

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



December 15, 2017

VIA ELECTRONIC MAIL

Mrs. [REDACTED] Cline
[REDACTED] Avenue, NW [REDACTED]
Washington, DC 20008
[REDACTED]@hotmail.com

VIA ELECTRONIC MAIL

Director Johanna Shreve,
Office of the Tenant Advocate
2000 14th Street, NW Suite 300
Washington, DC 20009
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RE: OOG-0006_8.28.17_FOIA AO

Dear Mrs. Cline:

The Office of Open Government (OOG) is in receipt of your August 28, 2017, request for a Freedom of Information Act (FOIA) advisory opinion on the legality of the Office of the Tenant Advocate (OTA) request that you: (1) pay fees associated with a FOIA request where the OTA acknowledged but failed to honor your request to provide you with an advance estimate of search fees, review fees, and duplication fees in excess of \$25; (2) pay the cost to obtain records where the cost exceeds the amount you told OTA you are willing to pay; and (3) pay in advance for future FOIA requests pursuant to D.C. Official Code Official Code § 2-532(b-3).

The foregoing non-binding advisory opinion is issued by the OOG pursuant to section 503(c) of the District of Columbia Administrative Procedure Act, effective March 31, 2011(D.C. Law 18-350; D.C. Official Code § 2-593(c)), which empowers the OOG to issue advisory opinions on the implementation of Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*), the Freedom of Information Act of 1976.

FOIA regulations state its “rules and procedures are to be followed by all agencies, offices, and departments and all persons requesting records pursuant to the act” (1 DCMR § 400.1). This means all parties to a FOIA request, whether an agency, public body or a requester must strictly adhere to FOIA regulations to lawfully process the request.

As discussed below, the OOG opines that the OTA is in violation of FOIA: (1) for failing to provide you (the Requester) the opportunity to inspect, and at her discretion, to copy public records, and for its failure to provide an advanced estimate of the cost to obtain records

(1 DCMR § 407.1); (2) for failing to properly process a request involving an extensive amount of documents (1 DCMR § 408.3); and (3) for issuing the records to the requester prior to obtaining payment (1 DCMR § 408.6). As a consequence of OTA's failure to adhere to the above referenced provisions, it now requires that the requester pay the cost of future FOIA requests in advance as it deems the requester as one who has a history of untimely payments. On this issue, the OOG's research did not disclose statutory authority or case law to support the OTA's mandate. In the case at bar, it would appear that equitable principals and the absence of legal precedent and statutory authority should preclude the OTA from invoking the advance payment fee provisions of D.C. Official Code § 2-532(b-3). This is because it is the OTA's failure to adhere to FOIA and its regulations that places the requester in the untenable position of "having previously failed to pay fees in a timely fashion." Since the OTA did not adhere to FOIA in processing the request, the agency may consider providing the records to the requester without charge as a courtesy. However, per FOIA the OTA may request advance payment of fees from this requester where the agency determines that a future request will exceed \$250.

BACKGROUND

The OTA was established pursuant to section 2(d) of the "Independent Office of the Tenant Advocate Establishment Amendment Act of 2006, effective October 1, 2007 (D.C. Law 16-181; D.C. Official Code § 42-3531.05). The OTA's statutory purpose¹ is "to advocate on behalf of the education of, and outreach to, tenants and the people of the District" (D.C. Official Code § 42-3531.02). The Requester is a District of Columbia tenant with a history of making FOIA requests to the OTA.

On July 11, 2017, the Requester submitted electronically to the OTA² a FOIA request to obtain the following: (1) Statistics containing or reflecting the total number of e-mail addresses on all OTA public outreach distribution lists for newsletters and rental housing news, notices for periodic stakeholder meetings and annual Summit announcements for 2014-2017; (2) Statistics containing or reflecting the total number of e-mail addresses on all OTA public outreach distribution lists for notices of all DC City Council legislative news and hearings, bills pending, description of laws passed and other pertinent legislative information; (3) Statistics, including OTA reports and sign-in attendance sheets, containing or reflecting the total number of attendees of all OTA stakeholder meetings for 2014-2017; (4) Statistics, including sign-in attendance sheets, containing or reflecting the total number of attendees at all OTA Summit renter workshops for 2014-2017; (5) Statistics, including OTA reports, containing or reflecting the total number of OTA website visits for 2014-2017; (6) Statistics, including OTA'S reports, containing or reflecting the total number of OTA's Facebook and Twitter visits for 2014-2017.

The FOIA request states that the Requester is willing to pay duplication fees of up to \$25 and asks for a waiver³ of fees for search and review pursuant to D.C. Official Code § 2-532(b-1)(2),

¹ D.C. Official Code § 42-3531.07, list the duties of the OTA.

² The FOIA request was sent to Harrison J. Magy, OTA Attorney Advisor and FOIA Officer.

³ In response to the Requester's waiver request, the OTA writes: "[Y]ou have requested a waiver of fees under D.C. Code § 2-532. Under D.C. Municipal Regulations Title 14, § 408.10, {sic} "[a] requester seeking a waiver or reduction of fees shall provide a statement in his or her request letter explaining how the requested records will be used to benefit the general public." As you have provided no such statement aside from just mentioning D.C. Code § 2-532(b-1)(2), we are unable to grant a request for a waiver of fees at this time. If you still wish to request a waiver

and states: “[I]f fees may be incurred, then please let me know the amount of any proposed search, review and reproduction charges *before those activities are carried out*. If you have any questions concerning this request, please contact me at [REDACTED].” (Emphasis added). That same day the Requester received from the OTA an electronic response acknowledging the FOIA and the request for advance notification of fees. This response, in relevant part, states:

“For services rendered under D.C. Municipal Regulations Title 14, § 408.1(a-1){sic}, we are allowed to charge \$7 per quarter hour after the first hour for searching for records by professional personnel, and \$0.25 per page for copies made by photocopy machine. *While we acknowledge your willing[ness] to pay duplication fees up to \$25[,] at this time, we are unsure of the fees that will be charged.* (So far, during Fiscal Year 2017, we have charged you an average of \$136.50 for searching, and \$16.50 for photocopying per request-though ultimate total fees for the instant request may be higher.) Under D.C. Municipal Regulations Title 14, §§ 408.6 {sic} and 408.7, *such fees are payable prior to issuance of the requested copies*, and shall be payable to the D.C. Treasurer in the form of a personal check or bank draft on a bank in the United States, or a personal money order[;] we may also request advance payment if we determine that the fee will exceed \$250. D.C. Code § 2-532(b-3). *We will commence our attempt to fulfill your request, and will let you know the fees to be charged as soon as they are calculated.*”

You have requested a voluminous amount of documentation and, pursuant to D.C. Code § 2-532(d)(1) and D.C. Municipal Regulations Title 14 § 405.3(a) [sic], the Office of Tenant Advocate (OTA) is exercising its option to extend the time to respond to your inquiry by ten business days. Therefore, we anticipate your request to be ready twenty-five business days, i.e., Tuesday, August 15, 2017, after today’s date, or receiving an amended request with a statement under D.C. Municipal Regulations Title 14, § 408.10 {sic}.(Internal quotes omitted)(Emphasis added).

On August 15, 2017, OTA electronically sent to the Requester a determination granting in part and denying in part the FOIA request along with the releasable records. The determination includes a breakdown of the \$240.75⁴ fee for processing the request. The determination in relevant part, states:

“As it is not possible at this time to issue a timely request only upon prior payment of fees, we will not insist on upfront payment before providing you with the response to your request. 1 DCMR § 408.6. *Therefore, please contact me as soon as possible to make payment arrangements. Please note we reserve the right to insist on the full payment of any fees prior to your receipt of response to any future requests.*” (Emphasis added).

of fees, please provide us with an amended request that includes a statement under D.C. Municipal Regulations Title 14, § 408.10 {sic}.” The Requester did not respond to OTA’s request to amend the waiver request.

⁴\$196 was for searching and initial review by professional personnel, \$40 for initial review by supervisory personnel and \$4.75 for photocopies.

Before focusing on the instant FOIA request, an analysis of previous OTA communications to the Requester in response to these FOIA requests is in order.

The OTA's Communications to the Requester in Response to the January 28, 2016, FOIA request.

On January 28, 2016, the Requester sent to the OTA an electronic FOIA request for records that relate to the OTA's 2015 Tenant Summit. The request in relevant part, reads:

"I am willing to pay duplication fees up to \$25. I request a waiver of fees for searching or review under D.C. Code § 2-532(b-1)(2). If fees may be incurred, then please let me know of the amount of any proposed search, review and reproduction charges before those activities are carried out."

That same day, the OTA sent an electronic acknowledgement to the Requester that does not provide an estimate of costs. On April 1, 2016, the OTA sent the Requester an untimely determination with responsive records. The determination states: "[Y]ou offered to pay up to \$25 of the expenses for assembly your request. However, as a courtesy, OTA will not be assessing any charges."

The OTA's Communications to the Requester in response to the October 4, 2016, FOIA request.

The OTA's October 7, 2016, acknowledgment to the Requester's October 4, 2017, FOIA requests provides an estimate of charges of at least \$99⁵ (\$84 for searching and \$15 for copying). The Requester, however, did not ask for advance notification of costs in this instance. The acknowledgment reminds the Requester that fees are payable prior to issuance of records and asks the Requester to notify the OTA of acceptance of the fee estimate. The acknowledgment reads in relevant part:

"Under D.C. Municipal Regulations Title 14, §§ 408.6 {sic} and 408.7, *such fees are payable prior to issuance of the requested copies*, and shall be payable to the D.C. Treasurer in the form of a personal check or bank draft on a bank in the United States *Please let us know as soon as possible if you wish to accept our fee estimate.*" (Emphasis added)

In an October 13, 2016, electronic correspondence the Requester confirms to the OTA an acceptance of its fee estimate. Later that same day, the OTA sent the Requester an electronic response which acknowledges the receipt of the Requester's fee estimate acceptance. On November 16, 2016, the OTA issued to the Requester its determination letter which states:

"You made a FOIA request, ultimately deemed effective October 11, 2016 when the Office of Tenant Advocate received ("OTA") confirmation of your acceptance of our estimate of \$99 in fees.

⁵ The actual charges to process the FOIA request are \$107.25.

Under D.C. Municipal Regulations Title 14, §§ 408.6 {sic} and 408.7, *such fees are payable prior to issuance of the requested copies*, and shall be payable to the D.C. Treasurer in the form of a personal check or bank draft on a bank in the United States . . .”

Concerning the October 4, 2016, FOIA request, the OTA provides to the Requester: (1) an estimate of fees to process the request; (2) a reminder that fees are due prior to the issuance of the requested copies; and (3) a statement that no action will be taken on the request until the agency receives the Requester’s fee acceptance notification.

The OTA’s Communications to the Requester in response to the Requester’s February 1, 2017, FOIA request.

The relevant portions of the OTA’s February 21, 2017, correspondence: (1) acknowledges the Requester’s acceptance of \$155.00 fee estimate; (2) states the February 1, 2017, request was dormant until receipt of the Requester’s estimated fee acceptance notification; and (3) reiterates the release of the records is predicated upon receipt of payment. Specifically, it states:

“I am in receipt of your acceptance of \$155.00 in estimated fees dated February 21, 2017, which reactivates your FOIA request of February 1, 2017 that was held dormant February 17, 2017 pending your acceptance of the estimated fees.

Under D.C. Municipal Regulations Title 14, §§ 408.6 {sic} and 408.7, *such fees are payable prior to issuance of the requested copies*, and shall be payable to the D.C. Treasurer in the form of a personal check or bank draft on a bank in the United States . . .

We will recommence our searching for the requested records and preparing our response, and will let you know if the fees end up exceeding \$155.00.

[Y]our request was received February 1, 2017. We sent you a new estimate February 17, 2017, twelve business days later and held your request dormant. You accepted the fees February 21, 2017, and reactivated the request.”

Similar to the OTA’s October 4, 2016, acknowledgement to the requester the February 21, 2017 FOIA acknowledgement provides: (1) an estimate of fees; (2) acknowledges acceptance of the fees by the Requester is necessary before “reactivating” the request; and (3) cites the FOIA provision that requires payment of fees prior to the issuance of records by OTA. With the review complete of the OTA’s prior history of FOIA communications to the Requester, an analysis of the instant request is in order.

The July 11, 2017, FOIA Request.

The Requester’s February 1, 2017, and the July 11, 2017, FOIA requests both ask that the OTA provide advance notification of any reproduction costs in excess of \$25, and an estimate of the search and review costs if it does not grant a waiver of these costs. However, the OTA’s

acknowledgment of the Requester's February 1, 2017, FOIA request contains the following language that is absent from the OTA's July 11, 2017, FOIA request acknowledgement: (1) an estimate of all costs for the request, (2) an acknowledgement of the Requester's acceptance of the charges; and (3) the statement that the OTA would notify the Requester if fees exceed the amount stated. Relevant language from the OTA's February 21, 2017, acknowledgement to the Requester differs from its August 11, 2017, acknowledgement to the Requester and reads in relevant part:

“Having conducted a broad, but preliminary, overview, we anticipate charging at least \$105 for searching and \$50 for photocopying—though these totals may be higher. . . On February 21, 2017, you confirmed that you accept the \$155.00 estimated figure. We will commence searching for the requested records and preparing our response, and will let you know if the fees end up exceeding \$155.00.”

It is unclear why the OTA's October 7, 2016 and February 21, 2017 FOIA acknowledgements to the Requester contains an estimate of all costs while the OTA's January 28, 2016 and August 11, 2017, FOIA acknowledgements fail to provide an estimate. The OTA made clear in its November 16, 2016 and February 21, 2017 correspondence to the Requester that work would not begin until the Requester acknowledged the fee estimate and agreed to pay prior to issuance of the records. However, the OTA inexplicably releases to the Requester records responsive to the July 11, 2017, FOIA request: (1) without receipt of the Requester's payment; (2) without providing the Requester an advance estimate of fees to process the request; and (3) without a corresponding acceptance of a fee estimate.

Dispositive of this issue are the FOIA regulations at 1 DCMR §§ 407.1⁶, 408.3 and 408.6 and the FOIA provisions in D.C. Official Code §§ 2-532(a) and 2-532(b-3). A discussion of these provisions follows.

The OTA violates D.C. Official Code § 2-532(a) and 1 DCMR § 407.1 by failing to notify the requester when and where the records were to be available for inspection or copies will be made available and any applicable fees.

D.C. Official Code § 2-532(a) makes abundantly clear that “[A]ny person has a right to inspect, and at his or her discretion, to copy any public record of a public body. . .” FOIA regulations found at 1 DCMR § 407.1 which implement this provision reads: “[W]hen a requested record has been identified and is available, the agency shall notify the requester where and when the record will be available for inspection or copies will be made available. The notification shall also advise the requester of any applicable fees.” Regarding the July 11, 2017, FOIA request, on August 15, 2017, the OTA sent the Requester the releasable records along with a request for payment of \$240.75. In doing so, the OTA's failed to provide the requester with the opportunity to inspect the releasable records as evident. The requester's statutory right to inspect records is fundamental to processing the request. This is because inspection allows a review to ascertain

⁶1 DCMR § 400 *et seq.*, “contains the rules and procedures to be followed by all agencies, offices, and departments of the District of Columbia Government which are subject to the administrative control of the Mayor in implementing the Freedom of Information Act, . . . and all persons requesting records pursuant to the Act.”

what records, if any to copy, and is crucial when the request involves an extensive amount of records. In the matter at hand, the OTA failed to allow the Requester the right to inspect the records, as evidenced by the OTA sending the Requester “136 pages of random, unidentified numbers that are useless, and blank attendance sheets that are useless.”⁷ Additionally, the OTA is demanding the Requester pay the copying costs for documents that are of no discernible use to the Requester and for which the Requester did not receive an advance notification of any applicable fees pursuant to 1 DCMR § 407.1. The OTA’s responses to the July 11, 2017, FOIA request is inadequate because of the following: (1) there is no estimate of costs to process the request; (2) there is no corresponding acceptance by the Requester of a fee estimate; and (3) there is a release of records prior to receipt of payment.

The OTA’s violation of 1 DCMR § 408.3 was its failure to inform the Requester that the records were available for inspection when an extensive number of documents were identified and the Requester did not indicate in advance the willingness to pay fees as high as had been anticipated.

To prevent blindsiding a requester regarding the cost of processing a voluminous FOIA request, 1 DCMR § 408.3 requires the agency to place the requester on notice that the records are available for inspection and subsequent copying, and any fees that may be charged in connection with processing a request. Prior to any action to locate responsive records by the OTA, the Requester states her unwillingness to pay duplication fees above \$25, and requests advance notification of search and review costs:

“[I]f fees may be incurred, then please let me know the amount of any proposed search, review and reproduction charges before those activities are carried out. If you have any questions concerning this request, please contact me at [REDACTED]

The OTA’s July 11, 2017, FOIA acknowledgment recounts that the Requester was charged \$136.50 for searching and \$16.50 for photocopying per request during Fiscal Year 2017, acknowledges the Requester’s willingness to pay fees up to \$25, and the request for a waiver of search and reviews charges. The OTA emphatically states: “[W]e will commence our attempt to fulfill your request, *and let you know the fees to be charged as soon as they are calculated.*” (Emphasis added). Additionally, the OTA’s July 11, 2017, FOIA acknowledgement states the request “involves a voluminous amount of documentation.” This fact in concert with the Requester’s request for advance notification of search and review fees and duplication fees in excess of \$25, places this matter clearly within the scope of 1 DCMR § 408.3, which reads:

408.3 Where an extensive number of documents is identified and collected in response to a request and the requester has not indicated in advance his or her willingness to pay fees as high as are anticipated for copies of the documents, the agency shall inform the requester that the documents are available for inspection and for subsequent copying at the established rate.

⁷ The aforementioned language is from a statement dated September 25, 2017, which the Requester provided to the OOG.

By failing to adhere to 1 DCMR § 408.3, the OTA took away the Requester's opportunity to inspect the records for subsequent copying, and to thereby eliminate certain records she found unnecessary to her request.

The purpose of 1 DCMR § 408.6 is to ensure the agency or public body receives payment for the applicable FOIA costs prior to providing documents to a requester.

To ensure an agency or public body receives payment, FOIA regulations provide that an entity may obtain payment for search, review and duplication cost prior to the issuance of responsive records to a requester. 1 DCMR § 408.6⁸ makes this abundantly clear. It reads:

408.6 To the extent permitted by applicable law, an agency shall require that fees as prescribed by these rules shall be paid in full prior to issuance of requested copies.

Additionally, FOIA case law places great emphasis on an agency's right to withhold records pending the receipt of payment. "[I]f Federal {sic} agencies were required to provide copies of records to FOIA requesters before receiving payment from them, the Government {sic} would effectively be bankrolling search and review, and duplicating expenses because there would never be any assurance whatsoever that payment would ever be made once the requesters had the documents in their hands." *Strout v. United States Parole Commission*, 842 F. Supp. 948, 951 (E.D. Mich. 1994). The OTA's August 15, 2017, determination letter to the Requester includes the following statement:

"As it is not possible at this time to issue a timely request only upon prior payment of fees, we will not insist on upfront payment before providing you with the response to your request. 1 DCMR § 408.6. *Therefore, please contact me as soon as possible to make payment arrangements. Please note we reserve the right to insist on the full payment of any fees prior to your receipt of response to any future requests.*" (Emphasis added).

Pursuant to FOIA and as is stated in the July 11, 2017, FOIA acknowledgement, the OTA should have provided an estimate of all costs to Requester and withheld the release of responsive records until receipt of payment. The OTA is in effect forcing the responsive records on the Requester. By providing the documents to the Requester prior to receipt of payment constitutes a violation by the OTA of 1 DCMR § 408.6. And along with its failure to notify the Requester of charges in advance is the proximate cause of the Requester being deemed as one failing to make timely payment. Therefore, it is the result of the OTA's failure to comply with FOIA and its regulations that is placing the Requester in the untenable position of not paying for the records.

⁸ Some federal agency regulations to implement Federal FOIA specifically authorize the agency to submit the response with a request for payment. See *Martinez v. SSA*, 2008 U.S. Dist. LEXIS 21703, at 16, which cites 20 C.F.R. § 402.180(c).

<https://advance.lexis.com/api/document/collection/cases/id/4S3H-KYM0-TXFP-D2DY-00000-00?cite=2008%20U.S.%20Dist.%20LEXIS%2021703&context=1000516>

FOIA's advance payment provisions.

D.C. Official Code § 2-532 (b-3) provides that “[N]o agency or public body may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency or public body has determined that the fee will exceed \$250.” The language which comprises subsection (b-3) was an amendment to section 202 of FOIA (the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-532), by the Documents Administrative Cost Assessment Amendment Act of 2004, effective March 17, 2005 (D.C. Law 15-242). The purpose D.C. Law 15-242 as its long title reflects is to “[A]mend the District of Columbia Administrative Procedure Act to conform the document fee costs under the District of Columbia Freedom of Information Act with the federal Freedom of Information Act as set forth in 5 U.S.C. § 552(4).” The FOIA language found in subsection (b-3), with the exception of inclusion of the phrase “or public body” after the term “agency” in both places, mirrors federal FOIA. The federal provision upon which subsection (b-3) is based, found at 5 USC § 552(a)(4)(A)(v) reads:

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

The D.C. FOIA is modeled on the federal Freedom of Information Act, and therefore we look to decisions interpreting like provisions in the federal act when we interpret the meaning of the D.C. FOIA. *See Hines v. District of Columbia Board of Parole*, 567 A.2d 909, 912 (D.C. 1989); *Barry v. Washington Post*, 529 A 2d 319, 321. The OOG is hard pressed to find case law, or in FOIA’s legislative history, support for the application of D.C. Official Code § 2-532(b-3) to cases where an agency or public body violates FOIA by providing a requester with records prior to receipt of payment and without providing the requester an requested estimate of charges to obtain the public record.

Therefore, unless it produces legal authority to do so, the OTA should be precluded from invoking the advance payment fee provisions of D.C. Official Code § 2-532(b-3) in this instance.

CONCLUSION

FOIA regulations provide, “[T]o the extent permitted by applicable law, an agency shall require that fees prescribed by these rules shall be paid in full prior to issuance of requested copies.” The purpose of this regulation is to ensure that agencies receive payment prior to the release of records to the requester. It is incumbent on the agency or public body to adhere to FOIA’s regulations. With the exception of one request where costs were waived. The OTA did not release records to the Requester prior to receipt of payment. Without legal authority to do so, an agency may not rely on FOIA’s advance payment provision, where at not fault of the requester it releases responsive records prior to receipt of payment; and fails to provide an estimate of costs at the requester’s request and per FOIA. The OTA provided records to the Requester without charge as a courtesy for supplying records untimely in response to the Requester’s January 28,

2016 FOIA request, presumably relying on 1 DCMR § 408.9⁹ to do so. The OTA may consider providing these records without charge to the Requester due to the circumstances of this case. Furthermore, to support the contention that FOIA's advance pay provisions do not apply to the instant case, the OTA's history of dealings with the Requester shows when given an estimate of the FOIA cost, payment is timely.

Sincerely,



TRACI L.HUGHES, ESQ.
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Board of Ethics and Government Accountability

cc: Harrison J. Magy, Esq.
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⁹ 1 DCMR § 408.9 reads, "An agency may waive all or part of any fee when it is deemed to be either in the agency's interest or in the interest of the public."