



BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
GOVERNMENT OF THE DISTRICT OF COLUMBIA



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VIA ELECTRONIC MAIL

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RE: Washington Humane Society's Responsibilities under the District of Columbia Freedom of Information Act # OOG-2023-001_AO

Dear Attorney Rich:

This advisory opinion responds to your February 8, 2023, request for an advisory opinion on behalf of the District of Columbia's Department of Health ("DC Health"). You asked whether the Washington Humane Society's (d/b/a Humane Rescue Alliance) ("HRA") anti-cruelty investigation records are subject to the District of Columbia Freedom of Information Act of 1976 ("D.C. FOIA").¹

It is the public policy of the District of Columbia government (the "District") "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."² To support the District's public policy, as Director of Open Government, I am authorized to "issue advisory opinions on the implementation of [D.C. FOIA]" pursuant to section 205c(d) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011.³ I am issuing this advisory opinion to provide advice on the following issues: (A) whether HRA is a "public body" under D.C. FOIA; (B) HRA's and DC Health's obligations under D.C. FOIA; and (C) whether other means of obtaining HRA's records exist.

As analyzed below, I conclude that HRA is a congressionally chartered non-profit corporation and despite its public-facing and beneficial mission, it is not a District government "public body" or "agency" directly subject to D.C. FOIA. HRA does perform animal control services under a contract with the District. However, the records at issue relate to HRA's anti-cruelty investigations. HRA's Humane Law Enforcement Department produces and collects these records pursuant to animal-cruelty *statutes*, not under a contract with the District government. HRA's Animal Care and Control Field Services Division performs HRA's *contractual* duties for

¹ Title II of Pub. L. 90 -614, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).

² D.C. Official Code § 2-531.

³ Effective October 30, 2018 (D.C. Law 19-124; D.C. Official Code § 1-1162.05c(d)).

the District government. So, while any record produced by HRA pursuant to its contract with the District may be a “public record,” *DC Health*, not HRA, is responsible for its release under D.C. FOIA’s provision concerning “record[s] produced or collected pursuant to a contract with a private contractor to perform a public function.”⁴ Additionally, since HRA’s records are not subject to D.C. FOIA, an entity with the authority or a party with a litigation interest in particular records may use a subpoena, as a means to obtain the records.

I. HRA IS NOT A “PUBLIC BODY” SO ITS RECORDS ARE NOT SUBJECT TO D.C. FOIA REQUESTS.

A. HRA is a congressionally chartered corporation.

HRA is a corporation, termed a “body corporate”, chartered by Congress (in this case, by a bill enacted by Congress and approved by the President).⁵ Originally it was the Association for the Prevention of Cruelty to Animals; then it became the Washington Humane Society, which now operates as the Humane Rescue Alliance. HRA has a campus in the District and four in New Jersey.⁶ Congressional incorporation was common in the District in the nineteenth century. A recent Congressional Research Service report explains:

When the District became the seat of the federal government in 1790, it had neither a general incorporation law nor a legislature that could grant charters. Congress, instead, assumed responsibility for incorporation within the District. Congressionally chartered District-based organizations included public entities, such as the City of Washington, as well as private entities, such as the Bank of Washington; the Washington, Alexandria, and George Town Steam Packet Company; and the Georgetown Gaslight Company. Congress also chartered some District-based charitable organizations, such as [T]he Washington City Orphan Asylum.[⁷]

Then, effective January 1, 1902, Congress delegated the authority to the District Recorder of Deeds to receive and file most corporate charters.⁸ The new corporation law applied to charitable societies

⁴ Section 202(a-3) of D.C. FOIA (D.C. Official Code § 2-532(a-3)).

⁵ An Act to incorporate an Association for the Prevention of Cruelty to Animals in the District of Columbia, approved June 21, 1870, 1st sec. (16 Stat. 158; D.C. Official Code § 44-1501) (“constitut[ing] and creat[ing] a body corporate in the District of Columbia, to be known as the Association for the Prevention of Cruelty to Animals”); An act for the protection of children in the District of Columbia and for other purposes, approved February 13, 1885, 1st sec. (23 Stat. 302; D.C. Official Code § 44-1501) (“[T]he Association for the Prevention of Cruelty to Animals for the District of Columbia shall be known as the ‘Washington Humane Society’ . . .”).

⁶ [About HRA | Animal Rescue and Adoption Services \(humanerescuealliance.org\)](#); [Locations & Contact Us | St. Hubert’s Animal Welfare Center \(sthuberts.org\)](#).

⁷ See Congressional Research Service, Rpt. No. R47236, at 2 (Sept. 8, 2022) (“Title 36 Charters: The History and Evolution of Congressional Practices”), available at crsreports.congress.gov/product/pdf/R/R47236 (footnotes omitted).

⁸ See An Act To establish a code of law for the District of Columbia, approved March 3, 1901, effective January 1, 1902 (31 Stat. 1189); D.C. Official Code (2001) §§ 26-201, 26-1301, 26-1307, 31-202(a), (b), 43-101; D.C. Official Code (1902) §§ 574, 589, 599, 605, 701, 751 (31 Stat. 1280, 1282–85, 1301, 1310, 1311).

and private companies.⁹ As you know, the Department of Licensing and Consumer Protection regulates businesses that operate in the District of Columbia. Its search-engine for corporations' status ([CorpOnline](#)) lists HRA as a non-profit corporation.¹⁰

HRA's services include a Humane Law Enforcement Department and an Animal Care and Control Field Services Division.¹¹ The District's former legislative assembly empowered the Humane Law Enforcement Department to, *inter alia*, "take possession of," feed, and hydrate animals in the District; formally complain to a magistrate judge about violations of humane laws; and prosecute the humane laws.¹² The Animal Care and Control Field Services Division is designated as the District's "Animal Care and Control Agency" by contract¹³ and delegated executive authority to perform certain animal-control functions.¹⁴

However, the plain language of the statute does not define HRA's responsibilities, if any, under D.C. FOIA. Next, I will discuss two D.C. FOIA mayoral appeal decisions that resolve the central issue of what responsibilities HRA has under the statute. These decisions find that HRA is *not* a "public body" under D.C. FOIA and therefore has no responsibility for responding to a D.C. FOIA request.

B. HRA is not a "public body" under D.C. FOIA even though it performs a government function.

D.C. FOIA provides the public with access to records of the District's affairs, whether electronic or tangible. D.C. FOIA applies to records of "public bodies" and extends to "any record produced or collected pursuant to a contract with a private contractor to perform a public function."¹⁵ To resolve your inquiry about D.C. FOIA's applicability to HRA, we first need to

⁹ See D.C. Official Code (1902) Ch. 18, Subch. 3 (concerning "societies, benevolent, educational, and so forth") (31 Stat. 1283).

¹⁰ The Internal Revenue Service also recognizes HRA as "[a] public charity" and "eligible to receive tax-deductible charitable contributions." See [Tax Exempt Organization Search | Internal Revenue Service \(irs.gov\)](#); [Internal Revenue Bulletins | Internal Revenue Service \(irs.gov\)](#); Washington Humane Society, 2020 Forms 990 & 990-T (Aug. 15, 2022), available at [apps.irs.gov/pub/epostcard/cor/530219724_202109_990_2022082920303242.pdf](#) & [apps.irs.gov/pub/epostcard/cor/530219724_202109_990T_2022082920299343.pdf](#).

¹¹ See generally D.C. Official Code (2001) §§ 8-1802 ("The Mayor [or her designee] may contract . . . with a District of Columbia humane organization to serve as the Animal Care and Control Agency."), 22-1004 *et seq.* (Chapter 106 of the Acts of the Legislative Assembly, adopted August 23, 1871, § 4 *et seq.*); [Animal Care and Control | Humane Rescue Alliance](#); [Humane Law Enforcement | Stopping Animal Cruelty & Abuse \(humanerescuealliance.org\)](#).

¹² See D.C. Official Code § 22-1004 *et seq.* & nts.

¹³ E.g., [dchealth.dc.gov/service/animal-care-and-control](#) (last visited Feb. 17, 2023); [Council Contract Summary \(dccouncil.gov\)](#) (Contract No. CW104540) (Feb. 28, 2023); 2020 Form 990 (Return of Organization Exempt from Income Tax) pt.VIII, l.2a, at [apps.irs.gov/pub/epostcard/cor/530219724_202109_990_2022082920303242.pdf](#) (Aug. 15, 2022).

¹⁴ See, e.g., D.C. Official Code § 8-1802(a); 24 DCMR § 1500 *et seq.* ("Hearing Procedures for Washington Humane Society," promulgated by City Administrator, "for the owner of a seized animal to be able to contest the seizure, detention, and terms of release and treatment of the animal, the allegation of cruelty, abandonment, or neglect, and the imposition of the lien and costs assessed for caring and providing for the animal"), 56 DCR 002374 (Mar. 27, 2009).

¹⁵ See D.C. Official Code § 2-532(a-3) (section (a-3) of D.C. FOIA).

determine whether HRA, acting as a private contractor performing a public function, becomes a “public body” subject to D.C. FOIA.

Two administrative-appeal decisions, one from the Mayor’s Office of Legal Counsel (“MOLC”) and one from the Acting Secretary of the District of Columbia,¹⁶ are on-point respecting this question. These decisions conclude that HRA is not itself a public body, even though it does collect and produce public records.

1. In Freedom of Information Appeal 2017-164, the Mayor’s Office of Legal Counsel held that “private initiative[s]” are outside D.C. FOIA.

In Freedom of Information Appeal 2017-164, the MOLC considered whether “HRA’s internal records” arising out of its Blue Collar Cat program “are outside the scope of [D.C.] FOIA as public function [*sic*] performed on behalf of [DC Health].”¹⁷ In its decision the MOLC recognizes a distinction between (1) “public functions” performed under a District government contract with a private contractor and (2) those that are mere “private initiative[s]” (even if charitable) without a contractual obligation.¹⁸ Records in category (2) are “not subject to [D.C.] FOIA.” The MOLC proffered:

In response to [requester-appellant Rodriguez’s] assertion . . . that [D.C.] FOIA extends to contractors performing public functions on behalf of agencies, [DC Health] explains that the Blue Collar Cat program is not a public function performed on its behalf but rather a private initiative of . . . HRA. As a result, HRA’s internal documents and correspondence regarding the program, which have not been shared with [DC Health], are not subject to [D.C.] FOIA.¹⁹

The MOLC found that Blue Collar Cat material held only by HRA and not DC Health were not “public records” under D.C. FOIA. So DC Health was not required to obtain and search *that* material, but only any public records that *DC Health* happened to possess itself.²⁰ Because DC Health had “made a reasonable determination as to the locations of the records [Ms. Rodriguez] requested and conducted an adequate search of these locations for the public records in its [*own*] possession,” the MOLC “affirm[ed DC Health’s] response to [the] request” as sufficient.²¹ HRA’s own inventory of Blue Cat Collar records was irrelevant, because there was not a contract with the District government to perform Blue Cat Collar program duties.

¹⁶ As you know, any person denied access to a public record may pursue judicial relief by filing a complaint for injunction or declaration in the Superior Court of the District of Columbia, or (with two exceptions not pertinent here), may first seek administrative review by appealing to the mayor’s designated agent. Since January 2, 2015, that designated agent has been the MOLC. Mayor’s Order 2019-067, 66 DCR 008796 (July 26, 2019 (effective *nunc pro tunc* (*i.e.*, retroactively))). Before that, Mayor’s Orders alternated the delegated authority among several officials and offices such as the Secretary of the District, the Office of the Secretary of the District, and the General Counsel of the Executive Office of the Mayor. *See generally* D.C. Official Code § 2-537 nts.

¹⁷ [October 10, 2017, Opinion of the MOLC](#), 64 DCR 013656, 013656 (Dec. 29, 2017).

¹⁸ *See id.* at 013657.

¹⁹ *Id.* at 013657, 013658.

²⁰ *See id.*

²¹ *See id.* at 013658.

I will next discuss another administrative-appeal decision that confronts your particular question about D.C. FOIA requests to HRA directly. This decision clarifies that non-District government agencies are not required to respond to FOIA requests submitted *directly* to them.

2. In FOIA Appeal MCU 342945, the Acting Secretary of the District held that a private security company, despite its “public function,” was beyond the reach of D.C. FOIA, though DC Health was responsible for “making . . . records available.”

In Freedom of Information Appeal MCU 342945,²² the Acting Secretary of the District of Columbia, the Mayor’s designee to “[r]eview and determine” D.C. FOIA appeals,²³ considered whether the records of a private security company were subject to a D.C. FOIA request. Requester-appellant Cole was an elementary-school teacher who sought “a copy of [the] security handbook” of MVM, Inc., a private contractor providing security guard services for the District of Columbia Public Schools (“DCPS”).²⁴ Cole sent her request not to DCPS, but directly to an employee of MVM.²⁵ The MVM employee responded in a letter that read, “Disapproved, no justification cited for the release of the requested material. Call me at 202-[#####] if you have [q]uestions.”²⁶ Cole then appealed to the Acting Secretary.²⁷

The Acting Secretary acknowledged the “public function” the private contractor, MVM, served in providing security to the public schools.²⁸ Still, she held that MVM was “patent[ly]” not a “public body” for purposes of the District of Columbia Administrative Procedure Act (“D.C. APA”),²⁹ thus not a “public body” for purposes of the D.C. APA’s Title II, D.C. FOIA.³⁰ As such, it was DCPS’s “responsibility,” not MVM’s, to comply with a D.C. FOIA request and deliver any responsive and non-exempt records.³¹ The rule, as stated by the MOLC, is a private entity is not required to respond to D.C. FOIA requests. As discussed below, this same reasoning applies to HRA and its animal control contract with DC Health.

Next, I will discuss why DC Health is responsible for responding to FOIA requests under its contract with HRA.

²² May 10, 2003 Opinion of the Assistant Secretary of the District of Columbia, [50 DCR 4043](#) (May 23, 2003).

²³ Mayor’s Order 97-177, § [I.]3.p (Oct. 9, 1997); Mayor’s Order 2003-54, § 1 (May 2, 2003), 50 DCR 4291 (May 30, 2003).

²⁴ 50 DCR 4044, 4045.

²⁵ *Id.*

²⁶ *Id.* at 4045.

²⁷ *Id.* at 4046 & n.5.

²⁸ *Id.* at 4051 (“There can be no doubt that MVM is performing a ‘public function’ while it is engaged as a contractor for the provision of DCPS’s security services.”).

²⁹ Approved October 21, 1968 (Pub. L. 90-614; 82 Stat. 1203).

³⁰ 50 DCR at 4049, 4050.

³¹ *See id.* at 4051, 4053 (quoting section 202(a-3) of D.C. FOIA (D.C. Official Code § 2-532(a-3))).

II. NOTWITHSTANDING HRA’S STATUS AS A PRIVATE COMPANY, DC HEALTH IS REQUIRED TO COMPLY WITH D.C. FOIA FOR ALL PUBLIC “RECORD[S] PRODUCED OR COLLECTED UNDER A CONTRACT WITH” HRA “TO THE SAME EXTENT AS IF THE RECORD WERE MAINTAINED BY” DC HEALTH.

HRA is not a “public body,” so it is not responsible for direct compliance with D.C. FOIA. However, records generated by its investigations are not inaccessible to the public. DC Health must “make available for inspection and copying any record produced or collected pursuant to a contract . . . to perform a public function.”³² That is, to whatever extent public records are “produced or collected” through HRA’s performance of its *contracts* with the District, those records are retrievable through DC Health, even if not from HRA directly.

HRA’s animal-*control* mission is contractual. The records “produced or collected pursuant to [its] contract” with the District are presumptive “public records” under D.C. FOIA. The public body with programmatic responsibility for HRA, DC Health, “shall be responsible for making such records available to the same extent as if the record were maintained by [DC Health].”³³ HRA’s records respecting animal-control are District records subject to D.C. FOIA due to the contract with DC Health. The District agency, not HRA, is responsible for fulfilling the D.C. FOIA request.

HRA’s anti-*cruelty* mission, on the other hand, is not contractual but statutory,³⁴ so records that HRA’s Humane Law Enforcement Department “produce[s] or collect[s]” under HRA’s anti-cruelty function are subject to D.C. FOIA only when HRA provides them to a District agency or public body.³⁵ Otherwise, those records are not subject to D.C. FOIA. HRA’s records related to its anti-cruelty mission are not presumptive District records subject to D.C. FOIA like its animal-control records. In summary, D.C. FOIA does not require a contractor such as HRA to disclose records “produced or collected pursuant to [its] contract” with the District. The public body that has the contract with HRA is responsible for fulfilling the D.C. FOIA request.

I note that the current contract with HRA includes terms to ensure that HRA cooperates with the District in retaining records and delivering them on request. The contract provides that HRA must “forward any request for documents to [DC] Health’s Freedom of Information . . .

³² See D.C. Official Code § 2-532(a-3) (section 202(a-3) of D.C. FOIA).

³³ See *id.*; [February 24, 2016 Opinion of the MOLC](#) (FOIA Appeal 2016-36), 63 DCR 008040, 008042 (May 27, 2016) (remanding to “the public body with programmatic responsibility for” the contractor to “(1) determine whether the documents requested were [produced or collected] pursuant to the contract . . . ; (2) if the records were collected or produced pursuant to the contract, review and make reasonable redactions based on appropriate . . . exemptions; and (3) disclose to [the requester-appellant] non-exempt portions”) (quoting D.C. Official Code § 2-532(a-3)).

³⁴ See An Act to incorporate an Association for the Prevention of Cruelty to Animals in the District of Columbia, § 5, approved June 21, 1870 (16 Stat. 158; D.C. Official Code § 44-1505) (“Members of the Metropolitan Police force of the District of Columbia, upon application of a member of [HRA] who has viewed a violation of a law or regulation of the District for the prevention of cruelty to animals, shall arrest the offending party.”); D.C. Official Code § 22-1004 *et seq.*

³⁵ See D.C. Official Code § 2-532(a-3) (section 202(a-3) of D.C. FOIA).

Officer” and “file and retain . . . records in accordance with the District retention schedule and make them available to the C[ontract]A[dmistrator] for review, duplication, and in response to Freedom of Information Act requests.”³⁶ Additionally, District law requires HRA to “[e]nsure that all contractually required records are accurate, easily accessible, and available at all times.”³⁷

III. CONCLUSION

HRA is a non-profit corporation that is not a component *within* the District government, so it is not a “public body” or “agency” under D.C. FOIA, including under its animal care and control services under contract with the District. Any record produced by HRA pursuant to its contract with the District may be a “public record” subject to D.C. FOIA; however, under D.C. FOIA’s private contractor performing a public function provision, the District agency administering the contract is responsible for processing requests that involve “any record[s] produced or collected pursuant to” the contract.³⁸

Finally, I note that an entity with the authority or a party with a litigation interest in particular records in HRA’s custody may use a subpoena to obtain the records, subject to HRA’s possible motion to quash.

Please contact me or Chief Counsel Johnnie Barton at johnnie.barton2@dc.gov if you want to discuss this matter further.

Sincerely,

/s/

Niquelle M. Allen, Esq.
 Director of Open Government
 Board of Ethics and Government Accountability

³⁶ Contract No. CW104540, *supra* note 13, §§ C.1, .5.1.6, .5.23.7, .24.4, F.3, G.9. The Contract Administrator is Dr. Vito DelVento of DC Health. *See id.* § G.9.2.

³⁷ *See* D.C. Official Code § 8-1802(b)(3) (section 3(b)(3) of the Animal Control Act of 1979).

³⁸ Section 202(a-3) of D.C. FOIA (D.C. Official Code § 2-532(a-3)).