

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



January 27, 2019

VIA ELECTRONIC MAIL

Fritz Mulhauser
D.C. Open Government Coalition
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**RE: OAH District of Columbia Freedom of Information Act Compliance
OOG-003_9.12.19_AO**

Dear Mr. Mulhauser:

On September 12, 2019, you contacted the Office of Open Government (“OOG”) to request an advisory opinion on the Office of Administrative Hearings (“OAH”) compliance with the Freedom of Information Act (“D.C. FOIA”). The relevant D.C. FOIA provisions require that agencies make “[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” (“Final Orders”) publicly available on the internet.¹

It is the public policy of the District of Columbia 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.”² This includes access to certain records that must be made publicly available on the Internet and without submission of a D.C. FOIA request. To support the District’s public policy, I am authorized to issue advisory opinions on the implementation of D.C. FOIA.³

As detailed below, I find that OAH is not in full compliance with D.C. FOIA’s requirement to make Final Orders publicly available on the internet.

¹ D.C. Official Code §§ 2-536(a)(3); 2-536(b).

² D.C. Official Code § 2-531.

³ D.C. Official Code § 1-1162.05c(d).

I. BACKGROUND

In 2016, the D.C. Auditor (the “Auditor”)⁴ recommended that OAH set a deadline for establishment of its publicly available case management system. The report recommended, *inter alia*, that OAH “[s]et a deadline for implementing a uniform electronic process for filing cases, along with a deadline for the public to access OAH records on the OAH website,” and “[m]ake OAH case dockets and decisions publicly accessible on the OAH website.”⁵ As detailed below, OAH’s inability to implement the public case management system or state the date it will be created is the basis of the advisory opinion request.

On September 12, 2019, I received your request for an advisory opinion concerning OAH compliance with D.C. FOIA’s mandatory disclosure of Final Orders requirement (D.C. Official Code § 2-536(a)(3)). I provided OAH with a copy of the advisory opinion request and on September 16, 2019, OAH submitted a written response to me. On November 2, 2019, you provided me with copies of documents responsive to your October 24, 2019, FOIA request. Your request to OAH was “for any record related to the plan to provide direct limited access from the OAH website to the OAH case management system.”

On December 11, 2019, you provided me with copies of the Mayor’s decision in FOIA Appeals 2020-021 and 2020-036, where you asserted that OAH did not fully respond to your request for records relating to its proposed plan to provide direct but limited access from the OAH website to the OAH case management system. On appeal the Mayor “affirmed OAH’s position that it conducted an appropriate search, and with supplemental document production, was justified in withholding the remaining documents (in whole or in part).” Both appeals were dismissed.

On December 12, 2019, at the Advisory Committee to the Office of Administrative Hearings’ (“Committee”), public meeting you addressed the Committee concerning the dearth of information that is publicly available about the case management system. At that time, the Chief Administrative Law Judge (“ALJ”) invited you to meet with the ALJ regarding information technology (IT) planning and to discuss the case management system. During the week of January 7, 2020, you met with the ALJ and OAH’s Deputy General Counsel.⁶

In response to your request, I reviewed the following: (1) OAH’s September 16, 2019, response to the Complaint; (2) my office’s FY19 agency FOIA compliance audit; (3) OAH’s website; (4) your FOIA submission for record’s concerning OAH’s planned public case management system; (5) FOIA Appeals 2020-021 and 2020-036; (6) OAH’s responses to the FY18-FY19 Performance Questions; and, (7) the Auditor’s 2016 report on OAH operations. I concluded my inquiry on December 17, 2019. I also contacted OAH regarding the matter and

⁴ *Administrative Justice in the District of Columbia: Recommendations to Improve DC’s Office of Administrative Hearings*, Kathleen Patterson, District of Columbia Auditor, September 7, 2016. View the Auditor’s report here <http://dcauditor.org/report/administrative-justice-in-the-district-of-columbia-recommendations-to-improve-dcs-office-of-administrative-hearings/>.

⁵ *Ibid* page 22.

⁶ Your January 13, 2020, email to me stated that during the meeting with the OAH’s ALJ over IT planning and its Deputy General Counsel “you did not learn of any plan developed as they had promised by September 30, 2019, nor any plans along those lines expected in FY20.”

OAH maintains that budgetary and staffing shortages are the reasons for its non-compliance. OAH's plans for full compliance include developing a case management system for public to access Final Orders. OAH acknowledges its non-compliance and has not yet publicly stated when the system will become operational.

I find that 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.⁷ A discussion regarding the reasoning for my findings follows.

II. DISCUSSION

D.C. FOIA's mandatory disclosure of Final Orders provision is not a recent requirement. D.C. FOIA contained a mandatory disclosure of Final Orders provision when the measure was first enacted as law in 1976. In 2001, the law was amended⁸ to require that all Final Orders created on or after November 1, 2001, be made publicly available on the Internet or by other electronic means. Approximately 19 years have elapsed since enactment of the latter provision.

At issue is OAH's adherence to D.C. Official Code § 2-536(a)(3), which states: "[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases"; and D.C. Official Code § 2-536(b) requiring such files to "...be made available on the Internet."

A. OAH is not in full compliance with D.C. FOIA.

My review shows some progress in making Final Orders publicly available. According to its response to the OOG's inquiry regarding the advisory opinion request and the OAH website, since 2017, OAH has made approximately 14,000 final orders publicly available. However, these Final Orders do not include all cases under the 26 areas of which OAH has jurisdiction.⁹ I note that these are more recent Final Orders, and none appear to date back to November 1, 2001.

The statute makes clear that agencies must make all Final Orders created or on after November 1, 2001, publicly available on its website. Based on my investigation results and OAH's admission, I must find that OAH has not fully complied with D.C. FOIA. OAH admits it is not fully compliant with D.C. FOIA and was very candid concerning its compliance status and reasons for its non-compliance. OAH provided the following response:

⁷ D.C. FOIA exemptions may be applied to withhold from records subject to mandatory disclosure. *See* February 4, 2011 Opinion of the Mayor's Office of Legal Counsel (FOIA Appeal 2011-03). Therefore, OAH may lawfully withhold from mandatory Final Orders that meet a FOIA exemption.

⁸ *See* Report of the Committee on Government Operations on Bill 1-119, the Freedom of Information Act of 1975, at 2 (Council of the District of Columbia July 23, 1975); and Report of the Committee on Government Operations, Bill 13-829, the Freedom of Information Amendment Act of 2000, at 5 (Council of the District of Columbia October 31, 2000).

⁹ OAH has authority to adjudicate over approximately 26 jurisdictions. *See* D.C. Official Code § 2-1831.03. The list of jurisdictions and Final Orders uploaded by OAH are here: <https://oah.dc.gov/service/find-final-order>.

OAH does not dispute that it has not fully complied with the statute. . .[H]owever, our collective desire on this front is not supported by the unfortunate realities of the Agency’s budgetary constraints.” “.... [a]ny non-compliance on OAH’s part to relevant legal requirements is not borne out of defiance or ambivalence-but out of a lack of require resources needed to make the agency compliant in these areas.¹⁰

OAH emphasized that its continuing non-compliance with the D.C. FOIA requirement is due to the agency’s financial and staffing constraints. Without contrary evidence, I accept OAH statements as true. Therefore, I also find that OAH’s current state of non-compliance with the statute is not willful. Having established that OAH is not fully compliant with D.C. FOIA, the discussion below turns to OAH’s plans for future compliance.

B. OAH’s plans to fully comply with D.C. FOIA by providing access to its records through a public case management system.

In response to an FY18-FY2019 Performance Question from the District of Columbia Council (the “Council”),¹¹ OAH stated to the Council that it plans to make Final Decisions available by use of a web-based public portal:

A web-based “portal” to the OAH case management system for members of the public is the next level of access, similar to the access now provided to DC government agencies. . .¹²

The implementation of the case management system will move OAH towards full compliance with FOIA. However, to date I have not found any information stating when the case management system will become operational. OAH should establish and make public the date it intends to make the case management system functional.

III. CONCLUSION AND RECOMMENDATIONS

OAH has progressed in making Final Orders publicly available. Overshadowing OAH’s progress are the uncertainties about the planned case management system that would allow the public to access the OAH Final Orders. In 2016, the Auditor recommended that OAH set a deadline for implementing a uniform electronic process for filing cases, and a deadline for the public to access OAH records on its website. I agree with the Auditor’s recommendation. It is crucial that OAH implement the case management system or some other system to make the applicable Final Orders publicly available on the Internet. OAH cannot move towards compliance with D.C. FOIA until it does so.

¹⁰ OAH’s September 16, 2019, correspondence to Director Allen.

¹¹ View OAH’s responses to FY18-FY19 Performance Questions here <https://dccouncil.us/wp-content/uploads/2019/03/oah19.pdf>.

¹²*Ibid.* page 51.

Sincerely,

Niquelle M. Allen

NIQUELLE M. ALLEN, ESQ.
Director, Of Open Government
Board of Ethics and Government Accountability

cc: Vanessa Natale
General Counsel, OAH