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**Testimony of the**

**D.C. Open Government Coalition**

by

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Co-Chair, Coalition Legal Committee

Before the

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

FY 22 Performance Oversight – Mayor’s Office of Legal Counsel

February 10, 2023

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. But in one crucial respect it serves the public: it is delegated the mayor’s statutory obligation to provide review of appeals of agencies’ Freedom of Information Act (FOIA) decisions. In this work, the MOLC staff are expected to apply the law, rather than represent the mayor as a client as they do in other situations.

**Agency FOIA errors are rampant; appeals matter**

In recent years 50-60 percent of D.C. FOIA requests were answered with adverse response (either denial the agency has the record, or records were found but withheld).[[1]](#endnote-1) 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 fast, free, and fair (independent) administrative appeal option, would Superior Court be clogged with routine reviews or, even worse, would erroneous decisions escape correction?[[2]](#endnote-2)

**The last few years have been difficult**

We testified in February 2022 about the big backlog of undecided appeals.[[3]](#endnote-3) Addressing at oversight the huge number remaining from 2020 and 2021, MOLC officials noted agencies under stress of early pandemic matters in 2020-21 often did not answer MOLC requests for explanations of denials. The Council did pause the 10-day appeal response deadline through January 2021, but that affected only enforcement; it did not suggest work stop. MOLC used its discretion to prioritize other work. And the pause ended, and deadlines resumed by February 2021—long ago.

A Coalition complaint about appeals processing resulted in a June 2022 Office of Open Government opinion that confirmed the backlog, and that the MOLC had failed to publish opinions in violation of the D.C. FOI law.[[4]](#endnote-4)

At last year’s hearing, the MOLC director “committed to dramatically improve” without addressing details such as informing the public what’s been happening to their long-delayed appeals, finding added resources, and setting a timeline for clearing the enormous backlog. (More cases awaited decision than the office typically handled in a previous full year.) He offered to consult his staff on moving FOIA appeals to another office.

The committee’s budget report recommended that MOLC promptly fill vacancies, do its work on time (“ensure FOIA requests are completed within the required timeline”) and stop hiding the problem (“provide quarterly status reports on the number of cases received by agency, the number of resolutions in progress and date of completion, and the number of cases that remain unresolved”).[[5]](#endnote-5)

Unfortunately, little has changed.

**FOIA appeals processing needs attention to be timely, independent, and transparent**

* Backlogs continue—108 noted in this year’s Pre-hearing Responses.[[6]](#endnote-6)
* MOLC may lack resources: it has unfilled vacancies and located a detailed attorney only last August. Whether MOLC has requested added resources for FY24 to do the work is unknown; it did not answer the standard prehearing Question 24 about its budget request.[[7]](#endnote-7)
* MOLC does not respond to FOIA requests for its data on the backlog.[[8]](#endnote-8)
* MOLC did not respond to the Council's request for regular updates on the backlog problem. To the Coalition’s FOIA request for the first required report, covering October-December 2022, MOLC responded on January 31, “this Office is not required to make quarterly status reports. A recommendation is not a requirement.”
* MOLC continues not publishing opinions, eight months after OOG urged fixing that (the latest is a 2018 appeal).[[9]](#endnote-9)

The FOIA appeals work differs from MOLC staff oversight of agency counsel, resolving inter-agency conflicts, managing external investigations, and the other high-stakes advice the mayor seeks from the tiny group (seven people).

Is MOLC doing the best it can? Outsiders can’t meaningfully assess MOLC productivity. MOLC continues to operate as a unique unit—the mayor’s law firm—and prepares no work plans, tracks no staff time, and does no performance evaluation. This is perfectly reasonable on the premise that it is chiefly judged on the metric of mayoral satisfaction.[[10]](#endnote-10) That’s just the wrong metric for their appeals work.

Enlarging the time for processing appeals, as OOG proposed, doesn’t solve everything. FOIA appeals need stable and adequate resources, including attorney specialists. This is so especially as adjudication of FOIA disputes such as adequacy of search or application of exemptions requires knowledge of federal case law, which is vast and complex and changes every month. As we noted

in reviewing last year’s MOLC budget, it never mentioned FOIA appeals. We conclude from all the signals that, even with good work to reduce the backlog, FOIA appeals appear to remain a low priority.

Perhaps most distressing, we fear work quality may be suffering as well, based on a recent experience of our Coalition. An agency denied a Coalition August 2021 request for data on a mayoral street violence initiative, and after unsuccessful discussions to clarify the disagreement, we appealed in November 2021.

Fourteen months later, on February 2, 2023, MOLC granted our appeal after reviewing the facts and the law of two claimed exemptions. In a 1,500-word opinion, the office rejected the agency’s reasoning on two claimed exemptions and ordered it to produce responsive records. We got no reply when we checked in with the agency FOIA officer about when to expect the release.

But something had happened behind the scenes. On February 6, MOLC wrote that it “inadvertently sent the incorrect draft” and attached “the correct decision.” We had no word of a request to reconsider that we could have rebutted. The new opinion didn’t correct a stray typo or citation; it entirely reversed the previous analysis and upheld the agency’s denial.

Generally, it is highly unusual for an adjudicatory body to reach its decision, issue it, and then pull it back to reverse the holding altogether (absent a powerful formal motion for reconsideration). It’s never happened before at the MOLC, according to those familiar with its history.

We conclude that an independent and adequately resourced office is needed to take over FOIA appeals. The mayor could delegate the task elsewhere; the Council could do so by statute. We hope to note progress in this regard by next year’s oversight hearing, and we are happy to contribute our knowledge of diverse schemes for handling the work of fair administration of public records access disputes.[[11]](#endnote-11)

For questions, I can be reached at fmulhauser@aol.com or 202-550-4131.

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 D.C. open government 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 13 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. ENDNOTES

 The denial numbers are big. In FY21, for example, agencies denied over 5,700 requests (no responsive records or found some but denied the request in whole or part). That is 56 percent of the 10,191 total processed. [↑](#endnote-ref-1)
2. Most people can’t go to court; and few do. In FY22 there were only 29 FOIA cases in D.C. courts, only a dozen brought by individual plaintiffs. See Office of Attorney General, FY23 FOIA Report. Available at: <https://lims.dccouncil.gov/Legislation/RC25-0012>. [↑](#endnote-ref-2)
3. Coalition testimony is available at: <https://dcogc.org/wp-content/uploads/2022/03/OGC-testimony-on-MOLC-2-25-22-1.docx>. [↑](#endnote-ref-3)
4. OOG opinion on FOIA appeals available at: <https://www.open-dc.gov/documents/molc-ao>. [↑](#endnote-ref-4)
5. Committee FY23 budget report dated April 20, 2022. Available at: <https://dccouncil.gov/wp-content/uploads/2022/04/MARK-UP-VERSION-FY23-COHEA-Budget-Report.pdf>. Recommendations for the MOLC are at p. 25. [↑](#endnote-ref-5)
6. MOLC FY 2023 Performance Oversight Questions (Q.3, Agency-specific questions, p. 19). Available at: <https://dccouncil.gov/wp-content/uploads/2023/02/MOLC-POH-Pre-Hearing-Questions-and-Responses-FY23.pdf>. The 108 comprises 5 from FY22, 63 submitted since October 1, and 40 in a “queue” – but most seem likely to be overdue, hence we count as backlog. The mayor’s annual FOIA report that includes appeal processing data was due February 1 but is not yet available.

 [↑](#endnote-ref-6)
7. The Budget Transparency Act of 2008 directs the agencies’ requests and enhancements be submitted with the mayor’s budget. D.C. Code § 47–318.05a. [↑](#endnote-ref-7)
8. To the Coalition request in June 2022, MOLC released only partial data, the rest promised “as soon as practical” which is not a lawful response. We received nothing more. The Coalition appealed in October and that has gone unanswered. Q.2 of the agency-specific questions (see preceding note) shows MOLC refers appeals from its own actions to the Office of the Secretary.

 [↑](#endnote-ref-8)
9. Appeals are published at: <https://tinyurl.com/4wxnw6zchere>. Publication is required by D.C. Code § 2-536(a)(3) (“E-FOIA” provisions requiring certain records to be proactively published online and accessible without need of request). The OOG opinion is linked in note iv. For the Council’s analysis of their authority to require submission of agency budget requests, see n.11 and related text of the Council amicus brief in *D.C. v. Terris, Pravlik & Millian*, Case No. 21-CV-543 (D.C. Court of Appeals, Feb. 8, 2022). Available at: <https://dcogc.org/wp-content/uploads/2022/02/Amicus-Brief-Stamped-Filed.pdf>. [↑](#endnote-ref-9)
10. Details of MOLC internal management are suggested by nonresponse to FY23 Performance Oversight Questions (standard questions): Q.29 (performance accountability reporting) and Q.30 (performance plans), as well as limited response to Q.34 (employee performance evaluations—not done yet but work in progress). The comment on service to the mayor as the chief performance metric came in last year’s submission, Q.33. [↑](#endnote-ref-10)
11. On key design criteria and diverse models for appeals and enforcement, see “OGIS 2.0: Reimagining FOIA Oversight.” (Reimagining OGIS Working Group and Legislation Subcommittee. Recommendations to the Federal FOIA Advisory Committee, May 4, 2022.) Available at: <https://tinyurl.com/3cz4nr2f>. Coalition board members took part in the review. [↑](#endnote-ref-11)