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FFF

March 6, 2022

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 – Publication of FOIA appeal opinions**

Dear Colleagues:

 This is a request for your review of the publication of opinions by the Mayor’s Office of Legal Counsel (MOLC). Though required by law, almost none have been published in recent years.

 Your authority to review all aspects of D.C. FOIA implementation is found in D.C. Code § 1–1162.05c(d). Treatment of appeals (factfinding, adjudication, notice of opinion to petitioner and agency, publication, and annual reporting) are all part of implementation of requirements found in the FOI statute. In support of our request we provide brief background, details of the problems we found, and suggestions for next steps.

**Background on FOIA appeals**

 The D.C. Freedom of Information Act (FOIA), D.C. Code §§ 2-531-539, provides that the public may ask to inspect and copy records of public bodies in the District. The law also provides that any denial (including nonresponse) may be appealed to the mayor, D.C. Code § 2-537(a). The mayor has delegated adjudication to the MOLC.

 Appeals were logged in at the MOLC at a rate of 200 or more per year in FY19 and FY 2020, according to the mayor’s annual FOIA processing report. FY21 data are not available as the mayor’s report due February 1, 2022, is not yet delivered to the Council or published to the public, according to staff in the Office of the Secretary last Friday (March 4).

 The law requires publication of final opinions and orders in decided cases, D.C. Code § 2-536(a)(3). The MOLC has published them for many years in two places, the *D.C. Register* and a searchable online database, available at: <https://dc.gov/page/freedom-information-act-foia>.

**Findings in recent search**

In recent days, we looked for data on FOIA appeals after receiving complaints from the community about backlogs and other aspects of the FOIA appeals process.[[1]](#footnote-1) We found no published opinions dated in the last two years:

* We searched the *D.C. Register* for publications of the MOLC. There are 680 but none are more recent than 2019.
* We searched the online database for decisions. The most recent publication was in early 2021 (over a year ago) and was a decision issued in 2018.

 The MOLC reported a year ago on many opinions issued in FY20, before the pandemic emergency rules went into effect, but none seem to be available. No details at all are available on any aspect of processing during FY21 (appeals, opinions, other dispositions) but again for no clear reason (can there have been zero opinions in FY21?) no opinions are published. We request that your office gather facts to show

* Whether any FOIA appeal decisions have been issued since March 2020;
* If not, why not (since staff remained at work remotely and had no orders that we know of to stop processing FOIA matters); and
* What is the plan to fully and promptly publish all those decisions not yet available to both catch up and make the two outlets consistent?

**Conclusion**

 The opportunity for administrative appeal of denials is a significant aspect of the D.C. public records access process, better in fact than half the states that lack such a scheme and so a requester has no choice but long and costly court challenge to even an elementary error. Assuring it works well is a key executive responsibility within the overall FOIA scheme, in fact-finding, applying often complex legal precedents, delivering clear decisions to requesters and agency staff, and publishing the result so there is no secret law--everyone can keep up with the executive view of the law.

 The information provided above suggests practice does not conform to the statute, even though some facts, and their possible explanations, are cloudy because of special circumstances of the pandemic and continued delays in reporting. But in any case, we conclude the D.C. FOIA appeals process needs review, to explore internal control processes that appear inadequate to assure performance of the statutory obligations involved. We request the Office of Open Government analyze the publication of appeal decisions under its broad authority to review and advise on the implementation of FOIA.

Sincerely,

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Fritz Mulhauser

Co-chair, Legal Committee

D.C. Open Government Coalition

1. See our testimony to the D.C. Council Committee on Housing & Executive Administration, performance oversight of the MOLC, hearing on February 25, 2022. Available at: <https://dcogc.org/wp-content/uploads/2022/03/OGC-testimony-on-MOLC-2-25-22.docx>. [↑](#footnote-ref-1)