

3901 Argyle Ter., N.W.

Washington, D.C. 20011

[www.dcogc.org](http://www.dcogc.org) -- (202) 780-6020

 **Statement of the**

 **D.C. Open Government Coalition**

by

Fritz Mulhauser

Co-Chair, Coalition Legal Committee

Before the

Council of the District of Columbia

Committee on Government Operations & Facilities

At the

Budget Oversight Hearing

D.C. Office of Administrative Hearings

June 14, 2021

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Thank you for the opportunity to provide the views of the D.C. Open Government Coalition as the committee reviews the Fiscal Year 2022 budget proposed by the mayor for the Office of Administrative Hearings (OAH).

OAH is a vital service for tens of thousands in our city. It is the central panel of neutral administrative law judges who hear appeals of decisions by dozens of D.C. agencies—many crucial to those especially reliant on a correct flow of public safety-net benefits such as unemployment, food stamps and Medicaid in the pandemic year. Even with constrained remote operations last year, the OAH had a docket of 30,000 cases and closed over 17,000.

Our main concern is that the Office provides no useful electronic public access:

* cases can’t be filed electronically,
* no docket of scheduled events is posted, and
* final orders after decisions are unpublished.

The OAH has been cited for not publishing decisions (an omission that goes back years).[[1]](#endnote-1) That electronic Freedom of Information Act (E-FOIA) requirement has been part of D.C. FOIA for decades.[[2]](#endnote-2) We appreciated your concern over this situation that was expressed when we testified at February oversight hearings.

To lend a hand in support for resources (since OAH officials have repeatedly said only funding remains a barrier), we met with Chief Judge M. Colleen Currie in April and reached out several times

to staff. We regret to say we’ve been unable to learn anything about concrete plans to address these longstanding gaps in the transparency the public expects of government.

The mayor’s FY22 budget adds judges as the new paid leave program is expected to add cases to the workload. But it shows no clear line item that would support the tech enhancements needed for e-filing, online docket and access to opinions. Thus there appears to be no budget commitment to back up plans in the budget text, a pattern common in prior years.[[3]](#endnote-3) The FY22 budget promises:

* an objective to “improve the OAH data management system to support a highly efficient, transparent and responsive OAH”;
* an activity of “acquiring a vendor to create system [*sic*] allowing customers to open cases and file documents electronically”; and
* an activity of “identifying elements in each jurisdiction to be available to litigants and elements in each jurisdiction to be available for searching by the general public.”

The limited aspirations are suggested by the single hard goal: only 15 percent of new appeals are to be e-filed in the coming year. E-filing, of course, is the starting point for a digital record system for use of judges, staff, parties and the public. Federal and D.C. courts have had e-filing for many years.

**Our recommendation**

The FY22 budget process should include—

* specific funds earmarked to accomplish e-filing, online docket and access to final orders; and
* clear direction in the committee’s budget report that OAH is expected to follow the law by publishing its final orders.

We hope the agency, guided by this clarity, will avoid the pattern of past years in which general plans and promises are not followed up with specific work plans and budget commitments. With new leadership in the agency, we hope for the best.

Such direction is consistent with Council action in other situations, such as at DCRA, in providing funds for FOIA publication compliance and insisting on progress. Our Coalition has testified on this broader point to the Council at oversight hearings on the Office of Open Government, that greater attention needs to be paid to agency ability, funds, and willingness to comply with the requirements of D.C. public records law. We would be pleased to work with this and other Council committees towards a broader approach to improved infrastructure needed for 21st century public records management.[[4]](#endnote-4)

Thank you for the opportunity to provide these views. We would be happy to assist the committee, the OAH chief judge, and the staff in further considering the ideas discussed.[[5]](#endnote-5)

\*

The Open Government Coalition is a citizens’ group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

1. **ENDNOTES**

 See Office of Open Government opinion letter dated January 27, 2019 (should be 2020). It is available at: <https://www.open-dc.gov/sites/default/files/FOIA%20Advisory%20Opinion%20OAH%20Final.pdf>. It is interesting that it is not mentioned in the agency pre-hearing materials for the Committee on FY20 and FY21 activity. In response to this Coalition’s complaint, the Office investigated and concluded in no uncertain terms:

OAH is not fully compliant with the mandatory disclosure provisions of D.C. FOIA (D.C. Official Code §§2-536(a)(3); 2-536(b)) and must make all Final Orders created on or after November 1, 2001, that are not subject to statutory exemption, publicly available on its website.

The opinion also records the OAH response—that it would like to comply but its “collective desire on this front is not supported by the unfortunate realities of the Agency’s budgetary constraints.” It is unusual for a government agency to say it cannot afford to follow the law. [↑](#endnote-ref-1)
2. The publication requirement was in the D.C. Freedom of Information Act from the outset in the 1970s, a list of items (including opinions in decided cases) copied from federal FOI law and mandated to be made available without request in agency “reading rooms” – literally, shelves or file drawers of material. Online publication was added in federal law in 1996 and D.C. followed a few years later. Because “publication” was henceforth to be electronic, the federal statutory provision came to be known as “E-FOIA.” [↑](#endnote-ref-2)
3. Past OAH plans mention improved public information but with little action:

	* FY2019. The agency in early 2019 told the Council that by September 30, 2019, it would “develop a proposed plan to provide direct but limited access from the OAH website to the OAH case management system.” OAH could provide no responsive document when we asked for the plan in October 2019.
	* FY2020. Identical language appeared in the agency FY20 plans as well. But at a December 2019 meeting of the OAH Advisory Committee the chief judge said there were plans but did not identify progress or funds. Audio is here: <https://app.box.com/s/blox8bmtj58w7g6vgi2jfeb31n12dfq8>. The judge added that he questioned any spending since he saw little public interest. The committee chair noted a well-functioning system would likely draw public use. The Coalition met at the invitation of the chief judge in January 2020 with senior officials including then-Judge Ann Yahner, Principal Administrative Law Judge for Case Management and Quality Control and the information technology expert in OAH. The judge and staff admitted no funds were set aside and the public could expect no progress in 2020. She observed that E-FOIA compliance and improved public information were not a priority among other needs for better technology in the office.
	* FY2021. The FY21 budget again had such a plan. Agency information submitted February 22, 2021, for the oversight hearing again promised to “make system updates to provide the necessary support and resources to District residents.” This was to include further work “to develop a public-facing web application which will allow visitors to search and view final orders remotely.” See [2.22.2021-Pre-Hearing-Responses-OAH.pdf](https://dccouncil.us/wp-content/uploads/2021/02/2.22.2021-Pre-Hearing-Responses-OAH.pdf). Half of jurisdictions were to have opinions available this year. But again there has been limited progress. Staff this spring said only that a vendor has been asked to plan some relevant steps. Despite repeated requests the Coalition has not been able to learn the results of the planning (such as future budget needs to be requested for FY22). The bottom line apparently is that again in FY21 no e-filing, online docket or the mandatory access to final orders will be available. [↑](#endnote-ref-3)
4. See here : <https://dcogc.org/wp-content/uploads/2021/04/OGC-statement-BEGA-oversight-2-26-21.doc>. [↑](#endnote-ref-4)
5. OAH officials frequently refer the burden of coping with sensitive personal details. We have provided staff with information about other states’ central panels that face similar conflicting values of transparency and privacy, for example since all must follow the national Medicaid regulation 42 C.F.R. § 431.244 (g) requiring publication of fair hearing decisions (another legal requirement OAH is not following). California handles this by simply directing administrative law judges to prepare publication texts with initials not names, as courts do with juvenile criminal cases. See <https://www.dgs.ca.gov/OAH/Case-Types/General-Jurisdiction/Resources/DDS-Decisions>. [↑](#endnote-ref-5)