy-guidance-attorney-generals-memo-foia> [<https://perma.cc/ZEE7-CAHD>] (detailing the language of Attorney General William French Smith's memorandum to agencies regarding the FOIA that emphasized disclosure as the main objective in administering the FOIA).

¹⁰¹ Cf. *N.Y. Legal Assistance Grp.*, 937 F.3d at 222–23 (opining that when Congress amended the FOIA to make the judicial remedy its own provision, it sought to clarify that the remedy was available for all violations, including refusing to publish applicable records in compliance with the reading room provision publicly). See generally *Most Agencies Falling Short on Mandate for Online Records*, *supra* note 93 (detailing the continued shortcomings of federal agency online record publication).

¹⁰² See H.R. REP. NO. 104-795, at 11 (1996), as reprinted in 1996 U.S.C.A.N. 3448, 3454 (stating that encouraging more direct public access to records online may lead to a reduction in FOIA requests and therefore more effective use of resources); *Most Agencies Falling Short on Mandate for Online Records*, *supra* note 93 (describing the key findings of a FOIA audit of all federal agencies that included that timely updating FOIA records to electronic reading rooms preserved government resources).

¹⁰³ See generally 120 CONG. REC. H10864-75 (1974) (statement of Rep. Moorhead) (presenting the passing votes for the bipartisan 1974 amendments to the FOIA that substantially changed the effect of the FOIA in favor of greater disclosure despite a presidential veto of the amendment by President Gerald R. Ford).

¹⁰⁴ See *Animal Legal Def. Fund*, 935 F.3d at 874–75 (indicating a split in judicial opinion regarding whether the judicial remedy provision of the FOIA authorizes district courts to force agencies to publish certain records online).

¹⁰⁵ See *Most Agencies Falling Short on Mandate for Online Records*, *supra* note 93 (noting that only approximately 40% of federal agencies had updated their electronic reading rooms frequently

CONCLUSION

Statutory effect can often come at the expense of legislative intent, particularly when that intent is unknown or opaque. In the case of the FOIA, however, it remains evident that its purpose was to address issues of disclosure. The Supreme Court has acknowledged the same. What the FOIA promised was a federal executive branch that operated on transparency. The U.S. Court of Appeals for the Ninth Circuit's conclusion in *Animal Legal Defense Fund v. U.S. Department of Agriculture* represented a strong step toward the fulfillment of that promise. In ruling that the judicial remedy provision of the FOIA authorizes district courts to order the online publication of reading room records, the Ninth Circuit advanced the prospect that there is relief available when agencies work against the ease of online access for the public. The D.C. Circuit, by premising its decision on individual relief, could not bring about that same kind of change. Although *Animal Legal Defense Fund* may not lead to the kind of sweeping change that the disclosure system needs, it serves as the right kind of driving force for the legislature to further improve the practical workings of the FOIA through a congressional amendment.

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and had a notable number of records, creating an inefficient system of information disclosure). See generally 5 U.S.C. § 552(a)(4)(F)(i) (detailing penalties that may occur when an agency unlawfully withholds documents and the government must compel their production).

¹⁰⁶ See H.R. REP. NO. 89-1497, at 25, 33 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2418, 2429 (introducing the FOIA and its purpose and emphasizing the need for an informed society).