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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 Public Works & Operations

FY 22-23 Performance Oversight – Office of Administrative Hearings

February 6, 2023

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Thank you for the opportunity to provide views on the performance of the Office of Administrative Hearings (OAH).

We speak once again today on behalf of the public, especially the thousands of nonlawyers who must use the District’s central hearing panel to raise questions about D.C. agencies’ actions—trash can or taxicab tickets, school suspensions, or unemployment or health benefits.

We urge you to keep them in mind as you evaluate the openness and accessibility of OAH as it does its job of wise judging, a task as old as King Solomon, but done now in the 21st Century in a digital environment that upends every record and process relied on in past decades, and that adds greatly heightened public expectations. Ask:

* Can those with a question about their case find information readily?
* Can a potential user find out how to proceed and about the treatment of past situations like theirs?

As we have reported in past years, the answer is still, generally, no.

**General concern**

The Office workload grows each year -- 20,740 cases arrived in FY22 – and 36 hard-working judges closed 19,000, but also left a backlog of 13,000.[[1]](#endnote-1) The Q.36 answer shows even agency responses to its modest FOIA request burden (under one request per week) took twice as long as the law allows last year (33 days on average); worse so far this year.

These numbers suggest analysis of the work and staff seems imperative. Staff inadequate for the workload comes up often in Pre-hearing answers (*e.g*., Q.55), and the promise that the staffing study the Council directed last year will be under way shortly is welcome. Special attention seems needed to the specifics of business process and underlying law and policy when almost 19,000 or 90 percent of the new cases come from only four D.C. agencies (DCRA, DHS, DOES, DPW).

The Committee should ask for a briefing and a copy of the report of results of a “deep dive” study of agency technology mentioned at Q.29—though no report is listed in Q.40.

**Open government issues in particular**

The public must navigate opaque sources to learn about the OAH and how to use it to contest agency decisions, though a new website is a definite improvement.[[2]](#endnote-2)

**1. No published orders yet.**

We have testified before about the lack of published “final orders” that are the opinions the OAH judges write deciding cases.[[3]](#endnote-3) Without publication, the office is creating a body of secret law. Publication is required by law and the Office of Open Government gave the OAH a formal opinion in 2020 saying so, following the Coalition’s complaint.[[4]](#endnote-4) Council committees have in recent years stressed the priority expected for improvements in this area.[[5]](#endnote-5)

That is still the case: no final orders are published. The agency says in Q.48 that it is “engaged in the procurement process” for a software vendor and internally “has begun to identify the process necessary for creating the database.”

Unfortunately, the agency has already signaled limitations to be expected in the new system. We learn in Q.48 the public will not see any older decisions (those handed down in the decades when decisions went unpublished), only “new orders moving forward” and not opinions from all areas where OAH decides cases—citing privacy/confidentiality concerns. We have testified before how other states publish case opinions to meet mandates even in cases with sensitive personally identifiable information. Judges must write in a publishable way, such as using initials. The OAH could begin to direct at least attorney filers to immediately begin to omit certain details from filings, in anticipation of future public release.[[6]](#endnote-6)

These are design decisions that will have a fateful effect on the usability of the system eventually procured. Input from our Coalition and other users has not been requested, for example, on how to cope with volume or redaction—problems faced in all court settings coping with public access challenges. Linking new public system design to user input is a best practice found in research on other states and embraced by the White House in a recent government-wide initiative to improve electronic government.[[7]](#endnote-7)

**2. No electronic filing across case areas yet**.

E-filing has just begun last November, with the corollary that most cases’ files are not electronic and so inaccessible. (The agency says in Q.41(c) that e-filing is available in several areas, but the website says only one.) “Major” agencies apparently are allowed access to the court file (Q.26-27) but not the public, though that is required by the original D.C. law enacting the OAH (see note iv). So, in most case areas, it appears a person with a case must ask questions such as the next hearing or filing deadline by calling an overworked clerk. And the public sees nothing.

**3. Help tools under-developed still**.

Nor is there accessible help for the public to navigate the arcane procedures of the office (whose rules span 71 pages).[[8]](#endnote-8) A part of one room is called a “resource center” but remains a work in progress and help is not consistently available according to observers and OAH staff speaking anonymously to OGC as they were not authorized to speak about the subject. The agency answer to Committee question Q.52 (b) suggests the existing resource center staffer is not full-time (duties are apparently split between the center and other offices); the Council added a new position this year to double the resources, but the same answer suggests that individual is not available consistently either. The Committee should consider steps that will assure that staff resources are used as intended.

**4. Tech workforce not enlarged yet**.

Information technology undergirds the Office work and the Council responded to executive concerns in recent years that OAH lacked adequate staff for three-dozen courtrooms’ technology, systems improvement, as well as new projects such as the opinion publication and greatly enlarged remote hearings after they proved popular during the COVID-19 emergency. The Council doubled the IT workforce in the FY24 budget (from two to four). Yet the new IT staff positions remain vacant, according to observers.

We request the Council ask the obvious questions about this modest progress, to find problems that can be solved, and to press for sound OAH plans to provide its thousands of users the resources 21st Century citizens expect from government: ready access to clear information on how to use the Office process, on current cases, and on past opinions.

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 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

 Number filed totaled from chart at Q.41. Closed numbers are in table at Q.54 (but table did not include answer to Council question on number of open cases by agency). Backlog at Q.56 (most from DCRA and DPW). The OAH Pre-hearing Responses for this hearing were provided by the committee and to our knowledge are not yet published. [↑](#endnote-ref-1)
2. Even the new website text acknowledges the Office may not help people determine if OAH is the right place, and if the user gets it wrong, they’re out of luck: “It is ultimately your responsibility to know whether OAH is the right place to request a hearing for your legal issue. If OAH does not have authority over an issue, your OAH hearing request will be dismissed.” <https://oah.dc.gov/page/hearing-request-forms>. OAH officials have stated to us several times their fears that court-based [↑](#endnote-ref-2)
3. help will become unauthorized law practice. These are important concerns (to protect users) but are not the final answer. *See* Lauren Sudeall, “The Overreach of Limits on ‘Legal Advice,’” *Yale Law Journal,* Vol. 131 (2022) (showing that “current definitions and applications of ‘legal advice’ are overly and unnecessarily broad, confusing those bound by them, severely disadvantaging pro se litigants, undermining the purpose of such limitations, and, in more extreme cases, implicating due-process concerns expressed by the Supreme Court in *Turner v. Rogers.”*). Available at: <https://tinyurl.com/3xmncr6v>.

 Public concerns go back to a 2016 D.C. Auditor [report](https://dcauditor.org/report/administrative-justice-in-the-district-of-columbia-recommendations-to-improve-dcs-office-of-administrative-hearings/). Our Coalition’s past testimonies are available at: [2021](https://dcogc.org/wp-content/uploads/2021/04/OGC-statement-for-OAH-oversight-hearing-2-25-21.doc) and [2022](https://dcogc.org/wp-content/uploads/2022/03/OGC-testimony-on-OAH-budget-2-25-22.docx). [↑](#endnote-ref-3)
4. The OOG opinion letter is dated January 27, 2019, but should be 2020. It is available at: <https://www.open-dc.gov/sites/default/files/FOIA%20Advisory%20Opinion%20OAH%20Final.pdf>. The OOG concluded “OAH is not fully compliant with the mandatory disclosure provisions of D.C. FOIA (D.C. Official Code §§2-536(a)(3); 2-536(b)) and must make all Final Orders created on or after November 1, 2001, that are not subject to statutory exemption, publicly available on its website.” D.C. Code § 2-1831.13 (d) from the outset required “all documents filed in any case before the Office shall be available to the public for review unless a statute, protective order, or other legal requirement prohibits disclosure.” Federal regulations also apply. See for example, Medicaid rules at 42 C.F.R. § 431.244 (g), “the public must have access to all agency hearing decisions.” [↑](#endnote-ref-4)
5. See FY22 and FY23 Budget Reports of the Committee on Government Operations & Facilities. Key text in the FY23 Committee report is [here](https://static1.squarespace.com/static/5bbd09f3d74562c7f0e4bb10/t/625f27bebed5b4634ad3ee43/1650403263232/GOF%2BFY23%2BReport%2B%2B%2BRecommendations%2Bon%2BFY23%2BBudget%2B-%2BCirculation%2BDraft%2B-%2B04.19.2022.pdf), pp. 89-95. Delay has plagued the recommendations of the committee, which, for example, asked last June for the staffing benchmark study “in advance of the initiation of the Fiscal Year 2024 budget process so that it can
guide budget decision-making.” The agency now says (Q.58) vendor selection is at the early stage of designing the RFP; the work will be done by October 2023, long after the Council has put the FY24 budget to bed. Likewise, the Committee urged OAH “to move swiftly to fill all positions within its IT Department and report back to the Committee if inadequate salaries make doing so difficult.” These were the new staff the Committee asked to “immediately advance the procurement, development, or implementation of a searchable, online, public portal.” [↑](#endnote-ref-5)
6. See D.C. Court of Appeals project which began in 2021 to educate court users about proper filing, long before selected files were released online in 2022. See instructions at <https://tinyurl.com/5t3t2aw6>. [↑](#endnote-ref-6)
7. The Council for Court Excellence studied for the D.C. Court of Appeals the growing trend of electronic access to court files nationwide. They [reported](https://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf) on this user engagement topic after many informants mentioned how helpful that had been as court staff designing new systems lacked perspectives brought by users. For the new federal direction to agencies to improve user engagement in digital service design, see E.O. 14058 (Dec. 13, 2021) (requiring that “Management of [the government’s] customer experience and service delivery should be driven fundamentally by the voice of the customer through human-centered design methodologies; empirical customer research; an understanding of behavioral science and user testing, especially for digital services; and other mechanisms of engagement.”) Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/13/executive-order-on-transforming-federal-customer-experience-and-service-delivery-to-rebuild-trust-in-government/>. [↑](#endnote-ref-7)
8. OAH rules are at the D.C. Municipal Regulations site, <https://dcregs.dc.gov/Common/DCMR/AgencyChapterList.aspx?AgencyID=1>, and also <https://tinyurl.com/y3jmnjvt>. That will help few. Even the OAH website advice about rules is written above the reading level of a significant fraction of the likely D.C. user population. An online tool that rates reading difficulty 666showed an 11th grade level for the text of <https://oah.dc.gov/page/rules-laws>. On reading problems for D.C. lower-income adults, see <https://www.washlit.org/single-post/2020/05/04/Left-Behind-DCs-Literacy-Divide>. Sadly, our testimony is inaccessible also, as the text is at a college level. Accessible and user-friendly advice tools for courts are a huge need nationwide and is one focus of the Stanford Legal Design Lab, <https://www.legaltechdesign.com/>. See also Self-Represented Legal Network, at <https://www.srln.org/>. [↑](#endnote-ref-8)