STATE OF SOUTH DAKOTA)
: ss
COUNTY OF CLAY)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,
a nonprofit corporation,
Plaintiff,

CIV. # 10-31

-vs.-

SOUTH DAKOTA BOARD OF REGENTS and THE UNIVERSITY OF SOUTH DAKOTA,

Defendants.

SUMMONS

FILED
FEB 03 2010
Robin Iverson
Clay County Clerk of Courts
1st Judicial Circuit Court of South Dakota

THE STATE OF SOUTH DAKOTA TO THE ABOVE-NAMED DEFENDANTD:

YOU ARE HEREBY SUMMONED and required to answer the Complaint of the Plaintiff in the above entitled action, which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the attorney for the Plaintiff, Caitlin F. Collier, at P.O. Box 435, Vermillion, SD 57069, within thirty (30) days after the service of this Summons upon you, exclusive of the day of such service; and in case of your failure to answer the said Complaint within that time, judgment by default may be rendered against you as requested in the Complaint.

Dated at Vermillion, South Dakota on February 2nd, 2010.

COLLIER LAW OFFICE
Caitlin F. Collier
Caitlin F. Collier
Attorney for Plaintiff
P.O. Box 435
14 W. Main St., Ste. A
Vermillion, SD 57069
(605) 202-0281

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF CLAY)

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Plaintiff,

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COMPLAINT FOR

DECLARATORY JUDGMENT

COMES NOW the above-named plaintiff, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (hereinafter PETA), by and through its attorney, Caitlin F. Collier of Vermillion, South Dakota, and for its cause of action pursuant to SDCL 21-24-3, states and alleges as follows:

SUMMARY OF FACTS

1. That the plaintiff is an IRS-qualified 501(c)(3) non-profit organization whose mission includes understanding and educating the public about vivisection, and animal mistreatment, including actions conducted at public universities, such as the University of South Dakota (USD). PETA also qualifies as a representative of the news media based upon the publication and multi-national distribution of its magazine, "Animal Times", as well as its publication and distribution of educational materials.

2. In 2007, USD was cited by the U.S. Department of Agriculture (USDA) for violations of the federal Animal Welfare Act (AWA), 7 U.S.C. § 2131-2159, pertaining to the use of primates in invasive stroke research experiments. The violations pertained to a lack of psychological enrichment in the cages, and housing the animals individually rather than in pairs

or groups.

3. The USDA violation citations prompted PETA to submit a public records act request, pursuant to the prior version of the South Dakota Public Records Act [SDPRA] S.D.C.L. §§1-27-1, *et seq.* An email request was sent to Laura J. Jenski, USD Vice President for Research, on July 22, 2008. This email request is attached to this Complaint as Exhibit # 1A, and incorporated herein by reference. Additionally, a Notice of Review of Request for Disclosure of Public Records, from PETA, was sent to James F. Shekleton, General Counsel for the South Dakota Board of Regents (Exhibit #1B). The request was denied, and an appeal through the South Dakota Board of Hearing Examiners was also denied, based upon the prior statute.

4. Effective July 1, 2009, South Dakota law concerning public access to governmental records was amended. On July 10, 2009, PETA re-submitted their request for public records to USD. On July 31st, 2009, USD responded claiming that certain information requests were denied based upon exemptions in the new law and that USD would charge an estimated fee of $ 2,000 to provide the requested information. This response is attached to the complaint as Exhibit # 2 and incorporated herein by reference.

5. On October 27, 2009, PETA sent Vice President Laura J. Jenski, a new and modified request for copies of public records (and dismissing the previous request). A copy of the first request is attached to the complaint as Exhibit # 3A and the newer request is attached to the complaint as Exhibit # 3B, and incorporated herein by reference. PETA also requested a waiver of fees pursuant to SDCL § 1-27-36.

6. On November 6, 2009, Vice President Laura Jenski responded to the new PETA request, again claiming that certain materials were exempt under SDCL § 1-27-1.5(3), and that

some information would be redacted pursuant to SDCL § 1-27-1.5(7) and § 1-27-10.1. The stated basis for the denial was that information was exempt "to protect the specific details of the subject research" and the redaction would cover "personnel names" "to protect personnel matters relating to assignments." Vice President Jenski denied PETA's request for USDA inspection reports and associated narratives, instead referring PETA to the USDA's general Animal Welfare Web page for access to this information. As of the date of this filing, the appropriate page does not provide links to all USDA records responsive to PETA's request, in that narratives are not posted. The inspection reports are posted on-line, but not narratives associated with those reports.

Additionally, Vice President Jenski estimated the cost for reproduction, postage and personnel time to provide the requested documents to PETA would remain in the range of $ 2,000, stating that "the university will not waive the costs". The response is attached hereto as Exhibit # 4, and incorporated herein by reference.

JURISDICTION, VENUE AND PARTIES

7. This court has jurisdiction over the subject matter of this action matter pursuant to SDCL 1-27-38 which states:

> If a public record officer denies a written request in whole or in part, or if the requestor objects to the public record officer's estimate of fees or time to respond to the request, a requestor ***may within ninety days of the denial commence a civil action by summons*** or, in the alternative, file a written notice of review with the Office of Hearing Examiners. (emphasis added)

This statute was enacted during the 2008 South Dakota Legislative Session.

8. Plaintiff PETA is, and at all times relevant to this complaint was, a non-profit public interest organization and a party acting in and for the public welfare and interest.

9. The defendants are state governmental agencies. The University of South Dakota (hereinafter USD) is a public university located in Vermillion, South Dakota. The governance of the University of South Dakota and its employees resides in the hands of the South Dakota Board of Regents

10. Venue of this action is proper pursuant to SDCL Chp. 15-5; and plaintiff seeks declaratory judgment in this action based upon SDCL Chp. 21-24.

APPLICABLE LAW

11. When Governor Mike Rounds signed the new public records bill into law on March 30, 2009, the Governor stated "The public clearly has a right to know what government is doing and to participate in the process." SDCL 1-27-1 states in part: " Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter." The statutory scheme and its legislative history clearly demonstrate a presumption of openness of government records.

12. The legislative history of the new law enacted in SDCL §§ 1-27 shows that the South Dakota law was modeled on the Nebraska open records statute, found at Neb. Rev. Stat. Chp. 84-712.

13. SDCL § 1-27-1.5(3) states in part:

> The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:

> (3) Trade secrets, ***the specific details of bona fide research***, applied research, or scholarly or creative artistic projects ***being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state***, and other proprietary or commercial information ***which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose*** (emphasis added)

and SDCL § 1-27-1.10 states:

> In response to any request pursuant to § 1-27-36 or 1-27-37, a public record officer ***may redact*** any portion of a document which contains information precluded from public disclosure by § 1-27-3 or which ***would*** unreasonably invade personal privacy, threaten public safety and security, ***disclose proprietary information***, or disrupt normal government operations. A redaction under this section is considered a partial denial for the application of § 1-27-37. (emphasis added)

14. In order for records to be exempt under this statute, defendant has the burden of proof to demonstrate that each record, or part of a record, sought to be withheld fits within the narrow scope of one of the statutory exemptions to the SDPRA. The requestor's burden of proof is substantially less and substantially different, as demonstrated by *Evertson v. City of Kimball*, 767 N.W.2d 751, 758-59 (Neb. 2009), in which the court stated:

> "A party seeking a writ of mandamus under § 84-712.03 [appeals process for public record's denials in Nebraska] has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by § 84-712.01; and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712.
>
> If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and convincing evidence that § 84-712.05 or § 84-712.08 exempts the records from disclosure."

Further, Plaintiff asserts that the applicable act should be read to require the Defendant to produce the records in their possession even if some portion of the records requested may be available elsewhere.

15. Further, because the burden of showing how and why an exemption applies rests

upon the defendant, the plaintiff asserts that the defendant should also be required to:

> (1) Specifically identify the exact portion(s) of each document and general content claimed to be proprietary, and why proprietary information, if it exists, cannot be redacted and the remainder of the information provided to plaintiff;
>
> (2) State whether the information claimed to be proprietary has ever been released in any manner to a person who was not an employee or in a confidential relationship with the agency;
>
> (3) State whether the information so specified is commonly known within the industry or is readily ascertainable by outside persons with minimal time and effort;
>
> (4) State how release of the information so specified would infringe intellectual property rights, or give advantage to business competitors; and
>
> (5) State how release of the information requested would serve no material public purpose.

16. The plain language of SDCL § 1-27-1.5(3) requires evidence that release of the specific details of bona fide research **will** infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose. Similarly, the plain language of SDCL §1-27-1.10 permits, but does not require, an agency to redact information that **will** disclose proprietary information.

USD Wrongfully Denied PETA's Public Records Request

17. Plaintiff asserts that it was incorrectly denied access to certain public records, that it was incorrectly denied access to unredacted records, and that the defendants incorrectly failed to waive the costs of production of records in this matter and failed to fairly and accurately calculate those costs.

18. Plaintiff further asserts that none of the information requested meets the criteria of proprietary or commercial information and that its release would not infringe

intellectual property rights or give advantage to business competitors.

19. The South Dakota Public Records Act carries a presumption of openness. Although the interpretation of this statute would be a case of first impression in the courts, the legislative history of the SDPRA shows that it was modeled upon the Nebraska Open Records Act -NEB. REV. STAT. -- 84-712 THROUGH 84-712.09 (1999, CUM. SUPP. 2006, Supp. 2007). An earlier interpretation of the "proprietary or commercial information" exemption by the Nebraska Attorney General's office (Op. Att'y Gen. No. 92068 (May 7, 1992) concluded that a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure, and nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage. The Nebraska Attorney General further asserted that the real inquiry under the exemption is "whether proprietary or commercial information would, if disclosed, give advantage to business competitors and serve no public purpose." The Nebraska Attorney General's office reaffirmed those requirements for assertion of the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997).

20. Plaintiff further asserts that disclosure of the information would serve a material public purpose in that it would further educate the public about violations of federal animal welfare law and policy by USD and USD's response to those violations.

21. Other states with similar public records statutes with similar exemptions have found either that the exemption for commercial and proprietary information did not apply to a similar disclosure request or that disclosure was in the public interest. *See, e.g., Progressive Animal Welfare Society v. University of Washington*, 884 P.2d 592 (Wash. 1994).

22. Plaintiff further asserts that the plain language of SDCL § 1-27-1.5(7) which exempts: "[p]ersonnel information *other than* salaries and *routine directory information*" does not bar the disclosure of the names of researchers who are part of the research documentation being requested.

USD Wrongfully Requested An Exorbitant Fee

23. SDCL §1-27-35 states:

> Any informal request for disclosure of documents or records shall be made to the custodian of the record. The custodian of the record may then provide the requestor with the document or record *upon payment of the actual cost of mailing or transmittal, the actual cost of reproduction, or other fee established by statute or administrative rule.* A requestor that makes an informal request *requiring the dedication of staff time in excess of one hour may be required to pay the cost of the staff time necessary for the location, assembly, or reproduction of the public record.* If any records are required or permitted to be made public upon request and no other rate is prescribed for reproduction or retrieval of such records, the ***Bureau of Administration*** shall establish, by ***rules*** promulgated pursuant to chapter 1-26, the maximum rate, or the formula for calculating rates, for reproduction and retrieval.

SDCL §1-27-36 states:

> For any informal request reasonably likely to involve a fee in excess of fifty dollars, the custodian shall provide an estimate of cost to the requestor prior to assembling the documents or records and the requestor shall confirm in writing his or her acceptance of the cost estimate and agreement to pay. The custodian may exercise discretion to waive or reduce any fee required under this section if the waiver or reduction of the fee would be in the public interest.

24. In her November 6, 2009 response, Vice President Laura Jenski informed PETA that:

> "We estimate that the costs for postage, copying and personnel time to provide these documents to PETA will be approximately $ 2,000, based on $ 0.07/black and white page copying or

actual cost of printing and personnel costs to cover the actual time required to assemble and to prepare documents for disclosure. The university will not waive the costs."

25. Plaintiff asserts that waiver or reduction of the fee is in the public interest because Plaintiff has no commercial interest in the records and because disclosure of the records will education the public about the operations of a publicly-funded institution.

26. Plaintiff further asserts that the small number of documents that Defendant is willing to provide does not justify the amount of the estimate provided by Defendants. According to her email of November 6, 2009, Vice President Laura Jenski was only willing to provide the following records:

- Institutional Animal Care and Use Committee (IACUC) semi-annual and annual reviews with personnel names redacted (based upon a reliance upon SDCL § 1-27-1.5(7));
- Routine veterinary records (January 1, 2006 to date of fulfillment), with experimental surgical reports redacted (based upon reliance upon SDCL § 1-27-1.10 and SDCL § 1-27-1.5(3)) to protect the specific details of the subject research and with personnel names redacted (based upon reliance upon SDCL § 1-27-1.5(7) to protect personnel matters relating to assignments;
- All correspondence between USD and USDA regarding any issues of non-compliance with personnel names redacted (based upon reliance upon SDCL § 1-27-1.5(7)) to protect personnel matters relating to assignments;
- USD IACUC meeting minutes that pertain to the referenced experiments with personnel names redacted (based upon reliance upon SDCL § 1-27-1.5(7)) to protect personnel matters relating to assignments;

And for these reviews, medical records, correspondence and meeting minutes, the Defendants are demanding $ 2,000, which sum is the same demanded for the previous records request which was substantially larger.

Further, Defendants made no mention of South Dakota Administrative Rule 10:10:01:02, which states: "For postage, courier, fax, or other method of transmittal, the custodian may charge a rate not to exceed the actual cost of transmittal. *If the records are transmitted electronically, other than fax, there shall be no charge for the transmittal.*" (emphasis added). No offer to

transmit documents electronically was made by Defendants.

WHEREFORE, Plaintiff prays for judgment in its favor and against the Defendants as follows:

1. That the Court enter an Order requiring the disclosure of all public records requested by Plaintiff in its email request dated October 27, 2009, which Defendant has not already agreed to disclose.

2. That the Court enter an Order requiring that the Defendants waive the costs of production in this matter or that the costs be reduced based upon an accurate and ascertainable estimate.

3. That an Order be entered requiring Defendant to pay all of Plaintiff's attorneys fees, tax, and costs reasonably incurred in this action.

4. That the Plaintiff be awarded such other and further relief as the Court may deem just and equitable

Dated this 2nd day of Feb, 2010.

Caitlin F. Collier
Attorney for Plaintiff
14 W. Main St., Ste. A
P.O. Box 435
Vermillion, SD 57609
(605) 202-0281

EXHIBIT 1A

From: Ian Smith [mailto:IanS@peta.org]
Sent: Tuesday, July 22, 2008 4:01 PM
To: Jenski, Laura J
Subject: Request for documents

July 22, 2008

Laura J. Jenski,
Vice President for Research
105 Slagle Hall
University of South Dakota
Vermillion, SD 57069

2 pages sent via email to: Laura.Jenski@usd.edu

Dear Ms. Jenski:

Pursuant to S. D. C. L. § 1-27-1, People for the Ethical Treatment of Animals (PETA) requests copies of the following documents:

- All incident reports and animal welfare complaints submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty and animal care staff (January 1, 2006-date of fulfillment)
- IACUC semi-annual and annual reviews of research projects involving nonhuman primates (January 1, 2006-date of fulfillment)
- All protocol revision request forms submitted to the IACUC for projects involving nonhuman primates (January 1, 2006-date of fulfillment)
- Veterinary medical records and necropsy/histology reports (if applicable) for all nonhuman primates at USD (January 1, 2006-date of fulfillment)
- All video and photographic footage (excluding those obtained on the microscopic level) collected of nonhuman primate surgeries, experiments and postmortem brain examinations. (January 1, 2006-date of fulfillment)
- Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal investigations/inquiries regarding AWA/PHS noncompliance carried out by USD, the USD IACUC, and any IACUC subcommittees. (January 1, 2006-date of fulfillment)
- USD IACUC meeting minutes (with corresponding attachments) (January 1, 2006-date of fulfillment)
- All nonhuman primate-related research protocols (approved, denied and deferred) received by the USD Institutional Animal Care and Use Committee (IACUC) (January 1, 2006-date of fulfillment)
- Copies of all correspondence between USD and OLAW regarding PHS/AWA noncompliant incidents (January 1, 2006-date of fulfillment)
- USDA inspection reports and corresponding inspection narratives (January 1, 2006-date of fulfillment)

- USDA final investigative reports with corresponding attachments (January 1, 2006-date of fulfillment)
- USDA letters of warning with corresponding attachments (USDA APHIS form 7060) (January 1, 2006-date of fulfillment)
- USDA letters of information (LOI) with corresponding attachments (January 1, 2006-date of fulfillment)
- USDA Decision and orders, consent decisions, official investigative reports and settlement agreements and OGC complaints and stipulations (January 1, 2006- date of fulfillment)
- USDA annual facility reports (January 1, 2006-date of fulfillment)
- OLAW compliance oversight evaluations and final reports (January 1, 2006-date of fulfillment)
- OLAW Assurance with corresponding attachments (January 1, 2006-date of fulfillment)
- All NIH grant applications submitted by Dr. Robert J. Morecraft (2004-date of fulfillment)
- All NIH Progress Reports submitted by Dr. Robert J. Morecraft (2004-date of fulfillment)

If any of the records or documents described above are considered to be exempt from release, please segregate and provide access to non-exempt portions, and itemize and justify deletions by reference to specific exemptions in S. D. C. L. § 1-27-3.

PETA is prepared to pay a reasonable search and duplication fee for the fulfillment of this request up to the amount of $50.00, but kindly asks that such fees be waived in light of our non-profit status. If the aforementioned request for a waiver or reduction of fees is denied and fees are expected to exceed $50.00, please notify PETA to this effect before this request is processed.

Please confirm that you received this request and that it is being processed.

Thank you for your attention. Please feel free to contact me via telephone at 860-705-7637 or via email at IanS@peta.org, with any questions or concerns.

Respectfully,

Ian Smith
Research Associate
Laboratory Investigations Department
People for the Ethical Treatment of Animals
Phone: 860-705-7637 / Email: IanS@peta.org

EXHIBIT 18

NOTICE OF REVIEW
REQUEST FOR DISCLOSURE OF PUBLIC RECORDS

Date of Request:	July 22, 2008
Name of Requestor:	People for the Ethical Treatment of Animals. Request submitted by Ian Smith, Research Associate, PETA Request for review submitted by Lori Kettler, Senior Counsel, PETA Foundation
Address of Requestor:	501 Front St., Norfolk, VA 23510
Telephone Number of Requestor:	757-819-4227 (Lori Kettler)

Type of Review Being Sought:
X Request for Specific Record
____ Estimate of Fees
____ Estimate of Time to Respond

Short Explanation of Review Being Sought Including Specific Records Requested:

Please see attached letter.

Name of Public Record Officer:	James F. Shekleton
Address of Public Record Officer: Pierre, South Dakota, 57501-2545	306 East Capitol Ave., Ste. 200,
Name of Governmental Entity:	Board of Regents
Address of Governmental Entity:	Same as above

You must include with the submission of this Notice of Review--Request for Disclosure of Public Records form the following information: (1) A copy of your written request to the public record officer; (2) A copy of the public record officer's denial or response to your written request, if any; and (3) Any other information relevant to the request that you desire to be considered.

I hereby certify that the above information is true and correct to the best of my knowledge.

Signature of Requestor:

From: Jenski, Laura J [mailto:Laura.Jenski@usd.edu]
Sent: Friday, July 31, 2009 6:46 PM
To: Ian Smith
Cc: Lori Kettler; Shekleton, Jim
Subject: Your request of 10 July 2009

EXHIBIT 2

Mr. Smith,

To follow up on your request for information, dated July 10, 2009 (attached):

1. All incident reports and animal welfare complaints submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty and animal care staff (January 1, 2006-date of fulfillment). There were no incident reports or formal animal welfare complaints submitted to the IACUC during this time period.

2. IACUC semi-annual and annual reviews of research projects involving nonhuman primates (January 1, 2006-date of fulfillment). Materials will be provided, redacted as per §§ 1-27-1.10 and 1-27-1.5 (3), (7) and (23) to protect the specific details of the subject research, personnel matters relating to assignments and to avoid endangering the life and safety of staff assigned to support or to oversee the subject research.
3. All protocol revision request forms submitted to the IACUC for projects involving nonhuman primates (January 1, 2006-date of fulfillment). These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.
4. Veterinary medical records and necropsy/histology reports (if applicable) for all nonhuman primates at USD (January 1, 2006-date of fulfillment). Routine medical records will be provided, redacted as per §§ 1-27-1.10 and 1-27-1.5 (3) to protect the specific details of the subject research.
5. All video and photographic footage (excluding those obtained on the microscopic level) collected of nonhuman primate surgeries, experiments and postmortem brain examinations. (January 1, 2006-date of fulfillment). These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.
6. Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal investigations/inquiries regarding AWA/PHS noncompliance carried out by USD, the USD IACUC, and any IACUC subcommittees. (January 1, 2006-date of fulfillment). There were no notes, reports, documentation, etc, related to internal investigations/inquiries regarding AWA/PHS noncompliance carried out by USD, the USD IACUC, and any IACUC subcommittees during this time period.
7. USD IACUC meeting minutes (with corresponding attachments) (January 1, 2006-date of fulfillment). These materials are exempt as per § 1-27-1.5 (3) and (24) to protect the specific details of the subject research and internal agency records.
8. All nonhuman primate-related research protocols (approved, denied and deferred) received by the USD Institutional Animal Care and Use Committee (IACUC) (January 1, 2006-date of fulfillment). These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.
9. Copies of all correspondence between USD and OLAW regarding PHS/AWA noncompliant incidents (January 1, 2006-date of fulfillment). Copies of correspondence will be provided, redacted as per § 1-27-1.5 (7) and (23) to protect personnel matters relating to assignments and to avoid endangering the life and safety of staff assigned to support or to oversee the subject research.
10. USDA inspection reports and corresponding inspection narratives (January 1, 2006-date of fulfillment). These will be provided, redacted as per § 1-27-1.5 (3) and (7) to protect the specific details of the subject research, to protect personnel matters relating to assignments and to avoid endangering the life and safety of staff assigned to support or to oversee the subject research.
11. USDA final investigative reports with corresponding attachments (January 1, 2006-date of fulfillment). There are no final investigative reports.
12. USDA letters of warning with corresponding attachments (USDA APHIS form 7060) (January 1, 2006-date of fulfillment). There are no letters of warning.
13. USDA letters of information (LOI) with corresponding attachments (January 1, 2006-date of fulfillment). There are no letters of information.
14. USDA Decision and orders, consent decisions, official investigative reports and settlement agreements and OGC complaints and stipulations (January 1, 2006- date of fulfillment). There are no USDA Decision and orders, consent decisions, official investigative reports and settlement agreements and OGC complaints and stipulations during this time period.
15. USDA annual facility reports (January 1, 2006-date of fulfillment). These will be provided.
16. OLAW compliance oversight evaluations and final reports (January 1, 2006-date of fulfillment). These will be provided, redacted as per § 1-27-1.5 (7) and (23) to protect personnel matters relating to assignments and to avoid endangering the life and safety of staff assigned to support or to oversee

17. OLAW Assurance with corresponding attachments (January 1, 2006-date of fulfillment). Materials on the OLAW FWA dated Jan. 1, 2006 and later will be provided.
18. All NIH grant applications submitted by Dr. Robert J. Morecraft (2004-date of fulfillment). NIH provided information from awarded grants in fall 2008; requests concerning grants after that time should be directed to NIH. Submitted proposals are exempt per § 1-27-1.5 (3) to protect the specific details of the subject research.
19. All NIH Progress Reports submitted by Dr. Robert J. Morecraft (2004-date of fulfillment). NIH provided information on progress reports from awarded grants in fall 2008; requests concerning grants after that time should be directed to NIH. Submitted progress reports are exempt per § 1-27-1.5 (3) to protect the specific details of the subject research.

USD staff estimates that it will cost considerably more than $50 and one hour of staff time to locate, assemble, and reproduce the materials; possibly in the range of $2,000. USD will not waive the fees. Once we hear from you whether you continue to have interest in this information, I estimate that it will take approximately 20 business days to complete the work.

Sincerely,

Laura Jenski

Laura J. Jenski, Ph.D.

Vice President for Research

The University of South Dakota

414 E. Clark Street

Vermillion, SD 57069

Tel: 605-677-5370

Fax: 605-677-6387

E-mail: laura.jenski@usd.edu

105 Slagle Hall

University of South Dakota

Vermillion, SD 57069

EXHIBIT 3A

2 pages sent via email to: Laura.Jenski@usd.edu

Dear Ms. Jenski:

Pursuant to S. D. C. L. § 1-27-1, People for the Ethical Treatment of Animals (PETA) requests copies of the following documents:

- All incident reports and animal welfare complaints submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty and animal care staff (January 1, 2006-date of fulfillment)
- IACUC semi-annual and annual reviews of research projects involving nonhuman primates (January 1, 2006-date of fulfillment)
- All protocol revision request forms submitted to the IACUC for projects involving nonhuman primates (January 1, 2006-date of fulfillment)
- Veterinary medical records and necropsy/histology reports (if applicable) for all nonhuman primates at USD (January 1, 2006-date of fulfillment)
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- Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal investigations/inquiries regarding AWA/PHS noncompliance carried out by USD, the USD IACUC, and any IACUC subcommittees. (January 1, 2006-date of fulfillment)
- USD IACUC meeting minutes (with corresponding attachments) (January 1, 2006-date of fulfillment)
- All nonhuman primate-related research protocols (approved, denied and deferred) received by the USD Institutional Animal Care and Use Committee (IACUC) (January 1, 2006-date of fulfillment)
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1, 2006-date of fulfillment)

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- All NIH grant applications submitted by Dr. Robert J. Morecraft (2004-date of fulfillment)
- All NIH Progress Reports submitted by Dr. Robert J. Morecraft (2004-date of fulfillment)

If any of the records or documents described above are considered to be exempt from release, please segregate and provide access to non-exempt portions, and itemize and justify deletions by reference to specific exemptions in S. D. C. L. § 1-27-3. Please note that this request was submitted to the University last year prior to the enactment of recent amendments to the S.D. public records law. Upon denial by the U, an appeal was lodged with the SD Office of Hearing Examiners. The recent amendments negate the SD Office of Hearing Examiners' order upholding the denial in that matter.

PETA is prepared to pay a reasonable search and duplication fee for the fulfillment of this request up to the amount of $50.00, but kindly asks that such fees be waived in light of our non-profit status. If additional information is required to process this request for a fee waiver, please notify PETA. If the aforementioned request for a waiver or reduction of fees is denied and fees are expected to exceed $50.00, please notify PETA to this effect before this request is processed.

Thank you for your attention. Please feel free to contact me via telephone at 860-705-7637 or via email at IanS@peta.org, with any questions or concerns.

Respectfully,

Ian Smith

Ian Smith, M.A.

Research Associate

Laboratory Investigations Division

People for the Ethical Treatment of Animals

To: <laura.jenski@usd.edu>
Date: Tue, 27 Oct 2009 13:40:33 -0400
Subject: Public records request - from PETA

October 27, 2009

EXHIBIT 3B

Laura J. Jenski, Ph.D.

Vice President for Research

The University of South Dakota

414 E. Clark Street

Vermillion, SD 57069

Dear Ms. Jenski:

This e-mail is a response to your e-mail dated July 31, below, in which you estimate a fee of approximately $2,000 to produce public records that I requested on behalf of People for the Ethical Treatment of Animals (PETA). In light of PETA's status as a non-profit organization and the substantial estimated fee, I would like to significantly narrow and otherwise modify the request as follows. Please ignore the original request and refer only to this new request in future correspondence.

Pursuant to S.D.C.L. § 1-27-1, PETA requests copies of the following ***public records that pertain to experiments conducted on non-human primates by or under the direction of Dr. Robert J. Morecraft***:. (Please note that the original request sought public records that pertain to all research conducted on non-human primates at USD. PETA also has eliminated some of the categories of records sought in the original request.)

- All incident reports and animal welfare complaints, whether formal or informal, submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty or animal care staff that pertain to Dr. Morecraft or to individuals who work under Dr. Morecraft's supervision, directly or indirectly, in the above-referenced experiments (Please note that your response below references "formal" animal welfare complaints. PETA requests copies of both "formal" and "informal" complaints)
- All research protocols (approved, denied and deferred) for the above-referenced experiments submitted to the USD Institutional Animal Care and Use Committee

(IACUC) (January 1, 2006-date of fulfillment)

- All protocol revision request forms for the above-referenced experiments submitted to the IACUC (January 1, 2006-date of fulfillment)
- IACUC semi-annual and annual reviews that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment)
- All veterinary medical records and necropsy/histology reports, routine or otherwise, that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment) (Please note that your response below references "routine" medical records. PETA request *all* medical records and necropsy/histology reports)
- All video and photographic footage that pertain to the above-referenced experiments (excluding those obtained on the microscopic level) (January 1, 2006-date of fulfillment)
- Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal inquiries or investigations regarding PHS or AWA noncompliance associated with the above-referenced experiments, and carried out by USD, the USD IACUC, or any IACUC subcommittees. (January 1, 2006-date of fulfillment)
- USD IACUC meeting minutes (with corresponding attachments) that pertain to the above-reference experiments (January 1, 2006-date of fulfillment)
- Copies of all correspondence between USD and OLAW or USDA regarding PHS/AWA noncompliant incidents associated with the above-referenced experiments (January 1, 2006-date of fulfillment).
- USDA inspection reports and corresponding inspection narratives that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment)
- OLAW compliance oversight evaluations and final reports that pertain to the above-reference experiments (January 1, 2006-date of fulfillment)

PETA also requests copies of the following ***public records that pertain to the use of rabbits in experiments at USD***:

- All incident reports and animal welfare complaints, whether formal or informal, submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty or animal care staff (January 1, 2007-date of fulfillment) (Please note that your response below references "formal" animal welfare complaints. PETA requests copies of both "formal" and "informal" complaints)

- All public records, regardless of form or source, that pertain to PHS or AWA noncompliant incidents (January 1, 2007-date of fulfillment)

- All protocols active on the date of fulfillment

If any of the records or documents described above are considered to be exempt from release, please segregate and provide access to non-exempt portions, and itemize and justify deletions by reference to specific exemptions in the Public Records Act.

3. *Disclosure will advance the understanding of the general public.*

PETA's experienced team of research associates and consultants will analyze the information obtained through this pubic records request and disseminate the information to a broad spectrum of the public.

PETA's Laboratory Investigations Division has over 25 years combined experience in the technical analysis of experiments conducted on animals in both public and private institutional settings, with a focus on animal welfare, regulatory oversight, adherence to applicable laws, and funding mechanisms. Moreover this Division of PETA consults on a regular basis with renowned scientists, physicians, and veterinarians to help distill this information for laypeople.

The information will contribute to public understanding, as PETA will distribute this information to members of the public via the following methods all of which are, or have been, utilized to inform the public about vivisection:

a. PETA's websites, including www.peta.org, with over 76,000 visitors daily, and www.stopanimaltests.org, with over 18,500 visitors daily

b. PETA e-news, with over 750,000 subscribers

c. The PETA Files blog, with over 7,500 visitors daily

d. *Animal Times*, PETA's quarterly publication with a worldwide circulation of approximately 373,000 that discusses current topics in the field of animal protection, including vivisection

e. PETA's Production and Literature Department, which prepares and distributes a wide array of educational materials such as brochures, flyers, and posters for distribution to members of the public often at no charge

f. PETA's Media Center, which disseminates billboards, print ads, radio advertisements, television advertisements, and web banners, and offers "PETA TV"

g. PETAs Laboratory Investigations Division, which compiles, analyzes, and interprets information about experiments conducted on animals for release through the avenues discussed above, which responds to inquiries from the public about vivisection, and which issues action alerts concerning vivisection

4. *The information will significantly broaden public understanding of the operations of USD*

PETA is prepared to pay a reasonable search and duplication fee for the fulfillment of this request up to the amount of $50.00, but kindly asks that such fees be waived in light of PETA's non-profit status and the public interest in these experiments. S.D.C.L § 1-27-36 provides "The custodian may exercise discretion to waive or reduce any fee required under this section if the waiver or reduction of the fee would be in the public interest."

The waiver of the fee is in the public interest for the following reasons:

1. The subject of the request concerns the operations and activities of a public institution.

The public records requested by PETA will provide PETA and other members of the public information about the operations and activities of a publicly-funded institution, whether that taxpayer-funded institution has upheld its responsibility to ensure that the animals are cared for in compliance with the law, and information pertaining to the types of research that USD chooses to fund and conduct.

2. *Disclosure of the records will reveal meaningful information about operations and activities of*

USD.

As discussed above, the release of the public records at issue will reveal information about the experiments conducted by USD as well as USD's response to non-compliance with the various laws and policies that exist to address the care of animals used in research. This is all information of a meaningful nature to the public, whose taxes, at least in part if not fully, fund these experiments on animals. The public has an interest in, and a right to know, how its money is used, and whether USD is making sound decisions regarding which research may be conducted as part of its operations.

Further, the information requested by PETA is not information that is available to the public at this time, nor is it readily available through any other avenue. The only way for PETA and the public to gain a greater understanding of the experiments conducted generally at USD, and in particular, the experiments conducted by faculty member Robert Morecraft, is to have access to the public records requested.

As discussed above, the information sought by PETA is not currently available to the public, and thus access to the information will significantly broaden the public understanding of how USD makes decisions about which experiments may be conducted by its faculty, the nature of those experiments, and the way USD ascertains compliance with federal animal-protection laws. Based on PETA's past experience, the information may also bring to light examples when governmental bodies failed to ascertain violations of federal animal-protection laws and take appropriate enforcement action.

5. *Disclosure of the public records is not primarily in the commercial interest of PETA.*

PETA is a 501(c)(3) nonprofit organization whose mission includes understanding and educating the public about vivisection, including vivisection conducted at public universities such as USD. PETA has no commercial interest in the information. PETA also qualifies as a representative of the news media based on the publication and multi-national distribution of its magazine "Animal Times," as well as its publication and distribution of educational materials, as discussed above, and thus a fee waiver is in the public interest.

If the aforementioned request for a waiver or reduction of fees is denied and fees are expected to exceed $50.00, please notify PETA to this effect before this request is processed.

Thank you for your attention. Please feel free to contact me via telephone at 860-705-7637 or via email at IanS@peta.org, with any questions or concerns.

Respectfully,

Ian Smith

Ian Smith, M.A.
Research Associate
Laboratory Investigations Division
People for the Ethical Treatment of Animals

- **From:** Jenski, Laura J [mailto:Laura.Jenski@usd.edu]
  Sent: Friday, November 06, 2009 12:26 PM
  To: Ian Smith
  Cc: Lori Kettler; Shekleton, Jim
  Subject: RE: Public records request - from PETA

EXHIBIT 4

Ian Smith, M.A.

Research Associate

Laboratory Investigations Division

People for the Ethical Treatment of Animals

Mr. Smith,

I have provided specific responses to your message of October 27, 2009. Please see the text in blue under the paragraphs from your message, below.

Sincerely,

Laura J. Jenski, Ph.D.

Vice President for Research

The University of South Dakota

414 E. Clark Street

Vermillion, SD 57069

Tel: 605-677-5370

Fax: 605-677-6387

E-mail: laura.jenski@usd.edu

Pursuant to S.D.C.L. § 1-27-1, PETA requests copies of the following ***public records that pertain to experiments conducted on non-human primates by or under the direction of Dr. Robert J. Morecraft***:. (Please note that the original request sought public records that pertain to all research conducted on non-human primates at USD. PETA also has eliminated some of the categories of records sought in the original request.)

- All incident reports and animal welfare complaints, whether formal or informal, submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty or animal care staff that pertain to Dr. Morecraft or to individuals who work under Dr. Morecraft's supervision, directly or indirectly, in the above-referenced experiments (Please note that your response below references "formal" animal welfare complaints. PETA requests copies of both "formal" and "informal" complaints)

There are no incident reports or animal welfare complaints, formal or informal, that have been submitted to the USD IACUC regarding Dr. Morecraft or any individual who works under his supervision.

- All research protocols (approved, denied and deferred) for the above-referenced experiments submitted to the USD Institutional Animal Care and Use Committee (IACUC) (January 1, 2006-date of fulfillment)

These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.

- All protocol revision request forms for the above-referenced experiments submitted to the IACUC (January 1, 2006-date of fulfillment)

These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.

- IACUC semi-annual and annual reviews that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment)

IACUC semi-annual reviews will be provided. However, personnel names will be redacted as per § 1-27-1.5 (7) to protect personnel matters relating to assignments.

- All veterinary medical records and necropsy/histology reports, routine or otherwise, that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment) (Please note that your response below references "routine" medical records. PETA request *all* medical records and necropsy/histology reports)

Routine medical records will be provided. Experimental surgical reports may be redacted as per §§ 1-27-1.10 and 1-27-1.5 (3) to protect the specific details of the subject research. There have been no spontaneous animal deaths nor serious illness requiring euthanasia and consequently no necropsy or histology reports. Personnel names will be redacted as per § 1-27-1.5 (7) to protect personnel matters relating to assignments.

- All video and photographic footage that pertain to the above-referenced experiments (excluding those obtained on the microscopic level) (January 1, 2006-date of fulfillment)

These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.

- Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal inquiries or investigations regarding PHS or AWA noncompliance associated with the above-referenced experiments, and carried out by USD, the USD IACUC, or any IACUC subcommittees. (January 1, 2006-date of fulfillment)

There is no correspondence between USD and OLAW regarding any noncompliance regarding the referenced experiments. All correspondence between USD and USDA regarding any issues of noncompliance will be provided. However, personnel names may be redacted as per § 1-27-1.5 (7) to protect personnel matters relating to assignments.

- USD IACUC meeting minutes (with corresponding attachments) that pertain to the above-reference experiments (January 1, 2006-date of fulfillment)

IACUC meeting minutes pertaining to the above-referenced experiments will be provided, however, personnel names will be redacted as per § 1-27-1.5 (7) to protect personnel matters relating to assignments.

- Copies of all correspondence between USD and OLAW or USDA regarding PHS/AWA noncompliant incidents associated with the above-referenced experiments (January 1, 2006-date of fulfillment).

There has been no correspondence between USD and OLAW regarding any noncompliant incidents

associated with the above-referenced experiments.

- USDA inspection reports and corresponding inspection narratives that pertain to the above-referenced experiments (January 1, 2006-date of fulfillment)

There has been no correspondence between USD and OLAW regarding any noncompliant incidents associated with the above-referenced experiments. USDA reports are available through their website. http://www.aphis.usda.gov/animal_welfare/index.shtml .

- OLAW compliance oversight evaluations and final reports that pertain to the above-reference experiments (January 1, 2006-date of fulfillment)

There have been no OLAW compliance oversight evaluations or final reports.

PETA also requests copies of the following ***public records that pertain to the use of rabbits in experiments at USD:***

- All incident reports and animal welfare complaints, whether formal or informal, submitted to USD Institutional Animal Care and Use Committee (IACUC) by USD faculty or animal care staff (January 1, 2007-date of fulfillment) (Please note that your response below references "formal" animal welfare complaints. PETA requests copies of both "formal" and "informal" complaints)

There have been no incident reports or animal welfare complaints pertaining to the use of rabbits in experiments at submitted to the USD IACUC.

- All public records, regardless of form or source, that pertain to PHS or AWA noncompliant incidents (January 1, 2007-date of fulfillment)

There have been no noncompliant incidents.

- All protocols active on the date of fulfillment

These materials are exempt as per § 1-27-1.5 (3) to protect the specific details of the subject research.

If any of the records or documents described above are considered to be exempt from release, please segregate and provide access to non-exempt portions, and itemize and justify deletions by reference to specific exemptions in the Public Records Act.

PETA is prepared to pay a reasonable search and duplication fee for the fulfillment of this request up to the amount of $50.00, but kindly asks that such fees be waived in light of PETA's non-profit status and the public interest in these experiments. S.D.C.L § 1-27-36 provides "The custodian may exercise discretion to waive or reduce any fee required under this section if the waiver or reduction of the fee would be in the public interest."

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2. *Disclosure of the records will reveal meaningful information about operations and activities of USD.*

As discussed above, the release of the public records at issue will reveal information about the experiments conducted by USD as well as USD's response to non-compliance with the various laws and policies that exist to address the care of animals used in research. This is all information of a meaningful nature to the public, whose taxes, at least in part if not fully, fund these experiments on animals. The public has an interest in, and a right to know, how its money is used, and whether USD is making sound decisions regarding which research may be conducted as part of its operations.

Further, the information requested by PETA is not information that is available to the public at this time, nor is it readily available through any other avenue. The only way for PETA and the public to gain a greater understanding of the experiments conducted generally at USD, and in particular, the experiments conducted by faculty member Robert Morecraft, is to have access to the public records requested.

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The information will contribute to public understanding, as PETA will distribute this information to members of the public via the following methods all of which are, or have been, utilized to inform the public about vivisection:

a. PETA's websites, including www.peta.org, with over 76,000 visitors daily, and www.stopanimaltests.org, with over 18,500 visitors daily

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c. The PETA Files blog, with over 7,500 visitors daily

d. *Animal Times*, PETA's quarterly publication with a worldwide circulation of approximately 373,000 that discusses current topics in the field of animal protection, including vivisection

e. PETA's Production and Literature Department, which prepares and distributes a wide array of educational materials such as brochures, flyers, and posters for distribution to members of the public often at no charge

f. PETA's Media Center, which disseminates billboards, print ads, radio advertisements, television advertisements, and web banners, and offers "PETA TV"

g. PETAs Laboratory Investigations Division, which compiles, analyzes, and interprets information about experiments conducted on animals for release through the avenues discussed above, which responds to inquiries from the public about vivisection, and which issues action alerts concerning vivisection

4. *The information will significantly broaden public understanding of the operations of USD*

As discussed above, the information sought by PETA is not currently available to the public, and thus access to the information will significantly broaden the public understanding of how USD makes decisions about which experiments may be conducted by its faculty, the nature of those experiments,

and the way USD ascertains compliance with federal animal-protection laws. Based on PETA's past experience, the information may also bring to light examples when governmental bodies failed to ascertain violations of federal animal-protection laws and take appropriate enforcement action.

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If the aforementioned request for a waiver or reduction of fees is denied and fees are expected to exceed $50.00, please notify PETA to this effect before this request is processed.

We estimate that the costs for postage, copying, and personnel time to provide these documents to PETA will be approximately $2,000, based on $0.07/ black and white page copying or actual cost of printing and personnel costs to cover the actual time required to assemble and to prepare documents for disclosure. The university will not waive the costs. If PETA wishes to proceed with this request, it will take 20 business days to complete these tasks once we are so informed by PETA.

STATE OF SOUTH DAKOTA) FILED IN CIRCUIT COURT

: ss FEB 03 2010

COUNTY OF CLAY) FIRST JUDICIAL CIRCUIT

Robin Iverson Clay County Clerk of Courts 1st Judicial Circuit Court of South Dakota

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, a nonprofit corporation,
Plaintiff,

-vs.-

SOUTH DAKOTA BOARD OF REGENTS and THE UNIVERSITY OF SOUTH DAKOTA,
Defendants.

CIV. # 10-31

NOTICE AND ADMISSION OF SUMMONS AND COMPLAINT

To: SOUTH DAKOTA BOARD OF REGENTS, by and through its attorney, James Shekleton, and to THE UNIVERSITY OF SOUTH DAKOTA, by and through its attorney, Marty J. Jackley, of the Office of the South Dakota Attorney General, DEFENDANTS:

The enclosed Summons is served pursuant to S.D.C.L. § 15-6-4(d)(5).

You must complete the admission part of this form and return one copy of the completed form to the sender within twenty (20) days.

You must sign and date the admission. If you are served on behalf of a corporation, unincorporated association, or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return this form to the sender within twenty days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer with the thirty days of the day after you sign this admission. If you fail to do so, judgment by default will be taken against you for a relief demanded.

I hereby certify that this Notice and Admission of Service was mailed on February 2nd ,2010.

Caitlin F. Collier
Attorney for Plaintiff
P.O. Box 435
Vermillion, SD 57069
(605) 202-0281