



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



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**VIA ELECTRONIC MAIL**

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**RE: Rental Housing Commission District of Columbia Freedom of Information Act  
Compliance OOG-2022-0011-M**

Dear Mr. Mulhauser:

On December 8, 2022, you contacted the Office of Open Government (“OOG”) to request an advisory opinion on the Rental Housing Commission’s (the “Commission” or “RHC”) compliance with the Freedom of Information Act (“D.C. FOIA”). The relevant D.C. FOIA provisions require that agencies make “[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” (“Final Orders”) publicly available on the Internet.<sup>1</sup>

It is the public policy of the District of Columbia 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.”<sup>2</sup> This includes access to certain records that must be made publicly available on the Internet and without submission of a D.C. FOIA request. To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of D.C. FOIA.<sup>3</sup>

I find that RHC is not fully compliant with the mandatory disclosure provisions of D.C. FOIA<sup>4</sup> and must make all Final Orders created on or after November 1, 2001, that are not subject to statutory exemption,<sup>5</sup> publicly available on its website in order to be compliant with D.C. FOIA. As detailed below, RHC admits that it is not in full compliance with D.C. FOIA’s requirement to make Final Orders available on the Internet.

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<sup>1</sup> D.C. Official Code §§ 2-536(a)(3); 2-536(b).

<sup>2</sup> D.C. Official Code § 2-531.

<sup>3</sup> D.C. Official Code § 1-1162.05c(d).

<sup>4</sup> D.C. Official Code §§ 2-536(a)(3); 2-536(b).

<sup>5</sup> D.C. Official Code § 2-534; See February 4, 2011, Opinion of the Mayor’s Office of Legal Counsel (FOIA Appeal 2011-03).

## I. BACKGROUND

RHC was established by the Rental Housing Act of 1985, D.C. Law 6-10, D.C. Official Code § 42-3502.01 (“Rental Housing Act”). RHC was originally established by former versions of the Rental Housing Act enacted in 1975, 1977, and 1980.<sup>6</sup> It is a three-member public body, whose members are appointed by the Mayor, with the advice and consent of the Council.<sup>7</sup> The Chairperson and Chief Administrative Judge serve as the administrative head and personnel authority of the Commission, which, since October 1, 2019, is an independent agency.<sup>8</sup> The Commission was located within the Department of Consumer and Regulatory Affairs (“DCRA”) from 1975 until Fiscal Year (FY) 2007. Prior to the Commission’s independence as an agency, the Commission was located within the Department of Housing and Community Development (“DHCD”) from FY 2008 until FY 2019.<sup>9</sup>

The Commission has three core duties to execute the Rental Housing Act: (1) the sole authority to issue, amend, and rescind rules and procedures; (2) deciding appeals brought to it from decisions of the Office of Administrative Hearings (“OAH”); and (3) the duty to certify and publish before March 1<sup>st</sup> of each year the annual adjustments to regulated rents.<sup>10</sup> The Commission must publish Final Orders and Opinions on the Internet.<sup>11</sup> Petitions filed in the Rental Accommodations Division of the DHCD, result in cases that are adjudicated by the OAH.<sup>12</sup> The Commission has the authority to review the appeals adjudicated by the OAH.<sup>13</sup> While determining appeals, the Commission may put forward procedural orders, as well as issue a decision and order on the merits.<sup>14</sup>

Although not an issue in this Advisory Opinion, the Commission has reported having an internal archive that contains electronic copies (in PDF format) of procedural orders and merits decisions dating back to 1975.<sup>15</sup> This internal archive is reported to include all decisions and orders issued by the Commission.<sup>16</sup> While not required, the Commission’s decisions and orders dating to 1985 are available through the subscription-based LEXIS research service.<sup>17</sup>

On December 8, 2022, I received your request for an Advisory Opinion concerning RHC’s compliance with D.C. FOIA’s mandatory disclosure of Final Orders requirement.<sup>18</sup> I provided RHC with a copy of the Advisory Opinion request and on January 12, 2023, RHC submitted a

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<sup>6</sup> See RHC’s response to Director Allen, page 1.

<sup>7</sup> D.C. Official Code § 42-3502.01(a-1)(1).

<sup>8</sup> D.C. Official Code § 42-3502.01a; See RHC’s response to Director Allen, page 1; the Commission presently has a quorum of two appointed members: Lisa Gregory, Interim Chair and Chief Administrative Judge; and Adam Hunter, Administrative Judge.

<sup>9</sup> D.C. Official Code § 42-3502.04b.

<sup>10</sup> D.C. Official Code § 42-3502.02.

<sup>11</sup> D.C. Official Code § 2-536(a)(3).

<sup>12</sup> D.C. Official Code § 2-1831.03(b-1).

<sup>13</sup> D.C. Official Code § 42-3502.16(h); D.C. Official Code § 2-509.

<sup>14</sup> See 14 DCMR §§ 3800.6; 3821.

<sup>15</sup> See RHC’s response to Director Allen, page 2.

<sup>16</sup> See RHC’s response to Director Allen, page 2.

<sup>17</sup> See RHC’s response to Director Allen, page 2.

<sup>18</sup> D.C. Official Code § 2-536(a)(3).

written response, which I attached to this document. In its response, RHC admits to not being fully compliant with D.C. FOIA's provision that requires the proactive publishing of Final Opinions to its website or the Internet.

## **II. DISCUSSION**

D.C. FOIA's mandatory disclosure of Final Orders provision is not a recent requirement. The mandatory disclosure of Final Orders provision was in D.C. FOIA when the measure was first enacted in 1976. In 2001, the law was amended to require that all Final Orders created on or after November 1, 2001, be made publicly available on the Internet or by other electronic means.<sup>19</sup> Approximately 22 years have elapsed since enactment of the latter provision.

At issue is RHC's adherence to D.C. Official Code § 2-536(a)(3), which states: "[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases"; and D.C. Official Code § 2-536(b) requiring such files to "...be made available on the Internet." The Commission admits it is not in full compliance with this provision of D.C. FOIA.

### **A. RHC is not in full compliance with D.C. FOIA.**

In RHC's response to the OOG, the agency states that its decisions and orders are covered by D.C. FOIA and that the decisions and orders must be posted on RHC's website.<sup>20</sup> According to RHC's website, RHC has made approximately 59 Orders and 22 Opinions available to the public.<sup>21</sup> The orders and opinions date back to 2019 and continue until 2022. I note that the orders and opinions do not date back to November 1, 2001, as mandated by D.C. FOIA.<sup>22</sup> RHC also does not proffer that any of these decisions and orders have been archived pursuant to their records retention schedule.

D.C. FOIA instructs agencies to make all Final Orders created on or after November 1, 2001, publicly available on its website.<sup>23</sup> D.C. FOIA's proactive disclosure provisions mirror the federal FOIA's affirmative disclosure provisions.<sup>24</sup> Federal case law provides justification for proactive disclosure requirements. The federal FOIA statute's reading-room provision has as its "primary objective the elimination of secret law."<sup>25</sup> The "FOIA's reading-room provision represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law."<sup>26</sup> D.C. FOIA has the same proactive disclosure provisions.<sup>27</sup>

Based on my review, OOG's investigation, and RHC's admission, I find that RHC has not fully complied with D.C. FOIA's proactive disclosure provisions because the RHC has not

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<sup>19</sup> See Report of the Committee on Government Operations on Bill 1-119, the Freedom of Information Act of 1975, at 2 (Council of the District of Columbia July 23, 1975); and Report of the Committee on Government Operations, Bill 13-829, the Freedom of Information Amendment Act of 2000, at 5 (Council of the District of Columbia October 31, 2000).

<sup>20</sup> D.C. Official Code §§ 2-536(a); 2-536(b); See RHC's response to Director Allen, page 2.

<sup>21</sup> [RHC Decisions and Orders](#).

<sup>22</sup> D.C. Official Code § 2-536(a); D.C. Official Code § 2-536(b).

<sup>23</sup> D.C. Official Code § 2-536(a)(3).

<sup>24</sup> 5 U.S.C. § 552(a)(2)(a).

<sup>25</sup> *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989).

<sup>26</sup> *N.L.R.B v. Sears, Roebuck & Co.* 421 U.S. 132, 153 (1975).

<sup>27</sup> D.C. Official Code § 2-536.

proactively disclosed all Final Orders, created on or after November 1, 2001, publicly available on the Internet or on its website.<sup>28</sup> The public does not have access to the information.

RHC admits it is not fully compliant with DC FOIA. Before becoming an independent agency in FY 2020, the RHC only had access to a page within the DHCD's website.<sup>29</sup> Since becoming an independent agency, the RHC has maintained a website with the intent to comply with D.C. FOIA by posting Final Orders but direct access to modify content has been controlled by the Office of the Chief Technology Officer ("OCTO").<sup>30</sup> RHC acknowledges the multi-step process for publication was ineffective and difficult to follow.<sup>31</sup>

Due to RHC's admission of non-compliance and acknowledgment of its inefficient procedure of posting decisions and orders prior to becoming an independent agency in FY 2020, I find that the RHC's current state of non-compliance is not willful. Having established RHC is not fully compliant with D.C. FOIA, the discussion below focuses on RHC's efforts to fully comply with D.C. FOIA.

### **B. RHC's current steps and future plans to fully comply with D.C. FOIA.**

After reviewing the request for an Advisory Opinion, the RHC began a prompt analysis of RHC's processes and procedures concerning its website. In response to the review, RHC immediately made changes to its procedures. A standard operating procedure (SOP) has been written to detail what is required for posting information and the section on its website listing Final Orders has been redesigned to allow RHC access to control content, instead of OCTO.

With the new SOP in place, RHC is confident staff will be able to ensure adequate and consistent public posting. The SOP outlines each step that should be implemented when posting Final Orders.<sup>32</sup> RHC's staff will be able to control the uploading of Final Orders and post information in a timely fashion. RHC also has plans to develop a database that will allow for easy access to current and past decisions. Because of the possible costs involved in the creation of the searchable database, RHC did not state a timeline for implementation. RHC should establish and make public its intent to institute the database and an anticipated date of completion.

## **II. CONCLUSIONS AND RECOMMENDATIONS**

While RHC's website contains orders and opinions dating back to 2019, it is incomplete. Therefore, to become fully compliant with the mandatory proactive disclosure provisions of the D.C. FOIA, RHC must make all Final Orders, created on or after November 1, 2001, publicly available on the website.

I understand your concern about posting Final Orders after November 1, 2001, and before October 1, 2019, while RHC was located within the DHCD and DCRA. In the interest of openness and transparency, a single point of access for the public would be ideal. I encourage a discussion with the respective agencies to allow input into the final decision.

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<sup>28</sup> D.C. Official Code §§ 2-536(a)(3); 2-536(b).

<sup>29</sup> See RHC's response to Director Allen, page 3.

<sup>30</sup> See RHC's response to Director Allen, page 4.

<sup>31</sup> See RHC's response to Director Allen, page 4.

<sup>32</sup> See RHC's response to Director Allen, page 4.

I also understand future efforts to automate the publication of information may be timely and costly, however, the D.C. FOIA proactive disclosure provisions are the law. All Final Orders should be published and years of not publishing the information should not continue. I recommend that RHC follow through with its plan to create a database that will allow public access to archived as well as current Final Orders. RHC should also request additional funding, if needed, to implement the database in a timely fashion.

As detailed above, I find that RHC is not in full compliance with the D.C. FOIA's requirement to make all Final Orders available on its website, the Internet, or by other electronic means.

Sincerely,



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Niquelle M. Allen, Esq.

Director of Open Government

Board of Ethics and Government Accountability

cc: Daniel Mayer, General Counsel, Rental Housing Commission