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Noncompliance, documentation and FOIA

Dr. Shana Madela, the USDA Veterinary Medical Officer (VMO) for Great Eastern University, was quite unhappy with what she saw. Six months earlier, she had cited the university for inadequate husbandry in the school's rhesus monkey colony and had given the school six months to remedy the problem. Now, on a return visit, it appeared to her that little had been done. Dr. Tom Swarovsky, the attending veterinarian, was equally dismayed, but for a different reason. Madela photographed what she considered to be evidence of the poor husbandry. She then asked Swarovsky for copies of the husbandry records for the monkeys covering the past six months and indicated that she would be taking the photographs and copies of the records back to her supervisor for further review. Swarovsky tried to downplay the importance of what Madela alleged and argued

that monkeys are messy animals and that Madela had arrived just before the cages were due to be cleaned. Madela was firm in her position, noting that caked-on fecal material and mold growth in the corners of the cages do not happen overnight.

Swarovsky, sensing problems for himself and the school, made a quick phone call to the university's legal counsel. He told the attorney that he believed the inspector was misinterpreting the regulations of the Animal Welfare Act (AWA), because it did not state that an inspector could remove records or pictures from the premises. The attorney had a brief conversation with Madela, in which she quoted the two sections of the regulations (§2.35 and §2.38) that she claimed gave her the authority to take records and photographs back to her main office. She politely said, "There would be no need to make copies of records or

take photographs if they weren't intended to be taken off the premises." The attorney countered (to no avail) that the regulations simply said that copies and photographs could be taken to another area of the animal facility or building for further review but did not suggest that this documentation could be removed from the premises. When he asked about the availability of the records and pictures to others through the Freedom of Information Act (FOIA), he was told that they would be handled in accordance with the applicable sections of that Act.

Do you think the USDA VMO was correct in claiming that she could remove photographs and copies of records from the Great Eastern animal facility and take them to her office? If they could be removed, would they be available to others through FOIA?

RESPONSE

Violators beware!

Marilyn J. Chimes, DVM, DACLAM, JD

If Great Eastern University has failed to comply with the AWA regulations, the public will be able to discover that fact.

Dr. Madela is correct that a USDA VMO may take photographs in order to document a research facility's alleged noncompliance with the AWA regulations, especially in this situation of an alleged repeat occurrence. The regulations explicitly authorize creating such documentation¹. Madela's belief that the caked-on fecal material and mold in the monkey cages demonstrate Great Eastern's failure to comply with the regulations' sanitation standards justifies the creation of a photographic record.

Madela also is correct that the AWA regulations authorize her to take her

photographs of the alleged noncompliance back to her office. The regulations permit USDA inspectors to remove photographs and copies of inspection-related documentation from research facilities' premises when, but only when, an alleged violation of the regulations has occurred or they are needed to investigate a possible violation or otherwise enforce the law².

Whether Madela may take copies of Great Eastern's husbandry records back to her office is a more complex question. The AWA regulations do not explicitly require that husbandry records be kept, although doing so certainly is prudent. Therefore, Madela exceeded her authority by asking for them, and Dr. Swarovsky could refuse to produce them³. Having seen them, however, Madela may take copies of them back to her office if, but only if, they provide evidence of failure to comply with the regulations' standards, especially since that noncompliance had already been cited.

As Madela indicated, once she has taken the photographs and copies of husbandry records away with her, they will be governed by the federal FOIA⁴⁻⁶. FOIA applies to records, including photographs, that a federal agency such as the USDA creates or obtains in the course of its public business and has in its possession or control. Upon a request from a member of the public, the agency must make those records available unless one of the exemptions to disclosure specified in FOIA squarely applies. If exempt information can be separated from non-exempt information, the non-exempt information must be released to a requester after deletion of the exempt portions⁷.

One exemption permits withholding information when the release of that information "would deprive a person of a right to a fair trial" or "could reasonably be expected to endanger the life or physical safety of any individual"⁸. Because releasing information evidencing inadequate care of research