

animals, particularly nonhuman primates, could incite public outcry or even violence against those responsible, the USDA likely would make Madela's photographs and copies of Great Eastern's husbandry records available to the public only after redacting any specific identifying information, such as names of investigators and the precise location of the monkey colony. The USDA also might withhold names of individuals if state or local privacy laws so require⁹. However, this FOIA exemption is unlikely to be interpreted to permit complete withholding of the records or of Great Eastern University's identity.

Other exemptions to disclosure probably would not apply in this case.

1. 9 CFR §2.38(b)(1).
2. 9 CFR §2.35(f).
3. 9 CFR §2.35.
4. 5 USC §552.
5. 7 CFR §Part 370.
6. 9 CFR §2.35(f).
7. 5 USC §552(b).
8. 5 USC §552(b)(7).
9. 5 USC §552(b)(3)

Chimes is of Counsel, Schoeman Updike Kaufman & Scharf, Chicago, IL.

RESPONSE

VMO has the authority

David P. Wadyka, Esq. & Kelly Skopak

The USDA VMO was correct in her interpretation of the relevant regulations under the AWA.

The regulations are both clear and unambiguous. Pursuant to §2.38, the VMO is permitted, among other activities, to enter the place of business; examine records; inspect facilities, property and animals; and "document by the taking of photographs and other means, conditions and areas of noncompliance"¹. The VMO had previously cited the University for inadequate husbandry. The VMO undoubtedly had the regulatory authority to review and document the conditions she observed.

§2.35 provides the additional regulatory authority for the copying and inspection of such records by the VMO. While University counsel was correct in part that these records are to remain on the research facility's

premises, he failed to note the additional language of §2.35, which carves out the following exceptions: "unless there has been an alleged violation, they are needed to investigate a possible violation or for other enforcement purposes"².

Here, any one of the three exceptions could apply. The VMO observed a possible violation (which she had seen before); she documented the possible violation; and she presumably needed the documentation as evidence for further investigation and for possible enforcement action. She clearly had the right to remove the documentation from the University premises.

§2.35 further provides that APHIS will maintain the confidentiality of the information, and that the release of any materials that contain trade secrets or commercial or financial information that is privileged or confidential will be governed by the applicable sections of FOIA. Since government employees conduct APHIS inspections, these records would be available to the public under FOIA

unless one of the nine FOIA exceptions applies³. Eight of the nine exceptions may quickly be dismissed as not applicable to the scenario presented. One exception, however, a specific exemption by another statute, requires a further inquiry into the AWA.

§13 of the AWA contains the same language as §2.35 regarding implementation of regulations dealing with disclosure of trade secrets and other confidential commercial or financial information⁴. However, the information documented and photographed by the VMO did not appear to include trade secrets or confidential commercial or financial information. Therefore, it would likely be available to the public for inspection pursuant to FOIA.

1. 9 CFR Subchapter A - Animal Welfare, §2.38(b)(1).
2. 9 CFR Subchapter A - Animal Welfare, §2.35(f).
3. 5 USC §552(b).
4. 7 USC §2131-2156, §2142(a), §13.

Wadyka is Partner and Skopak is Summer Associate in the law firm of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, PC, Warren, NJ.

A word from USDA

In response to the issues raised in this scenario, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care (USDA, APHIS, AC) offers the following clarification and guidance:

Inspectors may ask for, review and rely upon records and documents for which there is no maintenance requirement under the Act or regulations, to prove or disprove a potential noncompliant item. Taking photographs and obtaining photocopies of records are not uncommon components of an inspection. The photographs and photocopies are used to document facility conditions, to support an inspection report citation or to provide clarification for the registrant, if he or she was not present at the time the noncompliant item was observed.

Once the photocopies or photographs have been obtained, they become 'agency records' and are subject to requests for release under FOIA. If USDA receives such a request, the documents are examined for protected information (see http://www.aphis.usda.gov/footer_items/foia.shtml). The registrant may be notified of the pending request if the agency determines the responsive records contain commercial business information, and consequently given an opportunity to justify protection under FOIA. All information deemed by the USDA-Animal and Plant Health Inspection Service-FOIA office to be protected is redacted (blacked out) prior to public release, whether the document is a paper record or part of a photograph.

USDA Animal Care Inspection Reports have been determined to be frequently requested records under the Electronic FOIA amendments of 1996 and must be made available to the public on the internet. This ruling does not extend to any auxiliary inspection documents; these must be requested on an individual basis.

Chester Gipson, DVM

*Deputy Administrator
USDA, APHIS, AC*