

3901 Argyle Ter., N.W.

Washington, D.C. 20011

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

FFF

**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 Executive Administration & Labor

FY 24 Budget Oversight – Mayor’s Office of Legal Counsel

April 12, 2023

Thank you for the opportunity to provide views on the Mayor’s Office of Legal Counsel (MOLC) in connection with the budget request for Fiscal Year 2024 that begins October 1.

The MOLC chiefly serves the mayor. Its pre-hearing responses describe advising on complex legal problems within and outside D.C. government, and it oversees hiring and performance of agencies’ general counsels.[[1]](#endnote-1)

But in one crucial respect it serves the public directly: 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**

Delay and adverse decisions for D.C. FOIA requesters are both appealable and both are rampant:

* 4,800 requests were answered late in FY22, over half taking 26 days or more
* 1,800 left unanswered at year’s end had waited an average of 50 days, some as many as 360-400 days
* 6,500 agency responses to FOIA requests – 53 percent of all responses, and almost a thousand more than 2021 -- were adverse (denied in whole or part, or no records found).[[2]](#endnote-2)

Appeals are important because mistakes at every FOIA request stage are predictably common. First, the D.C. government records are not all digital or accessible; second, the complex laws governing agencies’ searches, exemptions, redactions, and fee decisions are 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 have resulted in reversal and remand for correction, according to our research over the years using the mayor’s reported MOLC appeal data.[[3]](#endnote-3) Without the fast, free, and fair (independent) administrative appeal option, Superior Court would be clogged with routine reviews or, even worse, erroneous decisions would escape correction.[[4]](#endnote-4)

**Appeals back to 2020 have been addressed.**

MOLC did address during FY22 a large backlog of old appeals. Agency FOIA processing went into a tailspin following the onset of the COVID-19 emergency in March 2020. A government shutdown sent most agency staff home and led the D.C. Council to suspend enforcement of processing deadlines (restored early in 2021 with a brief grace period to deal with a backlog).

But a year later, at the performance oversight hearing in February 2022, MOLC confirmed they still had a backlog of over 300 undecided opinions.[[5]](#endnote-5) As a result:

* Witnesses called for action,
* the MOLC director “committed to dramatically improve” and agreed to consult staff on moving FOIA appeals to another office that could do the job better and
* The committee’s FY23 budget report recommended that MOLC promptly bring its staff to full strength by filling vacancies, do its work on time (“ensure FOIA requests are completed within the required timeline”), and improve data sharing (“provide quarterly status reports on the number of cases received by the agency, the number of resolutions in progress and date of completion, and the number of cases that remain unresolved”).[[6]](#endnote-6)

But the pace of remedial work seems not to have picked up. MOLC data just released in mid-March as part of the mayor’s 2022 FOIA processing report shows only 121 MOLC appeal opinions in the first eleven months (October 2021 through August 2022). But with a spurt of 89 decisions issued in September 2022, as the fiscal year-end report deadline drew near, the MOLC ended the year with 210 opinions issued.[[7]](#endnote-7)

And as old appeals were cleared away, a new backlog was in the making.[[8]](#endnote-8) MOLC reported a new backlog of 108 in this year’s Pre-hearing Responses.[[9]](#endnote-9)

The Coalition believes these facts from the last few years show a systemic weakness in the District’s implementation of the appeal system created in the Freedom of Information Act. It’s time for the Council to consider a change. The mayor can’t put aside duties assigned by law if the responsible unit finds them low in priority.

**Why FOIA appeals need a new home where the work can be timely, independent, and transparent.**

* Contrary to the committee’s explicit requests in the FY23 budget report, staff vacancies in the MOLC persist, and as a result deadlines are ignored, backlogs remain sizable, and data remains inaccessible.[[10]](#endnote-10)
* Most important, MOLC priorities are elsewhere, in high-stakes advice to the mayor and complex negotiations among governments and agencies. Efficiency in FOIA work may be invisible since in general the office does not evaluate its productivity, makes no performance plans, does no performance evaluation of staff, and does not account for time on tasks. Ten agencies get 75 percent of requests; two generate half the backlog; three account for half the MOLC opinions finding mistakes and reversing denials. In short there would be ways to target special assistance if it were important.[[11]](#endnote-11) Yet work on FOIA with agency general counsels and their FOIA staff is not mentioned in program materials, for compliance let alone innovation.
* MOLC has yet to resume publishing its opinions, eight months after the Office of Open Government review confirmed that none had been posted since 2018-19.[[12]](#endnote-12)

In short: MOLC continues to operate as a unique unit, which is reasonable on the premise that it is chiefly judged on the metric of mayoral satisfaction.[[13]](#endnote-13) That’s just the wrong metric for their appeals work.

Enlarging the time for processing appeals, as OOG proposed in its June 22, 2022, advisory opinion, and repeated in the later *BEGA Best Practices 2022* report, doesn’t solve everything.[[14]](#endnote-14) FOIA appeals need stable and adequate resources, including dedicated attorney specialists. In the present arrangement, FOIA appeals do not merit a program line in the MOLC budget. We conclude from all the signals that, even with the special effort to reduce the backlog, FOIA appeals appear to remain a low priority and after several years we conclude that only reassigning the work can make a lasting difference.

Perhaps most distressing, we fear work quality is suffering as well, based on recent examples:

* One requester sent us a MOLC opinion denying an appeal without examining the record at issue where it seems that would have been essential. The agency denied a copy of the recording of a voluntary interview the requester had done at the agency as part of making a complaint. The agency cited a little-used part of the law enforcement exemption, D.C. Code § 2-532(a)(3)(E), that protects records from release that would reveal investigative techniques not widely known by the public. But the MOLC did not independently review the record to see if the exotic claim was sound (that, indeed, as the agency claimed, release of the recording “would expose investigative techniques, processes and methods of investigation” used during the questioning). Instead, the MOLC informed the requester that it was “inclined to defer to the agency determination” that the exemption applied. Shortcutting the work of adjudication, perhaps under backlog pressure (the opinion had taken five months), undermines the confidence of the community that MOLC decisions are based on full review and impartial analysis.
* In a request from the Coalition, as we reported at the February oversight hearing, MOLC granted our appeal after reviewing a mayoral office’s claimed exemptions of records about a highly visible crime-fighting program targeting certain areas. In a 1,500-word opinion, the office rejected the agency’s reasoning 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. Within days, MOLC wrote that “our office inadvertently sent the incorrect draft. Please find attached the correct decision regarding your FOIA appeal.”

Such a reversal is highly unusual, according to experts familiar with MOLC operations over many years. 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. It is rare 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).[[15]](#endnote-15)

We conclude that the law is not being carried out and an adequately resourced and independent office is needed to take over FOIA appeals. The mayor could delegate the task elsewhere; the Council could do so by statute.

As Woodrow Wilson said in his classic *Congressional Government* (1885): “Quite as important as lawmaking is vigilant oversight of administration.” We request the committee address the MOLC in its FY24 budget report and give clear direction for specific improvements that the community can expect, so we can note progress by next year’s oversight hearing. We are happy to contribute our knowledge of various schemes for handling the work of fair administration of public records access disputes.[[16]](#endnote-16)

For any 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

 These duties take three single-spaced pages to describe. FOIA appeal adjudication is barely mentioned. MOLC FY 2023 Performance Oversight Questions (Q.1, Agency-specific questions, pp. 15-17). Available at: <https://dccouncil.gov/wp-content/uploads/2023/02/MOLC-POH-Pre-Hearing-Questions-and-Responses-FY23.pdf>. The mayor’s budget does not mention FOIA appeals. [↑](#endnote-ref-1)
2. FY22 data are from the mayor’s FY22 FOIA processing report. Available at: <https://tinyurl.com/mmbntaxz>. FY21 data are from the equivalent report for that year. Available at: <https://tinyurl.com/2p9akv3a>. [↑](#endnote-ref-2)
3. iii On errors overall: MOLC data in the mayor’s FY22 FOIA processing report shows of 137 decided appeals, 33 percent were granted and remanded for corrective action by the agency. That doesn’t count another third of the 210 total appeals where the agency acted to correct itself after the requester appealed. MOLC closes those cases as moot without analysis and opinion, but agency error is the logical conclusion. On complexity: the most obvious example is the privacy exemptions in D.C. FOIA, D.C. Code §2-534(a)(2) and (a)(3). Agencies cited these in denials just under 3,400 times last year. Complexity arises because public interest in release is required to be balanced against privacy; only “unwarranted” invasions of privacy (those lacking countervailing public interest in release of the records) are protected by the exemption. Agencies often overlook the required balancing test or get it wrong. Hundreds of cases interpret this puzzle. In just one context (reviewing footage for FOIA release of police body-worn camera video), the Office of Open Government concluded that MPD gets the privacy analysis wrong often and redacts video that should not be exempted. See *FOIA Body Worn Cameras Advisory Opinion* (November 2020). Available at: <https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020>. [↑](#endnote-ref-3)
4. Most people can’t go to court; and few do. In FY22 there were only 29 FOIA cases in D.C. courts and only a dozen were brought by individual plaintiffs. See Office of Attorney General, FY23 FOIA Report. Available at: <https://lims.dccouncil.gov/Legislation/RC25-0012>. [↑](#endnote-ref-4)
5. The 300 figure was in pre-hearing answers in February 2022. It was confirmed by the Office of Open Government report of investigation of a complaint by the Open Government Coalition about delayed opinions and nonpublication of those issued. The June 2022 OOG opinion is available at: <https://www.open-dc.gov/documents/molc-ao>. [↑](#endnote-ref-5)
6. 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-6)
7. The Coalition got several opinions last September on 2021 appeals —both over 500 days after filing. Enforcement of MOLC appeals decisions is an issue for another day—but in that connection we note in the seven months since both opinions granted our appeals, neither agency has responded. [↑](#endnote-ref-7)
8. Coalition tally of MOLC materials included in mayor’s annual FOIA report for FY22. Available at: <https://os.dc.gov/sites/default/files/dc/sites/os/page_content/attachments/FY_2022_District_of_Columbia_FOIA_Report_3.16.23.pdf>. [↑](#endnote-ref-8)
9. 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 latest backlog figure of 108 comprises 5 from FY22, 63 submitted since October 1, and 40 in a “queue” for release with submission dates not specified.

 [↑](#endnote-ref-9)
10. On staffing: the mayor’s FY24 budget shows 10 FTE, with no change; and Schedule A submitted to the committee shows seven staff and three vacancies. Available at: <https://dccouncil.gov/wp-content/uploads/2023/03/AH0_Schedule-A-Template.pdf>. Backlog data comes from FY23 performance oversight pre-hearing responses, note x, above. On data access to follow MOLC work, we note MOLC denies almost all FOIA requests for its own records (66 of 71 reported in pre-hearing Q.31 in February). Our own FOIA efforts to obtain data on MOLC processing have also been largely unsuccessful (the office once told us it would respond “as soon as practicable” which is not a lawful response, and our appeal has never been answered). The Council committee has been no more successful; as far as we know the office has not submitted the quarterly appeal processing reports requested in last April’s FY23 committee budget report, even though the director acknowledged default and promised again in the February 2023 oversight hearing to submit the Q1 data. The Q2 report is now due also. [↑](#endnote-ref-10)
11. Conclusions about priorities are Coalition inferences from MOLC answers to multiple prehearing questions for FY23 performance oversight, note x, above. Details of MOLC internal management are suggested by nonresponse to 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).

 [↑](#endnote-ref-11)
12. Appeals are published at a D.C. government searchable site: <https://tinyurl.com/32dyxmua>. 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 publication of a wide range of executive records, 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-12)
13. The comment on service to the mayor as the chief performance metric came in last year’s submission, Q.33. [↑](#endnote-ref-13)
14. The OOG opinion on MOLC is cited at note v. The OOG repeated its recommendation for an enlarged deadline for appeal decisions in the *BEGA Best Practices Report 2022*, pp. 15-17. Available here: <https://bega.dc.gov/sites/bega/files/publication/attachments/BEGA%202022%20Best%20Practices%20Report.pdf>. [↑](#endnote-ref-14)
15. When the Coalition witness recounted the incident at the February performance oversight hearing, the MOLC director said he was not aware of it. We have not heard if he sent the committee the written response he promised.

 [↑](#endnote-ref-15)
16. 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-16)