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FFF

August 5, 2020

Office of Open Government

441 4th St., N.W. Ste. 540 South

Washington, DC 20001

*By e-mail: opengovoffice@dc.gov*

**Re: Request for FOIA Advisory Opinion -- FOIA Portal**

Dear Colleagues:

 This is a request for your review of the online FOIA request portal, called “FOIAXpress.” It is the first step for many requesters using the D.C. Freedom of Information Act (FOIA). Your authority to review all aspects of D.C. FOIA implementation is found in D.C. Code § 1–1162.05c(d). In preparation for a Coalition training series for the public, we recently reviewed the portal and past concerns voiced in the community to the Coalition. We identified many difficulties that together suggest D.C. implements FOIA in a way that frustrates novices and even experienced users. In support of our request we provide brief background, details of the problems we found, and suggestions for next steps.

**Background**

 Many are happy with ever-increasing online access to government services—driver’s permit and car tag renewals, tax filing, benefit application, and even (in the last year) virtual court hearings. FOIA requesters welcomed then-Mayor Vince Gray’s announcement in 2014 of a “FOIA portal” to provide one point of online access for filing requests with the many agencies covered by the law. Government and the public were both to benefit from more efficient request processing and tracking.

 However, all is not well. Members of the public have contacted the Coalition for years with complaints about the portal. And we have tried to work with the Office of the Chief Technology Officer that manages the portal software contract, to get attention to user concerns. For example, following Coalition [testimony](https://dcogc.org/blog/foia-online-request-portal-needs-overhaul-coalition-testimony-to-d-c-council-tech-oversight-hearing/) to the Council in 2019, OCTO [followed up](https://dcogc.org/wp-content/uploads/2019/09/OCTO-Slides-for-Meeting-with-OGC.pdf) on some issues raised.

 We have reviewed the portal again recently and we conclude numerous issues remain. Numerous issues of the user experience remain troublesome, as described below. Nor have we seen any signs of executive branch exploration of a broader portal improvement agenda. Some were labeled “ideas going forward” in the [2019 slides](https://dcogc.org/wp-content/uploads/2019/09/OCTO-Slides-for-Meeting-with-OGC.pdf) such as replacing the central portal and returning to agency portals or doing away with the required requester account. Another idea is a new competition that could show benefits if D.C. chose next-generation portal (and request management) software. There are numerous alternatives developed to meet exploding demand in state and local government in the years since D.C. chose FOIAXpress in 2014.[[1]](#footnote-1)

 The 2020-21 public health emergency has changed D.C. government tech priorities, of course. That the portal is unchanged and the broader ideas have languished may reflect an understandably lower priority in recent months at the agency.

 Even so, FOIA continues to be the way over 10,000 people a year interact with their government to find records they have a right to. Central to the user experience of D.C. FOIA is a 21st century online request process.

 Evaluation and improvement of the portal must come back on the agenda. We request that the Office review the implementation of the D.C. FOIA statute through the portal request system in several respects, listed below. Without specific statutory direction, criteria for a review may seem uncertain.[[2]](#footnote-2) But that is not the case. Both general performance review approaches as well as web design standards are well-known and would provide frameworks for the Office treatment of this request.[[3]](#footnote-3)

 The user perspective is so important in this project of creating software to link a government service with a broad public that brings a wide range of equipment, skills and patience. We encourage the Office to think about this request creatively, perhaps including a study group of users and government officials to help analyze the situation and advise on options for improvement. The General Services Administration team called 18F offers consulting services to non-federal governments.[[4]](#footnote-4)

**Areas needing review**

1. **Users can’t easily find how to reach an agency.**

Undirected requests are not allowed, so before trying the portal a user must have an idea which agency has the desired records. Unlike the federal FOIA which requires agencies to publish record-finding aids, the portal offers little help other than advice to contact agency FOIA officers (and the [list offered](https://dc.gov/node/818962) is incomplete). After establishing an account, the user must select the desired agency from a drop-down menu listing 61. This can be an early source of confusion, as 81 agencies handle FOIA requests and the portal doesn’t explain or help with what to do if a desired agency isn’t shown.[[5]](#footnote-5)

Frequent users will be fine; they know their targets and how to reach them. Do we know how many are in that category? The rest are in trouble; instructions in general on the portal site are brief and OCTO in 2019 gave their view that other D.C. government sources should bear the burden of explaining the system details. But they don’t.

The drop-down menu could be a key starting point—if it included all agencies and provided relevant information on each (portal access or not, FOIA officer link, extra requirements for special request types, etc.) but it doesn’t, possibly because no one felt a need, that would have come if anyone tested the arrangements with users of varying sophistication and prior knowledge.

1. **“FOIA request form” needs user testing and redesign.**
2. **The basic form** for initiating a request (that includes the agency menu, discussed above) is unappealing visually, uses a small font, and has unexplained or intrusive texts that frustrate novice users in several ways. Along with a full review of readability, clarity and plain-English criteria, the visual design including typefaces/colors/symbols could benefit from user review.
3. **Space in one of two text boxes is needlessly limited**. “Fee waiver request reason” is 255 characters. The request description allows 3,000, so there is no clear reason for this limit. Experience suggests 255 isn’t enough: D.C. agencies often reject justifications for “lack of explanation” of how the requested records and the user’s plans to use them will satisfy the statutory waiver criteria. Citing the statute is unhelpful, since it is precisely an explanation of that language that is needed. (See U.S. DOJ [discussion of criteria to be addressed](https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance) to satisfy the similar federal waiver criteria.)
4. **Most users are distracted by details not applicable to them**. Some requests involve special rules but how to direct those users to the special provisions applicable to them is challenging. “One form for all” appears to be a bad design choice, as it requires all requesters to puzzle through specialized information requests on the form that apply to only a few. Three examples are: requests for records about the requester, requests about an individual who consents to their release to the requester, and OIG requests.
	* The form has an unexplained label about a possible attachment, **“proof of identity.”** This is especially concerning to some novice users, resulting in calls to the Coalition asking if the law permits this and what use may be made of identity records. Of course, there is no general ID requirement for a FOIA request. We guess it applies where a requester wants “records about myself.” This is complicated because D.C. lacks an equivalent of the federal Privacy Act, which has required federal agencies to develop separate procedures for requesting one's own government records. For example, DOJ has an explanation, “[What Are the Requirements to Get Records on Myself](https://www.justice.gov/oip/make-foia-request-doj#5),” and a [form](https://www.justice.gov/oip/page/file/1280011/download). What’s important is that few need to read this, but the form doesn’t help thousands of readers decide if it’s pertinent.
	* The form also doesn’t explain a second attachment option, labelled **“consent.”** Again, thousands of readers ask, Who needs to consent, to what? We suspect, also by analogy to specifics seen in the federal system, it’s for those requesting records about someone else who consents to their release, to show that no privacy exemption needs to be asserted to protect that person. The same DOJ form handles both situations.
	* The form has special advice for **requests to the D.C. Office of Inspector General** that is especially distracting. The D.C. OIG received 34 requests last year but instructions about those clutter the very start of a form used by everyone—#2 under IMPORTANT and lettered in red ink.
5. **Legally significant aspects are hidden**. The D.C. Attorney General has recently taken the position in litigation that a plaintiff lacked standing to sue for denial of records because of confusion whether the requester was an individual or organization requesting “on behalf of” an individual. Nothing on the form suggests when a requester must provide details like this. Apparently, the software flags in internal displays those requests “on behalf.” But how that is known reliably without inquiry is obscure. The court has passed over the OAG contention and perhaps will never address it. But this must be clarified for the future.[[6]](#footnote-6)

1. **Status information provided is unhelpful**.

Another use of the portal is for communication with the requester, but unfortunately that function gives little useful information. After submission a user can “Request status” which displays seven “request details.” Three are old news, request number, description, and receipt date. Two more we have no experience with, “fee owed” and “download.” Our contact is chiefly with public interest requesters who are usually granted fee waivers, and agencies mostly download records directly without using the portal. The remaining two others are the source of frustration, at least as presently used by agency staff:

1. **“Estimate [sic] delivery date.”** This is of great interest to requesters. But after initial entry of the 15-day processing deadline it never changes.
2. **“Status.”** This column likewise displays unchanged one of a few standard texts for months (or years). For example, a Coalition request submitted in 2019 is today “in progress” (we do know it’s closed, as we initiated contact when the system never changed). Another submitted in March 2021 shows, five months later, that our request is “received” and a delivery date also in March. OCTO officials in 2019 declined to address the way agency staff produced information of no value, calling it “inherent to [the] process/system.”

The important takeaway for the user is that whatever the cause, D.C. government appears unable to take in, track and communicate information about a statutory obligation of government via a website—while e-commerce can track a pair of socks.

1. **“FOIA Reading Room” portal feature sounds good but delivers nothing of value**.

A user may see the home page tab “Publically [sic] Available Data/Records” and hope that their request is not unique and responsive records are already available. Clicking further on “FOIA Reading Room” gets a page headed “D.C. FOIA Public Access Portal.” It has a list of 80 units of government with no further explanation (each is called a “file cabinet”). A button called “Search tips” at the bottom of the page leads to a [page](https://foia-dc.gov/app/SearchTips.aspx) with about 1,000 words in a very small font (written at a college reading level), on contents and how to search. (Among many perverse design features: user must first uncheck boxes next to all unwanted agencies among the 80 and leave a check by the desired agency.)

 Everything about this feature—text, functionality, contents--is disappointing, starting with the cheery assertion “the FOIA Reading Room is updated on a timely basis.” It is not updated. Most agencies post nothing. It refers to a reading room with paper copies—which almost certainly doesn’t exist. Some of the 80 labels are incorrect (agency name changed). Some names are not in fact agencies – one is simply “FOIA requests.” The “search tips” refer to some of the 12 document types listed in the “E-FOIA” section of the law, D.C. Code § 2-536, but those are also not to be found in the agency file cabinets.[[7]](#footnote-7)

 OCTO reported in 2019 that it was “considering turning off this feature.” That’s still worth considering.

1. **Other software features like redaction and reports may not be optimally used**.
2. **Redaction**. The developer advertises the utility of the software to government staff in many ways, including “integrated redaction with proven reduction in labor cost by 66%.” (AINS [Factsheet](https://www.ains.com/brochures-factsheets/).) This refers to the removal of personally identifiable details (email address, Social Security number, confidential source name) before release--involving both covering up the record detail and adding a D.C. Code reference showing the legal basis for each exclusion. When routine electronic searches can produce many emails, taking names and addresses off those can take forever.

Redactions are at issue in a number of the reported 2020 FOIA cases in Superior Court, according to the Attorney General’s 2020 [annual report](https://lims.dccouncil.us/Legislation/RC24-0027). Administrative appeals for 2020 showed the most errors requiring remand for correction were found in, as in prior years, in MPD decisions. The agency has been found by your Office to over-redact. Delay and error in redactions may result from the genuine complexity of the work but also from inefficiency of tools. FOIA staff have told the Coalition in past years they choose not to use redaction capabilities in the FOIAXpress software. Reasons are unclear. They rely instead on Adobe or other more familiar software which they find easier. OCTO reported “users trained” in 2019 but redaction remains an issue.

Close analysis of FOIAXpress’ redaction tool as it is used (or not) could help diagnose and remedy a choke point. Automated redaction has developed greatly in the years since FOIAXpress was developed.[[8]](#footnote-8) While many D.C. agencies have small FOIA volume (in the last two years, over half the 81 agencies in the mayor’s report received less than 50 requests a year), the usefulness of that technology is worth exploring for larger-volume agencies such as MPD (1612 new requests in 2020) and DCRA (1297 new requests). AINS website notes they have an electronic document-reading technology for e-discovery customers; whether linked also to FOIAXpress is not clear.

1. **Reporting**. Effective reporting on the FOIA system has not been enhanced by the portal. Use of a common portal for requests to numerous agencies is advertised by its developer as “leveraging a single unified system” that can readily generate annual reports as well as “intuitive real time dashboards and analytics.” (AINS FOIAXpress [factsheet](https://www.ains.com/brochures-factsheets/).)

Annual reports by the mayor are routinely late, incomplete, and of uncertain data quality. All may result from the incomplete state of the portal coverage. Reports have never been on time the last five years. Ten percent of agencies listed in the mayor’s 2020 annual FOIA report display no data, just blanks. Beyond requests entered into the FOIAXpress database in real time as e-filed at the portal, how the rest (some 20 percent of the total) are entered (presumably from emails and letters sent directly to agencies) is unknown. Are they entered in some other way, perhaps by hand at the end of the year? If the annual report is generated from the FOIAXpress database, the coverage of non-portal requests and their data quality are of concern. The Coalition several years ago discovered that lack of data editing and quality standards allowed publication of one agency’s report showing 10,996 requests received, 38 times more than any prior year. Coalition inquiry to the agency FOIA officer (that uncovered misunderstandings of the term “FOIA request”) was the first question raised.

No FOIA request data access is available to the public outside the annual report, so the availability of the “real time dashboards and analytics” mentioned in the developer’s propaganda is unknown. Our experience raises questions whether such capability is active. Suspension of the FOIA processing deadline in March 2020 caused backlogs to mount, according to consumer complaints reaching the Coalition, yet community members advising the D.C. Council on corrective actions couldn’t get timely and accurate counts of incomplete requests, by agency (the Council got some numbers finally, by demand to EOM). And again this year, a July 14, 2021, request via FOIA is still unanswered, for portal data to check whether backlogs were declining after the Council restored deadlines effective January 15.

**Conclusion**

 The information provided above suggest areas of implementation of the D.C. FOIA request portal that need review. We suggest internal management and review procedures appear inadequate to assure performance of the FOIA request system serving users and FOIA managers alike. We request the Office analyze the portal under its broad authority to advise on FOIA matters.

 We recognize the lack of evaluative criteria in law and regulation may raise questions as you design the review, but there are answers both in general government and in web application evaluations. That is why we suggest review of GAO Yellow Book standards for internal controls and consulting with the General Services Administration which includes staff in the 18F unit that has developed applicable standards and also offers consulting with state and local governments. If a panel of users would be helpful, we offer the Coalition’s assistance to arranging that.

Sincerely,

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Fritz Mulhauser

Co-chair, Legal Committee

D.C. Open Government Coalition

1. On AINS, see <https://www.ains.com/foiaxpress/>. On others, see a 2019 review by the National Freedom of Information Coalition of the nationwide picture of multiple vendors and adoptions. Stephen Chamberlin, *Portal to Compliance: A Qualitative Analysis of Online Public Record Request Services in Major U.S. Cities.* Available at: <https://www.nfoic.org/wp-content/uploads/pages/2019-08/Portal%20to%20Compliance_0.pdf>. All web sources last visited 8/3/21. [↑](#footnote-ref-1)
2. The federal FOIA, for example, requires a “consolidated online request portal that allows a member of the public to submit a request for records … to any agency from a single website.” 5 U.S.C. § 552 (m). (The federal law also allows agencies to have their own portal, but subject to central rules for interoperability.) That requirement is easy to audit: can a requester reach all agencies via a single portal? D.C. law provides no such statutory guidance for the portal; whether to have a portal, and all design decisions about it, are left to the discretion of the executive. [↑](#footnote-ref-2)
3. Performance reviews are familiar in the work, for example, of inspectors general. See the GAO “Yellow Book” for generally accepted government audit standards, such as could apply here. For example, does D.C. government have the necessary “system of internal control that is designed to provide reasonable assurance of achieving effective and efficient operations”? Close review may show the many problems users encounter arise because there is no such system applicable to FOIA. *Government Auditing Standards 2018 Revision* (Washington, DC: GAO). Available at: https://www.gao.gov/assets/gao-18-568g.pdf . And the General Services Administration has developed a set of web design standards to help federal agencies assess web materials. See <https://18f.gsa.gov/2015/09/28/web-design-standards/>. The GSA site begins with advice: “We believe agencies should still usability test everything they build, but following the standards will help everyone avoid common pitfalls.” [↑](#footnote-ref-3)
4. On the 18F availability to help non-federal agencies, see <https://18f.gsa.gov/how-we-work/>. [↑](#footnote-ref-4)
5. The 81 agencies are those shown on the mayor’s annual FOIA report for 2020, though not all had requests that year. Agencies not in the portal drop-down menu include the Advisory Neighborhood Commissions, D.C. Housing Authority, D.C. Public Charter School Board, and the D.C. Council. At least 200 requesters needed to hunt for how to reach three of these in 2020 since they’re not on the portal drop-down menu. (The 40 ANCs don’t submit FOIA data for the mayor’s annual report either.) Even FOIA requests to the Board of Ethics and Government Accountability can’t be sent via the portal (though the BEGA FOIA page incorrectly says they can be). See <https://bega.dc.gov/page/open-government-and-foia-information> (informing readers that “you may submit a request online via the DC government Public FOIA Portal or to BEGA's FOIA Officer). [↑](#footnote-ref-5)
6. See *Judicial Watch v. D.C.,* No. 2021 CA 875 B (D.C. Sup. Ct.), Defendant’s Motion to Dismiss, Mem. of Points and Authorities, May 28, 2021, p. 7. [↑](#footnote-ref-6)
7. If E-FOIA requirements, widely ignored for decades, are in fact to be enforced as a recent Superior Court decision directed, a better scheme is needed. The purpose of E-FOIA, D.C. Code §2-536, is to require proactive disclosure outside of FOIA, maximally accessible and without request. Placing those records inside a portal accessible only after creating an account is contrary to the purpose of the law. The case, now on appeal, is *Terris, Pravlik & Millian, LLC* v. D.C., 2020 CA 3087 (D.C. Super. Ct.). [↑](#footnote-ref-7)
8. Tom Clarke et al., *Automated Redaction: Proof of Concept Repor*t (NCSC, 2017) (reporting favorable results of tests to assess usefulness of the technology in court clerks’ offices). Available at: <https://www.ncsc.org/__data/assets/pdf_file/0019/15238/sji-redaction-sep-2017.pdf>. [↑](#footnote-ref-8)