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**Testimony 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 Housing & Executive Administration

FY 23 Budget Oversight – Mayor’s Office of Legal Counsel

April 7, 2022

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Thank you for the opportunity to provide views on the budget request for the Mayor’s Office of Legal Counsel or MOLC.

The MOLC chiefly serves the mayor and agencies. But in one crucial respect it serves the public: it is delegated the mayor’s obligation to review appeals of agencies’ Freedom of Information Act (FOIA) denials. That’s in D.C. law: “any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld from public inspection.” D.C. Code § 2-537.

The concept of a fast, free, and independent review of FOIA denials is exemplary (only half the states provide it). Last year over 60 per cent of requests were answered with some kind of denial (either nothing found, or part or all of records found are denied for some reason). Incorrect denials are highly likely, since the complex FOIA law of searches, exemptions, redactions, and fee waivers is easy to get wrong. With modest training and frequent staff turnover among FOIA staff at agencies, it’s no surprise a third or more of decided appeals in past years have resulted in reversal and remand for correction, according to our research using the mayor’s reported MOLC statistics. Without the appeal option would Superior Court be clogged with routine reviews or, even worse, would erroneous denials escape correction?

But, as we explained in February, word from requesters and our own experience showed a big slowdown in MOLC decisions; another witness told you the same; and the MOLC pre-hearing report to the Committee showed over 300 backlogged. Our statement is attached and is available at <https://tinyurl.com/42k85cw5>.

And new information since the February hearing shows two important facts:

* First, FOIA work has become a very low priority in the MOLC as we suspected. New data in the mayor’s FY21 FOIA report show the MOLC didn’t just slow down FOIA work last year, it all but ignored it. The office decided just 37 appeals the whole year 2020-21 (12 left over from 2020 and 25 received during 2021). An appeal decision letter is a few pages (we’ve received dozens) with many stock paragraphs; an experienced attorney could write one in a few hours.[[1]](#footnote-1)
* Second, the mayor’s budget shows no plan or budget to address the problem in FY23. Dollars and staff slots that were insufficient to keep up with the appeal workload last year are unchanged (10 FTE). The director has already acknowledged that the office has other priorities (see the texts cited in our prior testimony). The FY23 budget repeats the office mission of assisting the mayor and sorting out agencies’ legal issues government-wide, no doubt always a full plate of time-critical and sensitive tasks. The budget **never mentions** the FOIA appeal responsibility.

We request the committee include in its budget markup and committee report a plan and resources for

* urgent attention to clearing the backlog this year and next, and
* notifying all those affected about the situation and remedial plan, as appellants have gone for months without notice that their government had basically stopped doing appeals.

We imagine there are options for the work of deciding the 300+ backlogged appeals filed in 2020, 2021, and the current year. One would be transferring the work and personnel slots to an office that can give it uninterrupted expert attention (such as the Office of Open Government). Another is adding temporary slots or contract attorneys for staff to do the work within the MOLC.

Either way, we request that the committee discuss the situation in the budget report so the executive can’t continue to ignore it, give guidance on the dimensions of the repair work needed, and add resources needed for a solution.

Attached: February 25, 2022, Coalition testimony on the MOLC for FY21 performance oversight

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**Testimony of the**

**D.C. Open Government Coalition**

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Fritz Mulhauser

Co-Chair, Coalition Legal Committee

Before the

Council of the District of Columbia, Committee on Housing & Executive Administration

FY 21 Performance Oversight – Mayor’s Office of Legal Counsel

February 25, 2022

Thank you for the opportunity to provide views on the performance of the Mayor’s Office of Legal Counsel or MOLC.

The MOLC chiefly serves the mayor and agencies. But in one crucial respect it serves the public: it is delegated the mayor’s statutory obligation to provide fast and free review of agencies’ Freedom of Information Act (FOIA) denials.

D.C. is exemplary in the administrative appeal provided in our statute (less than half the states allow it). FOIA law is complex—for example, thousands of cases define what is meant by an exemption to protect “personal privacy.” In such a context, agency mistakes are inevitable, and the expensive and drawn-out alternative of going to court is beyond the reach of most of the public.

But the D.C. FOIA system derailed during the pandemic. The mayor sent staff home and the Council suspended legal accountability for FOIA deadlines. Work could continue, handling requests remotely but there was no penalty for just putting FOIA work aside. Good information on the backlog problem has been elusive: to our FOIA request, OCTO said they didn’t have such data, which isn’t true (and our appeal has been pending 164 days). The mayor’s report on agency processing in FY 21 is now a month overdue.

The 10-day deadline for the MOLC response (set in law) is ambitious but was regularly met in past years. But no longer; our Coalition filed six appeals that remain undecided, on average 316 days, one over 600. The MOLC prehearing responses confirm there’s a major backlog—307 appeals (2/3 from last year).

Where delay may occur is unknown; the MOLC provides no information about the progress of appeals, either via a typical court-like online docket, or upon request. Sometimes we see a copy of an email in which the MOLC has asked the agency to respond, but not always. Another administrative detail is shaky; three of our appeals are assigned two different appeals numbers.

The office says the Council’s suspension of FOIA processing deadlines (from March 2020 to January 2021) “resulted in significant delays in agency appeal responses.” If appeals spiked simply when shuttered agencies didn’t answer, we hoped the MOLC could still have worked with requesters and agencies to understand if the pandemic conditions prevented any search. And agency delays should have ended when the suspension of deadlines and a brief catch-up period ended a year ago.

The office performance as an agency subject to FOIA is also not strong. When we heard of the pattern of many undecided appeals last year, in June we sent a FOIA request to the MOLC asking for data on the backlog. We got no response. And we’re not alone. The office still has 8 of 12 requests from last year pending (and 9 of 21 this year), according to the prehearing responses, Q.34. Nor does the office report its FOIA processing in the mayor’s annual FOIA report; its line is there, but blank. In Q.36 the office reports its belief that no law or regulation requires reports of any kind. (The Executive Office of the Mayor reports on processing in “EOM” generally; it may include MOLC.)

Productivity of MOLC staff is unknown. The response to Q.42 reveals the office doesn’t account for staff time, so the level of effort devoted to appeals is unknown. (The office waited all year to add staff; an attorney on six-month assignment arrived, according to Q.9 of prehearing responses, just eight weeks ago on December 27, 2021.) The agency does not have a performance plan and thus does not report its performance. Its prehearing responses at Q.33 suggest it considers “the most important metrics” are satisfying the mayor’s legal needs.

We conclude FOIA appeals are a low priority. The Council could direct the mayor to reassign FOIA appeals to another unit with consistent staffing and workload that can keep up. (In Q.33 of prehearing responses, MOLC said it “cannot anticipate what matters it will be expected to handle on a regular basis.”)

In any case, we recommend the Council direct the executive to give appeals more priority and to report more transparently on the work: MOLC should bring on more temporary staff to clear the backlog, establish an online docket for FOIA appeals where appellants can see their case and follow its progress, and report on FOIA request processing as other agencies must.

The Open Government Coalition is a citizens’ group established in 2009 to enhance public access to government information and ensure the transparency of D.C. government operations. 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.

We work to maintain the legal foundation assuring open government –- the Open Meetings Act, the Freedom of Information Act and the mayor’s Open Data Policy — through public education, legislative advocacy, and litigation. For example, the Coalition has an extensive website with practical advice for finding information and a blog on news, holds public forums such as an annual Summit during Sunshine Week in March, testifies to the D.C. Council, and files complaints and court actions to correct agency problems. The Coalition has no staff but does its work through the volunteer efforts of 16 directors, who include reporters, community activists, experts with open government institutions overseas and at the federal level, and attorneys in media law, nonprofit legal services, and criminal defense. The Coalition participates in a National Freedom of Information Coalition where advocates from dozens of states work together on common issues all are facing.

1. The mayor submitted the FY21 FOIA report March 11, 2022. Available at: <https://lims.dccouncil.us/Legislation/RC24-0148>. The MOLC section of the report shows that many appeals in the pandemic years were based on agency non-response. These were typically closed as moot (with no adjudication of claims of error needed) when an agency reported it provided records. Even if MOLC wrote a letter in each such mooted case (over 50 in the two years), with the minimal work involved we didn’t count them as “decisions.” [↑](#footnote-ref-1)