

**RESPONSE**

**Out of luck, but what if?**

**Brad Williams, DVM**

Although Great Eastern may have some bad publicity, Dr. Madela acted appropriately and within the authority of the AWA to document noncompliance by copying records<sup>1,2</sup> and taking photographs<sup>3</sup> at the time of inspection. The institution should retain all original documents, even during the investigation process. Any documentation taken away from the facility is subject to FOIA<sup>4</sup>. Release of any such materials, including reports, summaries and photographs that contain trade secrets or commercial or financial information that is privileged or confidential, is governed by applicable sections of FOIA.

But what if there had been no pre-existing noncompliance or suspected noncompliance, and Madela had observed the condition of the monkey cages during a routine inspection? Section 2.38(f) states, “All records shall be available for inspection and copying by authorized APHIS or funding Federal agency representatives at reasonable times. APHIS inspectors will maintain the confidentiality of the information and will not remove the materials from the research facilities’ premises unless there has been an alleged violation, they are needed to investigate a possible violation, or for other enforcement purposes.”

This text implies that providing copies of records does not automatically grant a VMO the right to remove the copies from a facility. There must be some justification beyond convenience and financial limitations for the inspector or APHIS. Section 2.35(f) also implies that once the documents leave the facility, they become part of the permanent file and are subject to FOIA. Removing documents or images from the facility during routine inspections without any violations, and then later destroying or surrendering them to the facility, creates a lack of confidence in FOIA requests and places APHIS and the institution at unnecessary risk. How does the public know whether all information regarding a published violation is being released, or whether some relevant, nonconfidential materials as defined under FOIA have been destroyed? Released materials may be accidentally left in a hotel, airplane or other vehicle. Additionally, how does a VMO or

APHIS determine what is or is not accessible under FOIA, if materials are not considered confidential under FOIA? How does APHIS securely discard those materials they deem not subject to FOIA?

There are too many unanswered questions for both APHIS and registered institutions surrounding ‘carte blanche’ removal

of materials from facilities. There must be adequate cause.

- 
1. 9 CFR § 2.38(b)(1)(iii).
  2. 9 CFR § 2.35(f).
  3. 9 CFR § 2.38(b)(1)(v).
  4. 9 CFR § 2.35(f).

*Williams is Campus Veterinarian and Network Support Specialist at the University of Idaho, Moscow, ID.*