



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



March 27, 2023

VIA ELECTRONIC MAIL

Fritz Mulhauser
D.C. Open Government Coalition
3901 Argyle Terrace N.W. #7
Washington, D.C. 20011
fmulhauser@aol.com

**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.¹

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.”² 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.³

I find that RHC is not fully compliant with the mandatory disclosure provisions of D.C. FOIA⁴ and must make all Final Orders created on or after November 1, 2001, that are not subject to statutory exemption,⁵ 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.

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

² D.C. Official Code § 2-531.

³ D.C. Official Code § 1-1162.05c(d).

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

⁵ 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 1980.⁶ It is a three-member public body, whose members are appointed by the Mayor, with the advice and consent of the Council.⁷ 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.⁸ 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 2019.⁹

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 1st of each year the annual adjustments to regulated rents.¹⁰ The Commission must publish Final Orders and Opinions on the Internet.¹¹ Petitions filed in the Rental Accommodations Division of the DHCD, result in cases that are adjudicated by the OAH.¹² The Commission has the authority to review the appeals adjudicated by the OAH.¹³ While determining appeals, the Commission may put forward procedural orders, as well as issue a decision and order on the merits.¹⁴

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 1975.¹⁵ This internal archive is reported to include all decisions and orders issued by the Commission.¹⁶ While not required, the Commission’s decisions and orders dating to 1985 are available through the subscription-based LEXIS research service.¹⁷

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.¹⁸ I provided RHC with a copy of the Advisory Opinion request and on January 12, 2023, RHC submitted a

⁶ See RHC’s response to Director Allen, page 1.

⁷ D.C. Official Code § 42-3502.01(a-1)(1).

⁸ 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.

⁹ D.C. Official Code § 42-3502.04b.

¹⁰ D.C. Official Code § 42-3502.02.

¹¹ D.C. Official Code § 2-536(a)(3).

¹² D.C. Official Code § 2-1831.03(b-1).

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

¹⁴ See 14 DCMR §§ 3800.6; 3821.

¹⁵ See RHC’s response to Director Allen, page 2.

¹⁶ See RHC’s response to Director Allen, page 2.

¹⁷ See RHC’s response to Director Allen, page 2.

¹⁸ 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.¹⁹ 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.²⁰ According to RHC's website, RHC has made approximately 59 Orders and 22 Opinions available to the public.²¹ 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.²² 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.²³ D.C. FOIA's proactive disclosure provisions mirror the federal FOIA's affirmative disclosure provisions.²⁴ 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."²⁵ The "FOIA's reading-room provision represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law."²⁶ D.C. FOIA has the same proactive disclosure provisions.²⁷

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

¹⁹ 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).

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

²¹ [RHC Decisions and Orders](#).

²² D.C. Official Code § 2-536(a); D.C. Official Code § 2-536(b).

²³ D.C. Official Code § 2-536(a)(3).

²⁴ 5 U.S.C. § 552(a)(2)(a).

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

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

²⁷ 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.²⁸ 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.²⁹ 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").³⁰ RHC acknowledges the multi-step process for publication was ineffective and difficult to follow.³¹

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.³² 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.

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

²⁹ See RHC's response to Director Allen, page 3.

³⁰ See RHC's response to Director Allen, page 4.


³¹ See RHC's response to Director Allen, page 4.

³² 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,



Niquelle M. Allen, Esq.

Director of Open Government

Board of Ethics and Government Accountability

cc: Daniel Mayer, General Counsel, Rental Housing Commission

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION**



**To: Niquelle Allen
Director
Office of Open Government**

**From: Daniel Mayer
General Counsel
Rental Housing Commission**

Date: January 12, 2023

Re: Request for advisory opinion dated December 8, 2022

Director Allen:

Thank you for the opportunity to respond to the request received by the Office of Open Government (“OOG”) for an advisory opinion (“AO Request”) regarding the Rental Housing Commission’s (“Commission’s”) compliance with the proactive disclosure provisions of the District of Columbia Freedom of Information Act (“DC FOIA”), D.C. Official Code § 2-536(a)(3) & (b).

Since receiving the AO Request, this agency has reviewed the current state of its website (<https://rhc.dc.gov>) and its internal procedures and, recognizing deficiencies, has already begun implementing changes to fully comply with its obligations. The Commission welcomes further advice and support from the OOG on best practices for meeting all statutory obligations regarding any information that must be made public.

The Commission

The Commission is established by the Rental Housing Act of 1985, D.C. Law 6-10, D.C. Official Code § 42-3502.01 (“Rental Housing Act”). The Commission was originally established by predecessor versions of the Rental Housing Act enacted in 1975 (as the “Rental Accommodations Commission”), 1977, and 1980. It is a three-member public body, whose members are appointed as Administrative Judges by the Mayor, with the advice and consent of the Council. *Id.*¹ The Chairperson, the Chief Administrative Judge, serves as the administrative head and personnel authority of the Commission, which, since October 1, 2019, is an independent agency. *Id.*; D.C. Official Code § 42-3502.01a. Previously, the Commission was administratively located within the Department of Housing and Community Development

¹ The Commission presently has a quorum of two appointed members: Lisa Gregory, Interim Chair and Chief Administrative Judge; and Adam Hunter, Administrative Judge.

("DHCD") since 2007, and the Department of Consumer and Regulatory Affairs ("DCRA") prior to that.

The Commission has an operating budget for Fiscal Year 2023 of \$1,356,911.78, approximately 95% of which comprises personnel services. The Commission currently has seven full-time employees and two vacant full-time equivalent positions, one of which is for a third Administrative Judge.

The Commission is charged with three core functions to effectuate the Rental Housing Act: (1) promulgating implementing regulations, (2) deciding appeals from administrative hearings on petitions brought by landlords and tenants covered by the act, and (3) publishing annual, inflation-based adjustments to regulated rents. The second function, appellate adjudication, constitutes the bulk of the Commission's work and is the subject of the AO Request.

Cases before the Commission arise from petitions filed in the Rental Accommodations Division of DHCD, which are then adjudicated by the Office of Administrative Hearings ("OAH"). D.C. Official Code § 2-1831.03(b-1). The Commission's review of appeals is governed by D.C. Official Code § 42-3502.16(h), which provides the familiar "substantial evidence" standard for judicial review of contested cases before administrative agencies. *See, e.g.*, D.C. Official Code § 2-509. The Commission's review of legal questions is de novo, and the District of Columbia Court of Appeals generally defers to the Commission's reasonable construction of the Rental Housing Act. *See United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n*, 101 A.3d 426 (D.C. 2014). Commission decisions in these cases are precedential, to be followed by OAH and by the Commission itself.

In deciding appeals, the Commission may issue any number of procedural orders and, after the parties have the opportunity to file briefs and present oral arguments, will issue a decision and order on the merits, if the case has not been dismissed for other reasons. *See* 14 DCMR §§ 3800.6 & 3821. The Commission has electronic copies (in PDF format) of procedural orders and merits decisions dating to 1975. This internal archive contains roughly 5,000 separate documents. It is our belief that this is a complete record of all decisions and orders issued by the Commission since its establishment. Some, but not all, have been converted with optical character recognition to text-searchable files. The Commission's decisions and orders dating to 1985 are also available in a text-searchable database through the subscription-based LEXIS research service often used by legal professionals.

Applicable law

DC FOIA requires the Commission to proactively disclose "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." D.C. Official Code § 2-536(a). There is no question that the Commission's decisions and orders are covered by this provision.

D.C. Official Code § 2-536(b) further requires covered records created by an agency after November 1, 2001 to be made publicly available on a website. There is no question that the Commission's decisions and orders since becoming independent and going forward must be posted on the Commission's website. The Commission is not clear as to whether, strictly

speaking, it is legally required to post decisions and orders issued while it was a part of DHCD or DCRA, separate agencies that maintain their own websites. We acknowledge, however, that it would be preferable, resources permitting, for there to be a single, publicly accessible source for all past Commission decisions and orders.

As a multi-member public body, the Commission is also subject to the Open Meetings Act, D.C. Law 18-350, D.C. Official Code § 2-571 *et seq.* (“OMA”). We note this obligation because it ties into how the Commission has previously posted its decisions and orders online. Although procedural orders may generally be issued by a single Administrative Judge, the Commission issues its merits decisions by convening as a quorum to adopt a draft decision and order by a majority vote on the record. 14 DCMR § 3800.6-.8. The Commission’s rules specifically require adopted decisions to be made available as part of the official record of the public meeting. *Id.* The Commission’s public meetings do not occur on a regular schedule; rather, hearings (oral arguments) are held as cases proceed through argument and merits decisions are issued as review and drafting are completed. Prior to becoming an independent agency with practical control of its own website, the Commission relied on the OOG’s online calendar of public body meetings (<https://open-dc.gov/public-bodies/meetings>) to post the notices and records of its meetings.

The Commission’s rules further require that:

All orders of the Commission, including final decisions and orders, shall be issued in writing and made publicly available at the Commission’s office, and may additionally be made available on the Commission’s website or the website of the Office of Open Government or by electronic database through other service as the Commission may deem suitable.

14 DCMR § 3800.9. The AO Request notes that the use of the permissive “may” for website posting does not fully capture the DC FOIA requirement that an agency “shall make records available” online. The Commission acknowledges that the mandatory language of DC FOIA supersedes the permissive language of its rule.

The Commission is currently in the process of making a variety of technical corrections to its rules, having promulgated an omnibus update of all Rental Housing Act regulations in December 2021. *See* 69 D.C. Reg. 012911 (Oct. 21, 2022) (notice of emergency and proposed rulemaking). The Commission will amend 14 DCMR § 3800.9 through this process to reflect the Commission’s online posting obligations.

The original website

Prior to becoming an independent agency in 2019 (fiscal year 2020), the Commission did not have its own website, only a page within DHCD’s general site. This was not conducive to timely publishing irregular meeting notices and decisions, because DHCD is a relatively large agency with its own communications department and review processes for web posting. The Commission’s internal procedures were modified in 2016, following an inquiry from the DC Open Government Coalition, and the Commission began posting meeting notices and records through OOG’s website, as described above.

When the Commission became an independent agency in 2019, it entered into a memorandum of understanding (“MOU”) with the Office of the Chief Technology Officer (“OCTO”) to create and maintain a website. The website (<https://rhc.dc.gov>) is based on the standard template for District agencies, with no customization in functionality. The Commission’s staff does not have direct access to modify the content of the website but relies on a designated point of contact at OCTO to make content updates as necessary.

As originally designed, the main page of the Commission’s website contains two elements for posting decisions, orders, and meeting notices. First, there is a news box (labeled “press releases”) where notices of scheduled hearings and votes appear by date issued, with links to PDF copies of notices and orders. The intent of these news items is to comply with the OMA and that they should be updated to include the complete record of the hearings that they describe after the fact, including audio/video recordings and copies of documents voted on by the Commission. Second, the menu bar contains a link for “Decisions and Orders,” which opens a new page intended to contain PDF copies of decisions issued by the Commission, organized by year.

The revised website

Upon receiving the AO Request, the Commission began a thorough review of its procedures and the current content of its website. The multi-step process for each meeting and decision, which had never been documented, was plainly ineffective, difficult to follow, and failed to include public posting of procedural orders. Accordingly, the Commission has already made two significant changes to its operations: first, a new, thorough standard operating procedure (“SOP”) has been written to cover all Commission actions that require online posting; and second, the “Decisions and Orders” page has been redesigned to link to a Google Drive account directly owned and operated by the Commission, rather than OCTO.

The new SOP for online posting provides a step-by-step list of each action that must be taken by the Commission’s staff when a hearing or vote is scheduled or when a decision or order is issued. This will ensure consistency and clarity in both internal record keeping, which has been adequate, and public posting, which has been sporadic. Having this single, controlling document will ensure that any member of the staff can perform all necessary actions in case of another’s absence.

The Google Drive page for Commission decisions is divided first by year and then by the type of record available. The Commission has posted all decisions, orders, and meeting audio recordings² going back to 2019 (the year it became independent). This new method of uploading decisions bypasses the limitations of a standard-template District website and the avoids delays

² Commission meetings prior to FY 2021 were recorded in a proprietary format using the For the Record software. Although these files can be played with freely available software from the developer, the process is cumbersome and involves multiple files per recording. These files have not been proactively posted. The Commission is working to obtain a current version of the recording software that will be able to convert past recordings into standard MP3 audio format.

the Commission has encountered in uploading information on short notice by going through OCTO.

Future development

The Commission considers the Google Drive archive of notices, decisions, and orders to be a temporary solution. In the long term, the Commission hopes to work with OCTO and outside vendors to develop a searchable archive of decisions similar to those of other independent adjudicatory agencies, such as <https://casesearch.oea.dc.gov/> or <https://cab.dc.gov/page/search-pending-and-closed-cases>. The Commission anticipates that an MOU with some significant costs would be required, however, and is not currently aware of the possible range of costs.

* * *

Thank you again for considering the Commission's response to the AO Request. The Commission takes seriously its obligations to keep the public fully informed of its actions. As explained above, we look forward to:

- Obtaining OOG's guidance on the Commission's obligations to post decisions, particularly with regard to those after November 1, 2001 and before October 1, 2019;
- Updating the Commission's rules to accurately reflect DC FOIA obligations;
- Implementing and monitoring performance under the new SOP for issuing and posting notices, decisions, and orders; and
- Working with OOG and OCTO to develop, in accordance with best practices and available budget, a useful, public facing database of Commission decisions and orders.

Please let me know if there is any further information that will help the OOG complete its review of this matter. You may reach me at daniel.mayer@dc.gov or (202) 442-7176.

DJM