**DISTRICT OF COLUMBIA AGENCIES’ FOIA PERFORMANCE IN 2015**

Analysis of the 2015 Annual FOIA Reports of the Mayor and

the Attorney General of the District of Columbia [[1]](#footnote-1)

Fritz Mulhauser[[2]](#footnote-2)

July 2016

**The FOIA Year 2014-15 In Brief**

The year was a perfect FOIA storm: more rejections, more delays and more errors. And an apparent reporting mistake (wrongly including non-FOIA document requests) casts doubt on processing data.

* DC agencies processed 6,191 requests. Not counting 10,996 reported by the Fire & Emergency Medical Services Department (FEMS), almost certainly a mistake, so omitted from this report.
* The total included 5,944 new requests, a 7 percent increase. The police department (MPD) received the most, 803; Consumer & Regulatory Affairs the next most, 650. Agencies began with an inherited backlog of 247 from 2014 but the number almost doubled, reaching 447 on 9/30/15.
* Agencies granted fewer and rejected more: 56 percent of requests were granted in full or part, down from last year’s 66 percent. Full denials were 9 percent, up from last year’s 8 percent rejection rate.
* Delays increased also: about 2,000 (36 percent) took more than the 15 workdays the law allows, up from 30 percent in 2014. Of the late responses, 810 took more than five weeks.
* Appeals sent back by the mayor because of errors grew to 43 percent, up from 33 percent. Nearly half of appeals needed no decision as agencies released records after the appeal was filed.
* The District defended agency FOIA denials in 30 active Superior Court cases and continued its weak track record there, losing or settling more than half the 28 decided cases and again paying out several hundred thousand dollars in costs and fees.
* Agency comparisons showed a concentration of problems at MPD:
* Starting the year with the most backlog: MPD, 49 (better that the prior year but it got worse);
* Most long-delayed responses (more than 26 days): MPD, 206;
* Oldest pending requests at year’s end: MPD, 111 requests left on 9/30/15, average age 68 days (two agencies had two each that were older, but MPD wins for combined volume and age);
* Most full denials: Office of Police Complaints, 183; MPD second with 156;
* Most often appealed: MPD, 39; but losing only 7 of 23 decided appeals in whole or part; DCRA, DCPS and OSSE lost all their decided appeals.
* Most often sued: MPD, 14 of 30 Superior Court cases; most often losing in court: MPD again, losing 9 times in 2015 by verdict or settlement.

**System and Data Issues in 2015**

The 2015 reports were again not issued on time to the public (posted a month late in March) and the processing report also contained a major unexplained data problem.

The Mayor’s Office of Legal Counsel for the first time compiled the 2015 reports on agency processing. The FOIAXpress software was in use for the full year and the mayor’s office also handles appeals, so the authors could have exploited new sources of information. Instead, the reports, as well as the attorney general’s litigation report, followed the same minimal format as in previous years.

Because of the mayor’s decision to include a highly unusual agency report, the true total of 2015 FOIA requests is uncertain. The Fire & EMS Department reported the unlikely number of 10,996 new requests. This is a huge and unprecedented figure—38 times more than this agency received the year before, and more than any other agency or the entire D.C. government received in any prior year. Both the mayor’s office and the FEMS FOIA officer confirmed the figure when we asked. The FOIA officer said she was new to the position and had used the FOIAXpress system to track “any request for agency records,” including an unknown number she acknowledged were probably not submitted under the D.C. Freedom of Information Act -- for example, from “doctors and hospitals with HIPAA releases, requests in relation to METRO mass casualties, audits, court and attorney subpoenas.”

The FEMS Department has changed, now answering hundreds of thousands of calls for emergency medical help and ambulance transport in a year, compared to only 30,000 fire runs. So it is not surprising that patients and their doctors or lawyers and others need resulting medical records. Unlike typical FOIA requests, almost all were quickly granted in full. Maybe some prior years’ requests were under FOIA and were undercounted; the key is no one seems to know. To our inquiry, the mayor’s office said they planned to discuss standards for such record keeping with the agency in the current year. Those would be good to share across all agencies. For now, the uncertain number of true FOIA requests to FEMS makes the 2015 data uninterpretable, so all FEMS data are omitted in the analyses below. The FEMS detailed data also failed to account for 253 requests (totals of received and backlogged requests were not matched by the total disposed of and backlogged at year’s end).

The litigation report was inaccurate (for example, information was incorrect or missing on the D.C. agency involved in seven of the 30 cases). Where possible, corrected details drawn from court files were substituted for this report.

Other aspects of FOIA management are not discussed in the annual reports. For example, problems with FOIAXpress, the online consolidated request portal and related software for users and agencies, are not addressed such as access only to 54 of the more than 80 D.C. government agencies and offices, no access for Safari browser users and a non-functioning “reading room” (only three records posted by MPD and none by DCRA, though together these two agencies process a quarter of all FOIA requests each year.)

Agency performance also is not reported on the proactive disclosure part of the D.C. FOI statute, requiring certain information to be available online (and thus without need of a written request). *See* D.C. Code § 2-536 (specifying ten categories of records such as staff lists, policies and decisions). Lacking a statutory enforcement method, regular executive and Council oversight are important. An Office of Open Government complaint investigation revealed in January that DCRA had for years ignored the statutory requirement that building permits pending and approved, with full plans and drawings, be readily available. *Available at:* <http://bit.ly/1TFx88J>. Another review of 50 agencies some years ago also found widespread noncompliance. *See* <http://bit.ly/28VOEI5>.

**Agency Processing of FOIA Requests**

(All analyses omit data from D.C. Fire & EMS.)

**Volume and disposition of requests**

Agencies in 2015 processed 6,191 requests, including 5,944 new ones, up 7 percent from 2014, and a backlog of 247.

More than a third of all requests went to three agencies: MPD, 803; DCRA, 650; and Department of Energy & Environment (DOEE), 648. All others received 350 or less. Most agencies process only a trickle of FOIA requests: 51 of the 76 agencies reporting received 50 or fewer in the whole year, or an average of one a week.

D.C. agencies released all or part of the requested files in 56 percent of requests, down from 66 percent in 2014 and much less than the 69-77 percent rate in earlier years.

Some agencies released almost all the requested records in full, such as Department of Employment Services that granted 91 percent of its 171 requests and DOEE, which granted 87 percent of 648.

Agencies with very low rates of full release included Office of Police Complaints (OPC), 2 percent; also the Office of Inspector General (never), D.C. Council (only six percent of its 51 requests granted in full) and Office of Planning (7 percent of 71 requests).

About a quarter of requests ended in three other ways: requesters withdrew 150; agencies referred or forwarded 523 to other agencies (not explained in the report); and 1,030 (half in DCRA and MPD) had some “other disposition” (also not explained). Staff in the mayor’s office have explained in previous years that the third category often means no records were found. It could also include requests that proved not to be agency records, requests not reasonably described, or that remained unresolved because of fee disputes.

And backlogs increased. This year’s operations left 447 unprocessed in all agencies. MPD has in past years had the biggest backlog, usually hundreds of requests unfinished each year, but reported starting 2015 with only 49. It couldn’t keep up, however, and still had 111 incomplete at year’s end; three other agencies had about 50 each left over, Office of Unified Communications (which answers 911 calls), DOEE and DCRA.

**Denials**

In 2015 D.C. agencies denied 1,506 requests or 27 percent (a jump from 20 percent last year) – including 560 denied completely and another 946 denied in part. Partial denials can be big or small; analysis is impossible without knowing details, and computations that follow in this section refer to full denials only.

This year’s full denial rate reached 9 percent, up from 8 percent the last few years.

The agencies with the most full denials in 2015 were again the Office of Police Complaints with 183 and MPD with 156—accounting for 60 percent of all full denials. At OPC, the rate of full denial continued a steady rise, reaching a new high of 79 percent. The MPD rejection rate has also been increasing in recent years, from 11 percent several years ago to 15 percent in 2014 and 18 percent in 2015.

**Denials Based on Exemptions**

Exemptions in the FOIA law, D.C. Code § 2-534, allow agencies to withhold certain kinds of records (or segments), from non-government business data to police files to homeland security plans, and agencies in 2015 cited them 2,058 times in the 1,506 full and partial denials. Use of each exemption followed patterns in prior years:

* Exemption 2 was the most often cited (1,036 times, or half of all exemption citations). It allows agencies to withhold personally identifiable information if release would mean a “completely unwarranted” invasion of privacy. It was especially often cited by the MPD (271) and the Office of Police Complaints (211). On the special case of the denial of police complaints, see the appendix.
* Exemption 3 was the next most frequently used (a quarter of all exemption claims), covering six different kinds of law enforcement records. Some are very specialized to protect police sources and methods but one exempts any police record whose release would be a privacy invasion (this time on a lower standard—just an “unwarranted” invasion). Of the 518 citations to Exemption 3, 385 (74 percent) were to the privacy part, 3(C), again over half by the Office of Police Complaints.
* Two other exemptions each accounted for about 8 percent of exemptions claimed. Exemption 1, for commercial and financial information from non-government sources, was commonly used by agencies with business dealings, Department of General Services and the Office of Contracting & Procurement. Exemption 4, covering records that are behind-the-scenes materials from the deliberative process leading up to decisions, was used most by the Office of Contracting & Procurement and the D.C. Council.

The annual report doesn’t address whether agencies are correctly claiming the thousands of exemptions. No regulations spell out quality control measures for agency FOIA operations, and staff doing FOIA work have a wide range of qualifications. But the extent of error is obvious in the roughly 50 percent rate at which agency decisions are reversed when challenged in appeals to the mayor or the similar rate at which the District loses when defending its agencies’ FOIA decisions in court (discussed in later sections).

**Delayed processing**

Delays continued to mount: almost 2,000 or 36 percent of all requests where processing time is reported took more than the three weeks the law allows. Forty percent of those delayed requests took more than 26 days, and how much longer is unreported. The actual fraction answered late may be larger, as agencies failed to give processing time for 603 or 10 percent of the year’s requests.

The five agencies reporting the most delayed responses (beyond the 15-day statutory deadline) were: DCRA, 426; MPD, 280; Office of Contracting & Procurement, 163; DOEE, 153; Office of Unified Communications, 114.

The most long delays were at MPD, where 206 requests took more than 26 days. No other agency was close.

The median number of days for processing a request is an indicator that isn’t skewed like the average by a few items delayed by size or complexity. The median describes the midpoint of a set of data.

Median processing times show delay is widespread: in 2015, 20 agencies (over a quarter) reported a median processing time of 16 days or more—so half their requests were answered late.

Five had median processing times of 30 days or more, double what the law allows. Office of Zoning was the slowest, with a median of 57 days to handle its 58 requests in 2015; D.C. Water & Sewer and Office of State Superintendent of Education (OSSE) both reported a median of about 30 days needed to handle the 100 or so requests each received in 2015.

Backlogged cases (the 447 left at the end of September 2015) included some long-delayed. The MPD backlog of 111 had been waiting an average of 68 days. The 44 at DCRA had waited an average of 44 days. Two small offices each had two items an average of 150 days old and others had an aging backlog as well, such as OSSE (15 items, average age 53 days) and the Office of Attorney General (6 items, average age, 49 days).[[3]](#footnote-3)

**Administrative Appeals**

The mayor also reports each year on appeals of agency denials, a barebones table of one-line entries that permits few conclusions. Appeals often challenge multiple aspects of the processing of a request, including delay, adequacy of search, or incorrect claims of exemption. The report describes the result for each decided case as affirmed, reversed, or a split decision (upheld in part, reversed in part)—without adding which claims were upheld and which not. Patterns of error are thus hard to detect. The statute requires a denial of an appeal to be accompanied by an explanation (“the reason for the action,” D.C. Code § 2-538(a)(4)), but the report gives none.

Appeal is easy and often successful either in getting agency action that moots the appeal or if decided, winning reversal on the merits. With 1,500 denials the small number is puzzling; 100 were received in 2015 (again omitting a handful of FEMS appeals), down from 115 in 2014. A decision is required within 10 working days but the report provides no data on timeliness. There appears to have been no backlog at the year’s end; at least no appeals were shown as undecided in the annual report. The mayor’s office investigates appeals based on the written record and its own inquiries to the requester and agency. A welcome improvement in public access to past opinions is a new D.C. government web page with an archive of opinions since 2006, searchable by date, agency and keyword (including case numbers found in the annual report of appeals)*.* See: <http://tinyurl.com/zrwbq4t>. Case numbers are thus available only after a year has ended; finding appeals would be easier if there were also a real-time public docket (*see, e.g.*, that offered by Massachusetts, <http://bit.ly/29Olyt3>).

The mayor reported finding reversible error in 24 or 43 percent of 56 decided appeals, up from 33 percent last year. This rate counts all appeals where the mayor remanded a request for corrective action by the agency; 20 percent were remanded altogether and another 23 percent were remanded in part.

The mayor upheld agency action a little more than half the time—32 of 56 decided appeals (57 percent).

About half of all appeals (44 of 100) were not decided. Most of those were reported as “moot.” Brief entries in the report show this typically occurs when an agency releases the requested records—but whether dropping an exemption claim, granting a fee waiver or completing a search isn’t reported.

MPD decisions drew the most appeals—39 of 100. Almost half were mooted; of the rest, MPD was affirmed in 16 of 23 decided appeals.

No other agency had such volume; DCRA, OSSE, D.C. Public Schools, OAG, and the Office of Chief Financial Officer all were challenged in fewer than eight appeals each. The first three of those, DCRA, OSSE and the schools, lost all their decided appeals, a total of nine.

The report briefly lists the exemption or issue involved in each appeal, but further analysis of agency error is difficult. Of the 24 reversals on appeal, 19 were based on problems with one or more agency claims of exemption. The law of FOIA exemptions can sometimes be very complex, so error is inevitable.[[4]](#footnote-4)

**Litigation Under the D.C. FOIA Statute**

The District defended 30 court challenges in 2015, down from the range of 40-50 in recent years but still almost double the number just six years ago (17 cases reported in 2009). The cases continue to age (the oldest filed in 2005); only half carry case numbers showing filing in 2013-15.

MPD is sued the most -- 14 cases active in 2015, all but two brought by the police union, Fraternal Order of Police (FOP). Five other agencies have more than one active case in the 2015 report: the Deputy Mayor for Planning & Economic Development, the D.C. Public Schools, Office of Chief Technology Officer, Office of the Attorney General and Advisory Neighborhood Commissions, all with two each. Five more are named in just one pending suit. (And D.C. Superior Court was sued once, though the D.C. public records law does not cover it.)

Beyond the FOP, which brought 16 of the 30 reported cases, other plaintiffs were almost all individuals. The Washington Teachers Union (and its national union, American Federation of Teachers), several community groups and two private businesses sued, but in general major media and nonprofits do not use FOIA litigation to get D.C. government records.

The FOP has filed fewer cases in recent years. They brought all but one of the 13 cases in the report filed in 2011 and earlier (including the oldest, filed in 2005).[[5]](#footnote-5) Of 17 cases filed since then, FOP filed only four.[[6]](#footnote-6)

The District loses often – losing or settling 16 of the 28 cases where the Attorney General’s report shows a clear decision.[[7]](#footnote-7) D.C. wins against first-time parties (7 of 12 victories), but fares much worse against a repeat player like the FOP that has experienced counsel to bring its challenges against FOIA actions of the D.C. agency with the biggest FOIA burden, the MPD. Between the two major litigants, FOP wins more (12 of its 16 cases) and MPD loses more (9 of its 14).

About half those plaintiffs who won or settled also got costs and attorneys’ fees. That cost the District in 2015 over $170,000.[[8]](#footnote-8)

**Recommendations**

1. **Instruct agencies on a standard classification of requests**. The confusion over counting requests for agency records and failing to segregate those under FOIA from others should be resolved promptly to prevent what happened in 2015--the reporting of 10,996 “requests” from FEMS that no one seems able to fully explain. Other agencies’ reports may also be incorrect for similar confusion and lack of standardized protocols. Without prompt attention to limit reporting to FOIA requests only, the mayor’s future reports to the Council will not comply with the law.
2. **Provide a more meaningful FOIA report**. Repeating last year’s recommendation, the executive branch should consider expanding the report from a statistical compilation to a substantive report to the Council and the public about access to records and FOIA generally. The data elements required by D.C. Code § 2-538 to be in the annual report to the Council need not constrain the report. Trends, agency differences and policy-related topics (see recommendations below) can be treated more thoroughly now that most requests are filed and tracked in the central FOIAXpress system. That could allow new kinds of codes to be tried to study issues, draw samples for special review, etc. The Office of Open Government could compile the report and contribute the analyses and recommendations for improvement called for by statute, D.C. Code § 2-593. Proactive disclosure and FOIAXpress could also be addressed. Such a report could provide a much-needed agenda for improvement each year to guide training and policy development.
3. **Make a priority of reducing delay in agencies with the worst records**. A growing fraction of requests are processed late—now 36 percent, and almost half of those take more than 26 days. The mayor should direct analysis of delay at the five agencies with the most. (Half the 2,000 delayed requests were at those five, and 35 percent at two, MPD and DCRA.) Ideas for incentives to speed up agency action are included in federal law and the pending bill B21-0577, “Strengthening Transparency and Open Access to Government Amendment Act of 2016.”
4. **Track error more closely and develop corrective action plans**. Error rates are also up—with 43 percent of decided appeals sent back for re-work because of agency mistakes. Improved quality of decisions by agency FOIA staff is an enduring challenge involving staff selection, training, and supervision at the agency level as well as central support. The executive branch should exploit several kinds of data that can serve as signals of problem areas. Appeals should be coded in more detail to track the most frequent sources of reversal of agency decisions. (If such information is now collected, it is not included in the annual reports.) Litigation is rare, and not always decisive, yet court decisions can also serve the same role of highlighting where agency responses can be improved.[[9]](#footnote-9) Once identified, error-prone aspects of practice can be addressed by targeted support for agency staff.
5. **Gather user views to help prioritize improvement projects**. Users’ views of their D.C. FOIA experience should be solicited as delays, backlogs and error rates grow. The Sunlight Foundation suggested such an idea in its review of the annual federal report on FOIA:

While the Justice Department’s statistics claim a historic high in the total number of FOIA requests processed, the data doesn’t capture the quality of the responses nor the satisfaction of the requestor with what he or she receives. We encourage the Justice Department’s Office of Information Policy (OIP) and agencies to request and publish data from requestors about the process, from how timely and responsive agencies were to the documents themselves. As more data on requestor experience is created and analyzed, Congress, OGIS and OIP will have more insight into which agencies or agency components need assistance.

The Foundation comment is available at <http://bit.ly/28VBpVJ>. The Project on Government Oversight also has offered useful suggestions for how to survey agencies to get at valid measures of public usefulness rather than paper compliance. *See at* <http://www.pogo.org/blog/2016/05/another-year-another-unhelpful-foia-report.html>.

1. **Establish a FOIA Officers’ Council and use it to drive agency–level improvement**. Better agency management of FOIA (and related proactive disclosure obligations in D.C. Code § 2-536) will take many steps, beginning with commitment and resources. Higher visibility in agencies for the responsibility of complying with the law could help. Such a group could demonstrate management concern for solving problems affecting speed and accuracy, develop improvement priorities, and engender a much-needed sense of professionalism and shared mission at all levels of larger agencies.[[10]](#footnote-10)
2. **Evaluate FOIAXpress**. Now in operation for two years, the online portal should be thoroughly reviewed from both government and public users’ perspectives. Commercial software adopted for government purposes too easily becomes a locked-in “legacy” system with files that can’t be migrated to a better system and a grim wait for the final crises when a vendor ends support and the last knowledgeable staff member moves on. Only scattered rumblings of staff users’ discontent have surfaced; for example, one agency included in its annual report a plea that FOIAXpress track processing time in the same intervals used for the annual report (15 days and under; 16-25 days; 26 days or more)—a simple tweak of software that would seem useful and inexplicably incomplete. The public has noted limitations such as incomplete coverage of D.C. agencies (54 of over 80), unhelpful “status” information (“in progress” shown for months), security glitches preventing Macintosh users with Safari browsers from accessing the portal, and the empty reading room.

**Appendix**

**Requests for Records of Police Complaints and “Glomar denials”**

The large volume of law enforcement denials partly results from D.C. policy to withhold complaints against police, not even acknowledging whether such records exist. Both MPD and OPC argue that to release complaints (some likely unverified) is such an invasion of an officer’s privacy that no public interest could justify such possible harm. D.C. officials are following precedent developed in many cases in federal court about requests for records of investigations of federal officials such as FBI agents.

According to the Department of Justice:

A FOIA request seeking records which would indicate that someone has been the subject of a law enforcement investigation may require an agency to flatly refuse to confirm or deny whether such records exist. Such an extraordinary response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. This response, colloquially known as a “Glomar denial” was first judicially recognized in the national security context. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes’ submarine retrieval ship, the *Glomar Explorer*).

*DOJ FOIA Update,* VII (1), January 1986. *Available at*: <https://www.justice.gov/oip/blog/foia-update-oip-guidance-privacy-glomarization>.

The case law suggests that records concerning a higher official or one charged with significant misconduct could be of such public interest to override concern with stigma. Not so for lower level officers. Stigma is assumed to arise from disclosure that a person is even mentioned in an agency’s law enforcement files. Strictly speaking, each Glomar denial based on privacy concerns should be an individual judgment call, requiring the application of past case law setting the legal standard and balancing the public interest in the records against the likelihood of harm from doing so. Uncertainty of such projections of harm, and use of exaggerated fears, led advocates to add to federal FOIA the warning that the prediction must be reasonable. D.C. law lacks such a limiting principle.

Even if an agency denial appears unjustified on the traditional balancing test, few requesters probably can craft a successful appeal questioning government privacy arguments. The mayor in several appeals has upheld the D.C. agencies’ general use of this exemption. The most recent, No. 2015-58 (May 4, 2015), simply asserted that the “Glomar response is justified in this matter because if a written complaint or subsequent investigation against the officers you have named exists, identifying the written record may result in the harm that the FOIA exemptions were intended to protect.” *Available here*: https://dc.gov/sites/default/files/dc/sites/DC/publication/attachments/2015-58%20Wolf.pdf#:~:text=RE%3A%20FOIA%20Appeal%202015-58%20Dear%20Mr.%20Wolf%3A%20This,withheld%20records%20you%20requested%20under%20the%20DC%20FOIA.

Importing the Glomar response into state public records law has withstood a recent challenge. Over the objections of 20 media organizations and the ACLU as *amici*, one state court has recently held that a Glomar denial may be used even though (as in D.C.) it was not among the agency responses allowed in state public records law. *Abdur-Rashid v. New York City Police Department*, No. 13-101559, slip op. (N.Y. App. Div. June 2, 2016) (citing the “instructive” federal FOIA case law upholding such responses and allowing police to neither confirm nor deny existence of records of surveillance of Muslims that the NYPD argued would reveal sensitive details of counter terrorism operations protected by exemptions in New York FOI law). *Available at:* <http://bit.ly/28XMZ6W>.

1. This analysis is based on data provided in three different reports for 2015 and prior years submitted by the executive to the Council, available at the website of the Office of the Secretary, <http://os.dc.gov/>. From the tab “About OS,” click on “Annual FOIA Reports.” D.C. Code § 2-538 calls for three reports each year, due by February 1: (1) the mayor is to report on certain specific details of requests received and processed by agencies under D.C. FOIA in the prior fiscal year; (2) the mayor is to report on administrative appeals; and (3) the attorney general is to report on litigation of FOIA matters, the exemptions involved, the cases’ disposition and any costs assessed. The reports are tables mostly of numbers or (in the case of litigation) short case annotations. The mayor’s reports ignore the statutory requirement for a “qualitative description or summary statement, and conclusions drawn from the data regarding compliance.” A similar question to agencies goes mostly unanswered (agency reports are attached to the mayor’s report and available online at <http://bit.ly/29I3ocf>). MPD, with a new FOIA officer, was unique in providing a 600-word note on special circumstances affecting their processing performance. Another agency took the opportunity to criticize FOIA, concluding that “DC FOIA is too burdensome on the government without corresponding benefits to the general public.” Several complained about unreasonable requests, requestors unresponsive to clarification requests and sometimes not even retrieving results. Ideas for improved reporting are at the end of this review, recommendation #2. [↑](#footnote-ref-1)
2. The author is solely responsible for the content of this paper. No endorsement of the analysis or recommendations by any employer or organization where he is a board member should be inferred. [↑](#footnote-ref-2)
3. Federal agencies processed the 700,000 FOIA requests received last year on average in 23 days for simple requests and 122 days for complex requests. The oldest have been in process at the Archives for decades on topics such as records of the 1963 assassination of President John F. Kennedy. Federal FOIA processing data for 2015 are available at: <http://1.usa.gov/28ZtYkS>. [↑](#footnote-ref-3)
4. See, for example, the *Department of Justice Guide to the Freedom of Information Act* (2009 edition) that includes over 500 pages explaining the similar federal exemptions. [↑](#footnote-ref-4)
5. That 2005 case went to trial in 2008 and FOP won but appealed the fee award; it was remanded in 2012 and the parties settled, with the District agreeing to pay over $53,000 in legal fees and to produce 4,000 pages a month that the FOP agreed to pay for. The attorney general in 2015 reported the FOP has stopped paying so the District has stopped producing, with 25,000 responsive pages as yet unreleased. [↑](#footnote-ref-5)
6. The courts may welcome a cease-fire. The D.C. Court of Appeals recently took note that its opinion this spring in *Fraternal Order of Police v. District of Columbia*, No. 13-CV-1146, was the eighth resulting from the “course of pitched warfare in the courts” between the police department and union—the result, wrote the court, of “an apparent inability or unwillingness by both parties to communicate effectively to achieve the objectives animating” the public records statute, D.C. FOIA. “Both parties seem to have forgotten what FOIA is all about” said the court, noting multiple errors by the District agencies suggesting more interest “in gamesmanship than in FOIA compliance,” but also questioning “whether FOP was more interested in obtaining responsive documents, or in litigating about obtaining responsive documents.” Concluding that good faith consultation is imperative and, though lacking authority to “order FOP and the District to end their FOIA feuds,” the court directed the Superior Court at least in this case to order mediation before allowing any further litigation to resume. [↑](#footnote-ref-6)
7. Finding final decisions is not easy from the reported details. Cases last for years and decisions are reconsidered, appealed and remanded, and appealed yet again. The annual report listing for each case in litigation is brief with details and dates often missing. As a result, the reported court actions and settlements may not all have been in 2015 and some decisions that appear final may be changed in later action. [↑](#footnote-ref-7)
8. Settlements and fee awards by the court shown for cases in the 2015 OAG report total $245,000 but lack clear dates. Some had also been shown in earlier years’ reports. Thus the total of new awards in 2015 is less but we can’t say for sure how much without courthouse research into the detailed case records. For our estimate we subtracted earlier awards of $53,544 to FOP and $21,110 to a private individual both still mentioned in the 2015 report but also reported in 2013. [↑](#footnote-ref-8)
9. For a vivid example, consider former Superior Court Associate Judge Ann Macaluso’s 90-minute opinion from the bench concluding a three-year suit against MPD in 2012. The court denied agency arguments that big sections of their policy manual (called “general and special orders”) should be exempt from FOIA and used the case as a kind of explicit “teachable moment” to send a message to D.C. agencies and their government attorneys. The court explained the burden of adjudicating dozens of blanket exemption claims that required review of many documents that turned out to be innocuous, yet which had been denied to the requestor with exaggerated claims of privilege, later defended in litigation with “transparently false” affidavits proffered by counsel from MPD officials, swearing that public safety would be dangerously at risk if any part were released.

   The court explained to counsel for MPD (from Office of the Attorney General) how “willingness to rely on false documents undermines every argument the District puts forward” and asked rhetorically, “do you have any idea what a false statement like that does to your professional credibility?...You can do better than this.” She sought and received an apology from counsel for not independently assessing the agency materials (“I deeply regret that my representations and my filings advocating the department’s positions have brought shame on my office, brought shame on my position.”). And the court ended with a warning that the lesson should be heeded broadly -- “let the word go out that no District of Columbia attorney is to do what you did in this case. … [Y]ou and everybody else who handles FOIA cases in your office better learn from this” because “the next time something like this is done, there is going to be a phone call” to the Attorney General. Hearing Transcript (March 9, 2012) at 18 and 30. *Partnership for Civil Justice Fund v. District of Columbia (MPD)*, No. 09-CA-748. It had been an expensive lesson; the 2012 litigation report showed attorneys’ fees were settled for $190,000. [↑](#footnote-ref-9)
10. Staff concerns in FOIA offices at all levels, vividly expressed in comments reproduced in a recent *Atlantic* post, included uncooperative colleagues in line units holding the records, overwork and lack of recognition, and poor records management in their agencies. Andrew McGill, “WhyFOIA Is Broken, From A Government Worker’s Perspective.” *Atlantic Notes*, July 6, 2016. *Available at*: <http://theatln.tc/29iLOuU>. [↑](#footnote-ref-10)