



D.C. FOIA ADVISORY OPINION REVIEW

AUGUST 6, 2025

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Office of Open Government

Office of Open Government

The Office of Open Government is a component (along with the Office of Government Ethics) under the Board of Ethics and Government Accountability. OOG is overseen by the Director of Open Government, Niquelle M. Allen, Esq., and began operations in April of 2013.

OOG interprets and monitors compliance with:

- (1) the Open Meetings Act (the OMA), which requires that public bodies provide proper notice of, access to, and detailed records of their meetings; and
- (2) the Freedom of Information Act of 1976, which concerns the transparency and availability of public records.

OOG provides guidance (including formal advisory opinions) to public bodies on compliance with the OMA. OOG also conducts training and outreach and can also enforce the OMA on the basis of complaints from the public and its own investigations, and as a last resort may sue public bodies in the Superior Court for injunction, declaration, and/or civil fines.

The Director

§ 1-1162.05c(d).

- ▶ The Office of Open Government may issue advisory opinions on the implementation of subchapter II of Chapter 5 of Title 2, regarding the D.C. Freedom of Information Act


§ 2–531

Public policy statement, AKA “The Preamble”.

- ▶ The public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.
- ▶ *To support the District’s public policy, the Director of Open Government, is authorized to “issue advisory opinions on the implementation of [D.C. FOIA]” pursuant to section 205c(d) of the Government Ethics Act of 2011.*

ADVISORY OPINIONS FOR DISCUSSION:

- FOIA Advice Concerning Use of Multiple Extensions – re Executive Office of the Mayor (EOM)
- FOIA Appeals Backlog – re Mayor's Office of Legal Counsel (MOLC)
- Deputy Mayor for Planning and Economic Development Under the Freedom of Information Act of 1976



Case #1: FOIA Advice Concerning Use of Multiple Extensions (EOM)

OOG-2025-004

Addresses the use of multiple extensions by the
Executive Office of the Mayor (EOM) in response to a
D.C. FOIA request by the requester

Request:

Evaluate “whether the EOM[‘s] decision to cope with delay by invoking multiple extensions is the correct implementation of the law.”

Relevant Law Regarding DC FOIA Time Limit and Extension

§ 2-532(c)(1)

(c)(1) Except as provided in paragraph (2) of this subsection, a public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor.

Relevant Law Regarding DC FOIA Time Limit and Extension

§ 2-532(d)(1)

(d)(1) In unusual circumstances, the time limits prescribed in subsection (c)(1) and (c)(2) of this section may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination. Such extension shall not exceed 10 days (except Saturdays, Sundays, and legal public holidays) for records requested under subsection (c)(1) of this section and 15 days (except Saturdays, Sundays, and legal public holidays) for records requested under subsection (c)(2) of this section.

Relevant Law Regarding DC FOIA Time Limit and Extension

§ 2-532(d)(2)

(d)(2) For the purposes of this subsection, and only to the extent necessary for processing of the particular request, “unusual circumstances” are limited to:

- (A)** The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;
- (B)** The need for consultation, which shall be conducted with all practicable speed, with another public body having a substantial interest in the determination of the request or among 2 or more components of a public body having substantial subject-matter interest therein; or

Relevant Law Regarding DC FOIA Time Limit and Extension

§ 2-532(e)

(e) Any failure on the part of a public body to comply with a request under subsection (a) of this section within the time provisions of subsections (c) and (d) of this section shall be deemed a denial of the request, and the person making such request shall be deemed to have exhausted his administrative remedies with respect to such request, unless such person chooses to petition the Mayor pursuant to § 2-537 to review the deemed denial of the request.

Background and Timeline:

- ▶ December 22, 2023 – Requester submitted D.C. FOIA request to EOM, through the District of Columbia's Online FOIA Portal (FOIAXpress), regarding the Mayor's travels during a particular timeframe.
- ▶ January 18, 2024 - EOM's FOIA officer, sent Requester a notification of 10-day extension citing "unusual circumstances" as described in D.C. Official Code § 2-532(d), need for consultation and/or the need to search for, collect, and appropriately examine a voluminous number of records demanded by Requester's request necessitates this extension.
 - ▶ EOM ensured a determination or update on the status of Requester's request by February 1, 2024.
- ▶ January 31, 2024 - a second notice of extension indicating that EOM was exercising an additional 10-day extension and setting a new date of determination for February 21, 2024.

Background and Timeline (Cont'd, 2):

- ▶ February 2, 2024 – Requester received an email from EOM which stated that they identified emails and Teams messages which are responsive to the request; however, they had not yet been able to review text messages, WhatsApp, and analogous messaging apps.
 - ▶ EOM asked if the Requester would they be open to narrowing this portion of the request.?
- ▶ February 5, 2024, Requester responded, by email, agreeing to limit the scope of the request, indicating that all of the staff members mentioned in the February 2, 2024.
- ▶ February 13, 2024, Requester received an email from EOM asking again if Requester would be open to limiting the request to text and WhatsApp messages. The email further stated that EOM had not received a response from Requester and notified Requester that if they did not respond within ten (10) business days (ending on February 28, 2024), the request would be considered closed.
- ▶ That same day, Requester responded that they had replied to the February 2, 2024, email and Requester forwarded a copy of their February 5, 2024, email agreeing to limit the scope of the request.
- ▶ EOM responded on February 14, 2024, that Requester's emails had gone to the spam folder. And agreed to move forward with the request right away.

Background and Timeline (Cont'd, 3):

- ▶ February 15, 2024 – Requester received another extension notification, which provided a March 1, 2024, date for determination of the request.
 - ▶ Requester subsequently received identical extension notifications from EOM on: March 1, 2024; March 15, 2024; March 29, 2024; April 17, 2024; and April 30, 2024.
- ▶ May 30, 2024 - EOM sent Requester a letter stating that documents responsive to the request had been delivered via the FOIA portal and informed the Requester that documents and portions of documents had been withheld pursuant to the following FOIA exemptions:
 - ▶ 1. D.C. Official Code § 2-534(a)(2) - information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.
 - ▶ 2. D.C. Official Code § 2-534(e) - the deliberative process privilege, as incorporated under D.C. Official Code § 2-534(a)(4).
- ▶ EOM also advised the Requester of its right to appeal the letter to the Mayor of the District of Columbia or to the Superior Court of the District of Columbia under D.C. Official Code § 2-537 and 1 DCMR § 412.8

OOG
Director's
Analysis:
Problem #1:

“EOM’s
Notification to
[the Requester]
invoking an
extension to issue
a determination
did not comport
with FOIA’s
Requirements.”

OOG
Director's
Specific
Citations:
1DCMR
§ 405.5(c)

This regulation requires that the agency inform a Requester of their right to treat the delay as a denial and of the appeal rights provided by D.C. FOIA and the FOIA regulations.

In this case, EOM failed to include this information in the January 18, 2024, notice of extension. In this regard, EOM's January 18, 2024, notice of extension did not comport with FOIA's requirements

OOG
Director's
Analysis:

Problem #2:

“EOM Failed to Make a Determination to Dispatch the Requested Records Within the Applicable Time Period.”

OOG
Director's
Specific
Citations:
1DCMR
§ 405.5(a)

With the extension, the applicable time limit for the EOM to issue a determination was twenty-five (25) days, excluding weekends and legal public holidays. As your request was received on December 22, 2023, EOM was required to respond by February 1, 2024..

OOG
Director's
Analysis:
Problem #3:

“DC FOIA
Does Not
Provide for
the Use of
Multiple
Extensions.”

OOG Director's Analysis:

Problem #4:

“Failure to Provide a Timely Determination of the December 22, 2023, FOIA Request Became Moot Once EOM Issued a Determination.”

Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990)

CONCLUSION

- ▶ When the agency does not make a determination within the applicable time-frames, 1 DCMR 405.5 provides that the agency must notify the requester of the following:
 - ▶ (1) the reason for the delay;
 - ▶ (2) the date on which a determination may be expected; and
 - ▶ (3) the right to treat the delay as a denial and of the appeal rights provided by D.C. FOIA.

CONCLUSION

- ▶ Here, EOM provided the requester with the reason for the delay and subsequent dates on which the determination might be expected. However, EOM failed to notify the requester of the appeal rights, which FOIA law requires agencies to provide.
- ▶ Further, D.C. FOIA provides for the issuance of only one extension. While FOIA law indicates that the agency may continue to process the request, the issuance of several successive notices of extension does not conform with the District's FOIA laws and regulations.

DIRECTOR'S RECOMMENDATIONS



(1) with all future FOIA requests, EOM should strictly adhere to the requirements of D.C. Official Code § 2-532(d)(1), D.C. Official Code § 2-537(a)(1), and 1 DCMR 405.5;

(2) EOM should ensure that no more than one notice of extension is issued, in accordance with the provisions of 1 DCMR 405.5; and

(3) when a determination cannot be made within the applicable time period, EOM must ensure that requesters are informed of their right to treat the delay as a denial and their appeal rights under D.C. FOIA



Case #2:

FOIA Appeals Backlog – re Mayor's Office of Legal Counsel (MOLC)

OOG-2024-006

Addresses the backlog of administrative
appeals under D.C. FOIA

Request:

Request for an advisory opinion regarding the Mayor's Office of Legal Counsel ("MOLC") continuing delay in publishing its administrative appeals decisions under District of Columbia Freedom of Information Act of 1976.

Specific Questions:

1. Whether delayed publication of opinions in the DC Register at a pace set by the agency and the Register by itself proper implementation of the D.C. FOIA proactive publication requirement?“
2. Whether the publication of D.C. FOIA appeal decisions by MOLC in the Register affords searchability that meets the requirements of D.C. Official Code 2-536 (b) and
3. Is the Register an adequate substitute for the District's publication website "Publications"?

Background:

Previously issued Advisory Opinion:
OOG-2022-004_AO

In that AO, the Director provided an overview of the D.C. FOIA administrative appeals process and described how the deadlines were suspended by legislation for several months to accommodate delays due to the COVID-19 pandemic.

In addition, the Director analyzed MOLC's docket relative to the information on unavailability of appeal decisions from the public provided in the Requesters request letter.

The Mayor's reports stated that, of the 519 appeals submitted to the MOLC in FY2020 and FY2021, 46% (239 out of 519) were overdue at the end of FY2021, (i.e., as of October 1, 2021)

More Background:

Previously issued Advisory Opinion:
OOG-2022-004_AO

At that time, there were no full texts of any recent FOIA-appeal decision by the MOLC is available on-line.

The Director went on to say that it appeared that the MOLC had not affirmatively released FOIA-appeal decisions in the D.C. Register since the November 1, 2019, issue, which published many decisions at once.

D.C. FOIA and its regulations do not require that MOLC decisions appear in the D.C. Register, but the MOLC must at least post them to its website

Even More Background:

Previously issued Advisory Opinion:
OOG-2022-004_AO

In that same 2022 advisory opinion, the Director reported that the MOLC's Director cited three reason for appeals publication delays:

1. the Executive decision to stay MOLC's processing of FOIA responses because of the COVID-19 pandemic;
2. the lack of adequate resources (insufficient workers); and
3. getting responses from custodial agencies in a timely manner.

And Yet More Background:

Previously issued Advisory Opinion:
OOG-2022-004_AO

The Director also opined that the delay in the MOLC disposing of FOIA appeals is in part due to the brevity of the administrative review period under D.C. FOIA.

Specifically, that the ten business days limit for final FOIA decisions in relation to its federal counterpart and the corresponding laws or practices of Maryland and Virginia.

As such, the Director recommended that the Mayor seek a legislative remedy through the D.C. Council that properly addresses the inadequate processing time, and perhaps adopt an “unusual circumstances” extension like that available for first-level D.C. FOIA responses and federal FOIA appeals.

FACTS OF THE MATTER

- In preparation for a response to the Requester's letter, OOG's Chief Counsel contacted the MOLC's FOIA Officer and relayed the Requester's specific concerns and sent an email regarding the Requester's initial inquiry with information that he had gathered from the MOLC's FOIA Office
- The FOIA Officer informed the Chief Counsel that they (the MOLC) were working on a project to provide public access to all the previously unreleased MOLC FOIA Appeal decisions from 2020 to the present, by posting them to the D.C. Register.
- In addition, FOIA Officer informed the Chief Counsel that the endeavor entailed a "multi-step process" and would take some time to complete. But no completion date was provided.

FACTS OF THE MATTER

- The FOIA Officer explained that:
 - 1. The decisions needed were prepped into a specific format prior to publication to the D.C. Register. At that time 600 of 1008 decisions had been prepped into the required format;
 - 2. The MOLC had been in discussions and working with the Register regarding a publication schedule, i.e. a timetable for posting, as opposed to overwhelming the Register all at once with 1000+ decisions, for which they would need to review for compliance (the format, etc.); and
 - 3. The MOLC also were accounting for some delay in the preliminary administrative processes, i.e., some back and forth with the Register on the required formatting and possibly some additional work to do on their (the MOLC's) end to adequately prepare their decisions.

Judicial Review and the MOLC's Administrative Review Process Under D.C. FOIA

- ❑ “Any person denied access to a public record may pursue judicial relief by filing a complaint for injunction or declaration in the Superior Court of the District of Columbia (“Superior Court”), or (may first seek administrative review by petitioning (i.e., sending an appeal to) the Mayor’s designated agent. (D.C. Official Code §§ 2-532(e); 2-537(a)–(b))
- ❑ Since January 2, 2015, that designated agent has been the MOLC.

The MOLC's Administrative-Review Process

1 DCMR § 412

412.3

“An appeal to the Mayor shall be in writing. The appeal letter shall include “Freedom of Information Act Appeal” or “FOIA Appeal” in the subject line of the letter as well as marked on the outside of the envelope. The appeal shall be mailed...”

***MOLC's website states that the MOLC accepts and prefers appeals sent by email at foia.appeals@dc.gov**

The Requester should also forward a copy of the appeal to the Freedom of Information Officer, or agency head in the absence of a designated Freedom of Information Officer, of the agency whose denial is the subject of the appeal.

The MOLC's Administrative-Review Process

1 DCMR § 412

(Cont'd)

412.4

“An appeal to the Mayor shall include:

- (a) Statement of the circumstances, reasons or arguments advanced in support of disclosure;**
- (b) Copy of the original request, if any;**
- (c) Copy of any written denial issued under § 407.2; and**
- (d) Daytime telephone number, email address or mailing address for the requester.**

The MOLC's Administrative-Review Process

1 DCMR § 412

(Cont'd)

Section 412.5 deals with the processes, deadlines and responsibilities of the Agency on which the appeal to the MOLC was filed.

Discussion:

A. MOLC's Additional Plans for Timely Publication of FOIA Appeal Decisions and Implementation of its Previous and Recent Plans

The AO Discussed the progress since the MOLC's initial correspondence regarding its plans and progress:

1. Three months after MOLC's initial letter to OOG relaying its plans for publication, all of those 1008 appeals had been prepared, i.e., formatted, etc., for posting to the D.C. Register.
2. MOLC working with the Register to publish opinions – sending them over in manageable batches;
3. MOLC reported that the Register was posting decisions – not a sizeable amount at that time, but progressing.

Director's Discussion on the MOLC's Progress:

The Director acknowledged that while the MOLC had taken impressive steps to complete its plans for processing and publication of some of its appeals backlog, its delay in doing so was out of compliance with D.C. Official Code § 2–536(a)(3).

SPEAKING OF D.C. Official Code § 2–536...

Discussion:

B. Proactive Disclosure Requirement of the D.C. FOIA –

D.C. Official Code § 2-536(a)(5) requires among other things that “the following categories of information are specifically made public information, and do not require a written request for information ... [c]orrespondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party.”

HOWEVER...

The Director pointed out that it was actually D.C. Official Code § 2–536(a)(3) was more applicable to the concerns of the Requester, as it related to the publication of “. . . [f]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”

Discussion:

C. MOLC and DC
Register
Independent
Publication
Arrangements –

QUESTION:

“Is there any provision within D.C. Official Code § 2-536 which grants exception or exemption to proactively publishing the required opinions”?

THE ANSWER IS....



NUR...

Discussion:

D. Searchability of DC Register for MOLC's FOIA Appeal Decisions

D.C. Official Code § 2-536 (b), each public body must make available to the public all public records created on or after November 1, 2001. The statute mandates that the said records be made “available on the Internet or, if a website has not been established by the public body, by other electronic means.”

As this relates to the MOLC...

“If the appeal decisions are locatable on the internet, the MOLC’s website or some other electronic means, the MOLC has satisfied the requirement of the preceding subsection.

However, where a more readily accessible means is available to disclose the information publicly on the internet, the MOLC’s website, or any other electronic means, the MOLC should utilize such means.”

The MOLC has been publishing its Appeals Determinations on the D.C. Register.

Which begs the question...

“Whether the D.C. Register is an adequate substitute for the District’s publication website “Publications?”

“D.C. Official Code § 2-536 does not address the degree of search that is acceptable to locate information that must be made available to the public under the said section. The statute requires that appeal decisions be made public without a written request.”

The degree of difficulty with which records are searchable does not equate to it being unavailable. Although - public availability suggests that the information be more readily accessible than not.

In this case, the MOLC had a backlog in the disclosure of its FOIA appeal decisions while utilizing the D.C. Register as a means of disclosure.


DIRECTOR'S RECOMMENDATIONS AND CONCLUSION

- (1) that the MOLC hire contractors to help specifically with processing the FOIA appeal decisions for public disclosure.
- (2) MOLC explore additional means of disclosing its FOIA appeal decisions on the internet, if such is not feasible via the MOLC's website
- (3) that the District reform the FOIA Appeals process to permit the Mayor to reasonably dispose of FOIA Appeals.
 - (a) D.C. Council should consider amending D.C. FOIA to permit the Mayor's Office of Legal Counsel twenty (20) business days or more to complete the D.C. FOIA appeals process.

DIRECTOR'S RECOMMENDATIONS AND CONCLUSION

(4) the Office of Open Government should also officially serve as the “DC FOIA Ombudsman,” like the federal government’s Office of Government Information Services (OGIS).

OOG would provide confidential dispute resolution allowing requesters and DC public bodies to engage in candid and fruitful discussions of issues and concerns. In this process, OOG would provide a neutral referee to resolve conflicts. OOG would continue its effort to ensure fairness in DC FOIA processing by serving as an impartial ombudsman.



Deputy Mayor for Planning and Economic Development Under the Freedom of Information Act of 1976

OOG-2023-006_AO



Request:

Evaluation by the Office of Open Government regarding the Deputy Mayor for Planning and Economic Development's (DMPED) denial of a request by an individual for public records under the Freedom of Information Act of 1976 (DC FOIA)



Question:

MAY AN AGENCY JUSTIFIABLY
DENY A D.C. FOIA REQUEST
WHEN THE AGENCY'S
INFORMATION TECHNOLOGY
SYSTEM WOULD BE DISRUPTED
OR DISABLED BY THE PROCESS
OF REVIEWING EMAILS THAT
THE AGENCY RECEIVED FROM
THE OFFICE OF THE CHIEF
TECHNOLOGY OFFICER
(OCTO)?

REQUESTER'S ORIGINAL REQUEST PARAMETER

“[O]NE COPY OF EVERY DOCUMENT, EMAIL
OR AUDIO RECORDING TO OR FROM THE
DIRECTOR (OR ACTING DIRECTOR) OF DMPED
AND ONE COPY OF EVERY DOCUMENT,
EMAIL OR AUDIO RECORDING TO OR FROM
ANY STAFF MEMBERS OF DMPED [BETWEEN
01/01/2022 AND 11/29/2023] CONTAINING
ANY OF THE FOLLOW”: “5625
CONNECTICUT”, “SQUARE 1866”, “SQ. 1866”,
.....
.....” [INCLUDING ALL ATTACHMENTS AND
MAIN BODY OF EMAILS]

[YOU GET THE POINT]

Discussion:

“DC FOIA provides a right of access to public records and requires a reasonable search but limits an electronic search for records if it ‘would significantly interfere with the operation of a public body’s electronic system.’”

D.C. Official Code §2-532(a-2).

Other Facts and Pertinent Law:

DMPED conducted a “search” as defined by § 2-532(a-2) when DMPED’S FOIA Officer attempted to review the files provided by OCTO.

- ° DC FOIA requires a public body to “make reasonable efforts to search for records.” DC Official Code § 2-532(a-2); and to attest that a search for the documents was reasonably calculated to discovery response documents. *Wisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).
- ° Agencies are required to conduct a thorough, good faith search for records. *Goland v. CIA*, 607 F.2d 1344, 1351 (D.C. Cir. 1983).

Other Facts and Pertinent Law (Cont'd-2):

“Significant interference” occurred when DMPED’s IT failed when the FOIA Officer attempted to use an application to review the files provided by OCTO.

- DMPED’s FOIA Officer attempted to narrow the scope of the request to facilitate production, but requester refused. The FOIA Officer then attempted to fulfill the request, as written, thereby causing an actual disruption of the agency’s systems.
- “A public body is not required to undertake a reasonable search of the electronic records if the search would ‘significantly interfere’ with [a public body’s] automatic information system.” However, it is the public body’s burden to prove that such an interference exists. *Pinson v. United States DOJ*, 80 F. Supp. 3d 211, 216 (DDC 2015).

Other Facts and Pertinent Law (Cont'd-3):

“DMPED should have conducted the search that would yield the results of the request, even though the requester insisted on specific search terms.”

- In *Pinson*, the court made clear that an agency has the responsibility to conduct a search that is most likely to yield the records requested.

Two cases where agencies faced with a burdensome search resolved the issue by conducting a search for records in a manner deemed most appropriate.

1. When an agency has conducted numerous searches. *Blakely v. DOJ*, 549 F.Supp. 362, 366-67 (DDC 1996).

2. When an agency conducted a broader search that produced the records sought. *Greenberg v. Dep't of Treasury*, 10 F.Supp. 2d 3, 13 (DDC 1998).

Other Facts and Pertinent Law (Cont'd-4):

DMPED was not bound to use the specific terms of the Requester in order to execute a “reasonable search.

It should have conducted the search that would most likely yield the results the requester was seeking.



CONCLUSION

The Director concluded that in this instance, DMPED correctly denied the request as unreasonable because the review process actually disrupted its information technology system.

“When faced with a demand to conduct a specific electronic search, the agency is not bound by the specifics of that request. The agency’s FOIA Officer should instead conduct an electronic search that will yield the records the requester is seeking that will not compromise its systems.”

CONTACT INFORMATION

For further assistance regarding
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The Office of
Open
Government
thanks you,
and this
concludes D.C.
FOIA Advisory
Opinion Review.

