



BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY  
GOVERNMENT OF THE DISTRICT OF COLUMBIA



February 4, 2025

VIA ELECTRONIC MAIL



**RE: MOLC Delays in Publication of Freedom of Information Act  
Administrative Appeal Decisions in the D.C. Register # OOG-2024-  
006\_AO**



This advisory opinion responds to the D.C. Open Government Coalition’s (“OGC”) July 8, 2024, advisory opinion request (“Request”) 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<sup>1</sup> (“D.C. FOIA”). OGC requested that the Office of Open Government (“OOG”) address the following questions. First, “[W]hether long-delayed publication of opinions in the DC Register at a pace set by the agency and the Register is [] by itself [] satisfactory implementation of the D.C. FOIA proactive publication requirement?”<sup>2</sup> Second, 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 is the Register an adequate substitute for the District’s publication website<sup>3</sup> “Publications?”<sup>4</sup>

It is the public policy of the District of Columbia government (the “District”) “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.”<sup>5</sup> To support the District’s public policy, as Director of Open Government, I am authorized to “issue advisory opinions on the implementation of [D.C. FOIA]” pursuant to section 205c(d) of the Government Ethics Act of 2011.<sup>6</sup>

<sup>1</sup> Effective March 29, 1977 (added to Pub. L. 90-614 by D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).

<sup>2</sup> Email from [REDACTED] to Louis Neal (OOG) on July 8, 2024.

<sup>3</sup> *Ibid.*

<sup>4</sup> [Publications | DC](#).

<sup>5</sup> D.C. Official Code § 2-531.

<sup>6</sup> Title II of D.C. Law 19-124, effective October 30, 2018 (D.C. Official Code § 1-1162.05c(d)).

First, I find in like manner to my prior advisory opinion (OOG-2022-004-AO) that there has been delay in publication of FOIA appeal decisions by the MOLC. Second, I find that D.C. FOIA does not address any pace or schedule of an agency formed with the D.C. Register to post [FOIA] opinions. Therefore, such a pace or schedule as described in your Request cannot be used to determine whether an agency's (such as MOLC) publication of opinions amounts to satisfactory implementation of D.C. FOIA proactive disclosure requirements. Third, while the MOLC's delay in posting FOIA appeal decisions in the D.C. Register falls short of the proactive disclosure requirements of D.C. FOIA, the degree of search required to locate the information does not amount to unavailability of the same.<sup>7</sup> Thus, the search required does not in and of itself contravene D.C. Official Code § 2-536(b). In addition, I am issuing this advisory opinion in response to your inquiry about any further recommendations to address the delay in the MOLC's posting of FOIA appeal decisions to the Register, if it is found that the MOLC's plans do not meet the legal requirements for timely and accessible publication. I find that MOLC's plans as relayed to you in Chief Counsel Neal's response letter dated July 8, 2024, and my advisory opinion (OOG-2022-004-AO), are insufficient to the extent they have not been fully implemented by the MOLC and/or do not fully address the issue of making FOIA appeal decisions publicly available as D.C. Official Code § 2-536(a)(3) requires. As such, I have provided additional recommendations to the MOLC's plans to remove (or prevent) the backlog of publicly disclosing its FOIA appeal decisions in accordance with D.C. FOIA and urge the MOLC to fully implement all its previously communicated plans.

## **I. BACKGROUND**

### *A. Acknowledgement of the MOLC's Backlog and OOG's Recommendation in 2022*

On June 29, 2022, I issued an advisory opinion in response to your Request concerning MOLC's issuance and publication of administrative appeal decisions under D.C. FOIA.<sup>8</sup> In response to your description of and objection to MOLC's backlog of D.C. FOIA appeals not posted in the D.C. Register, I 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, I analyzed MOLC's docket relative to the information on unavailability of appeal decisions from the public provided in your Request. My analysis reads in part as follows:

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<sup>7</sup> This is based on certain statistics provided in my advisory opinion - OOG-2022-004-AO, and letter dated July 8, 2024, from OOG's Chief Counsel Louis Neal to OGC.

<sup>8</sup> OOG-2022-004-AO; D.C. Official Code § 2-531.

The Mayor's reports state 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).<sup>9</sup>

Also, while there are summaries in the Mayor's annual FOIA reports, it does not appear that the full text of any recent FOIA-appeal decision by the MOLC is available on-line. I agree with you that ensuring that "the D.C. public records access process works well" demands the "key executive responsibility" of "publishing the result[s] so there is no secret law-everyone can keep up with the executive view of the law."

It appears that the MOLC has not affirmatively released FOIA-appeal decisions in the *D.C. Register* since the November 1, 2019, issue, which published many decisions at once.<sup>10</sup> On its FOIA Appeals page,<sup>11</sup> the MOLC invites the reader to a link that produces FOIA decisions as a search result, but that search (last viewed on June 21, 2022) yields no decisions more recent than FOIA Appeal 2018-078, decided on March 7, 2018. **To be sure, 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.**<sup>12</sup>

In my June 29, 2022, advisory opinion, I reported on the MOLC's Director Eugene A. Adams' identification of the causes of MOLC's inability to make its FOIA appeal decisions publicly available in a timely manner. He identified the following: the Executive decision to stay MOLC's processing of FOIA responses owing to the public health emergency presented by the COVID-19 pandemic; lack of adequate resources (insufficient workers); and getting responses from custodial agencies in a timely manner.

In addition, I 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. I discussed 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, I recommended (and still maintain) that the Mayor seek a legislative remedy through the D.C. Council that properly addresses the inadequate processing time. Bound up in my preceding recommendation was (and remains) that the D.C. Council could adopt an "unusual circumstances" extension like that available for first-level D.C. FOIA responses and federal FOIA appeals.

<sup>9</sup> See [FY2020 Final-FOIA-Report](#) at 178-98; [FY-2021-District-of-Columbia-FOIA-Report](#) at 207-16. Of course, not all FOIA requests are equally complex, so not all appeals are equally time-consuming to evaluate and decide.

<sup>10</sup> See 66 DCR 014580-014799 (Nov. 1, 2019) ("FOIA Appeals" numbers 2019-51 to 2019-162 (not entirely inclusive)).

<sup>11</sup> [Freedom of Information Act \(FOIA\) - Appeals](#).

<sup>12</sup> D.C. Official Code § 2-536(a)(3), (b) (section 206 (a)(3) and (b), of D.C. FOIA) (requiring affirmative posting of certain "records created on or after November 1, 2001," including "[Jina] opinions" and "orders, made in the adjudication of cases").

## B. *Main Facts Under Consideration*

On July 1, 2024, you sent correspondence to OOG regarding concerns from OGC with continuing delays in publication of FOIA opinions by the MOLC.<sup>13</sup> Your letter also stated that OOG had previously examined this topic and concluded that “The MOLC should ensure that, at the same time that an opinion is signed and released to the requester(s) and custodian(s), it affirmatively posts the opinion for public viewing.”<sup>14</sup>

In preparation for a response to your letter, OOG’s Chief Counsel Louis Neal contacted the MOLC’s Senior Attorney Advisor and FOIA Officer Shawn Nolen and relayed OGC’s specific concerns. On July 8, 2024, Chief Counsel Neal emailed you a letter responding to your initial inquiry with information that he had gathered from Mr. Nolen. As relayed to you in a letter dated July 8, 2024, Mr. Nolen informed Chief Counsel Neal 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, Mr. Nolen informed Chief Counsel Neal that the endeavor entailed a “multi-step process” and would take some time to complete. Mr. Nolen did not provide the Chief Counsel with an exact date of completion but stated that he would be able to better estimate a timeframe for completion within a few months of that date.

Chief Counsel Neal further relayed to you in that same letter that Mr. Nolen provided him with a then-current report of where the MOLC stood regarding their FOIA opinions publication process. At the time, Mr. Nolen reported that:

1. The [MOLC’s] decisions needed were prepped into a specific format prior to publication to the D.C. Register. They [had] currently identified 1008 decisions for publication during [that] timeframe. [R]oughly 600 of those ha[d] been prepped into the required format;
2. [The MOLC] ha[d] been in discussions with the Register about the volume of the decisions to publish and [they were] also 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. [Mr. Nolen] suspect[ed] that even after getting through the preliminary administrative processes, there [could] be 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.

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<sup>13</sup> Email from [REDACTED] to Louis Neal (OOG) on July 1, 2024.

<sup>14</sup> OOG-2022-004-AO, 10.

Chief Counsel Neal also relayed to you that Mr. Nolen had granted an open invitation to you and the OGC to contact him directly if you had any questions or additional concerns about their ongoing publication project. On that same day, July 8, 2024, you responded by email to Chief Counsel Neal and expressed that both you and the OGC hoped to hear more about the MOLC’s publication plans; but also wanted OOG’s independent views on the matter, as we are so authorized under our governing statute to provide such an advisory opinion.

You have asked in your Request that OOG provides an advisory opinion on the following. “[W]hether long-delayed publication of opinions in the DC Register at a pace set by the agency and the Register is [] by itself [] satisfactory implementation of the D.C. FOIA proactive publication requirement?”<sup>15</sup> Second, 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 is the Register an adequate substitute for the District’s publication website<sup>16</sup> “Publications?”<sup>17</sup> I note that your first question presumably has in contemplation certain information (second point in the preceding) Chief Counsel Neal relayed from Mr. Nolen to you, in letter dated July 8, 2024.

A description of the MOLC’s administrative review process follows and precedes the MOLC’s recent correspondence concerning plans to decrease the backlog of the publication of its FOIA appeal decisions. MOLC’s recent publishing of its FOIA appeal decisions from FY2020 to FY2024 (approximately 1094 decisions)<sup>18</sup> on its website is discussed. Also, information on the extent to which plans relayed in Chief Counsel’s response letter dated July 8, 2024, and my advisory opinion (OOG-2022-004-AO) have been implemented are presented and discussed.

*C. 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 (with two exceptions<sup>19</sup>), may first seek administrative review by petitioning (i.e., sending an

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<sup>15</sup> Email from [REDACTED] to Louis Neal (OOG) on July 8, 2024.

<sup>16</sup> Ibid.

<sup>17</sup> [Publications | DC](#).

<sup>18</sup> Email from Shawn Nolen (MOLC) to Louis Neal (OOG) on January 28, 2025.

<sup>19</sup> Requesters denied access to “public record[s] in the possession of the” Council of the District of Columbia or the Attorney General must appeal directly to the Superior Court. See D.C. Official Code Section 2-537(a) to (a-2).

appeal to) the Mayor’s designated agent.<sup>20</sup> Since January 2, 2015, that designated agent has been the MOLC.<sup>21</sup>

The MOLC’s administrative-review process is in 1 DCMR § 412:<sup>22</sup>

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<sup>[23]</sup> to:

Mayor’s Correspondence Unit<sup>[24]</sup>  
 FOIA Appeal  
 1350 Pennsylvania Ave[. N.W.]  
 Suite 221  
 Washington, D.C. 20004

The requester shall 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.

412.4 An appeal to the Mayor shall include:

(a) Statement of the circumstances, reasons or arguments advanced in support of disclosure;

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<sup>20</sup> *Id.* §§ 2-532(e); 2-537(a)–(b).

<sup>21</sup> The Mayor’s designee “to review and determine administrative petitions or appeals” has been the Mayor’s Office of Legal Counsel since January 2, 2015, as confirmed by Mayor’s Order 2019-067, 66 DCR 008796 (July 26, 2019 (effective nunc pro tunc (i.e., retroactively))). While 1 § DCMR 412.3 requires the requester-appellant to mail the petition to the Mayor’s Correspondence Unit, I note that (1) the MOLC accepts appeals by e-mail, [Freedom of Information Act Appeals | molc](#), and via the online Public Access Portal (PAL), [foia-dc.gov/app/PalLogin.aspx](#); and (2) Mayor’s Order 2019-067, § 2, requires that “any appeal . . . mailed to the Mayor’s Correspondence Unit in accordance with 1 DCMR § 412 . . . be forwarded to [the] MOLC.”

<sup>22</sup> 1 DCMR § 400 et seq. are the D.C. FOIA regulations applicable to “agencies, offices, and departments . . . subject to the administrative control of the Mayor. . . . and all persons (hereinafter “requesters”) requesting records pursuant to [D.C. FOIA].” 1 DCMR § 400.1.

<sup>23</sup> According to the MOLC’s “[Freedom of Information Act Appeals](#)” site, the MOLC also accepts (and indeed “prefer[s]”) appeals sent by e-mail to [foia.appeals@dc.gov](mailto:foia.appeals@dc.gov) or via GovQA. But the regulations do not mention any medium or method of submission beyond postal mail. Accordingly, to maximize the options for the requester, I recommend that the Mayor amend 1 DCMR § 412.3 to accept appeals submitted electronically as the MOLC currently does (and, if feasible, in-person).

<sup>24</sup> Mayor’s Order 2019-067, § 2, provides for appeals “mailed to the Mayor’s Correspondence Unit” to “be forwarded to [the] MOLC.” However, this address is no longer accurate and conflicts with the mailing address for appeals on the FOIA Appeals page. That page has a mailing address to the MOLC. I recommend clarifying or technical amendments to the regulations to update this information.

- (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.

412.5 Within five . . . days (excluding Saturdays, Sundays, or legal public holidays) of receipt of its copy of the FOIA appeal the agency shall file a response with the [MOLC<sup>25</sup>]. The response shall include . . . :

- (a) The agency's justification for its decision not to grant review of records as requested, to the extent not provided in the agency's letter of denial . . . ;
- (b) Any additional documentation as may be necessary and appropriate to justify the agency's decision . . . ; and
- (c) A copy of the public record or records in dispute on the appeal; provided, that if the public record or records are voluminous, the agency may provide a representative sample; and provided further, that if the public record contains personal, sensitive, or confidential information, the public body may redact such information . . . in a manner that makes clear that the agency has made redactions.

412.6 An agency may request additional time to file documentation required by § 412.5 by filing a . . . request . . . with a copy to the requester. The request . . . must be filed within five (5) days (excluding Saturdays, Sundays, and legal public holidays) of receipt of the appeal. The [MOLC<sup>26</sup>] will respond to the request . . . with a copy to the requester. An agency that does not file the information required by § 412.5 within the time provided . . . shall be deemed to have waived its right to respond to the appeal.

412.7 A written determination with respect to an appeal shall be made within ten (10) days (excluding Saturdays, Sundays and legal public holidays) of the filing of the appeal.

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<sup>25</sup> Substituted for "Secretary." 1 DCMR § 412.2.

<sup>26</sup> Substituted for "Secretary." 1 DCMR § 412.6.

412.8 If the records, or any segregable part thereof, are found to have been improperly withheld, the [MOLC<sup>27</sup>] shall order the agency to make them available. If the agency continues to withhold the records, the requester may seek enforcement of the order in the Superior Court.

412.9 A denial in whole or in part of a request on appeal shall set forth the exemption relied upon, a brief explanation consistent with the purpose of the exemption of how the exemption applies to the records withheld, and the reasons for asserting it. The denial shall also inform the requester of the right of judicial review.

412.10 If no determination has been dispatched at the end of the ten-day period, the requester may deem [the] appeal denied, and exercise [the requester's] right to judicial review of the denial.

I now turn my attention to the MOLC's additional plans to decrease the backlog of the publication of its FOIA appeal decisions and the extent to which the previous plans and those that follow have been implemented.

## II. DISCUSSION

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

To respond to your Request concerning the MOLC's delay in the publication of its FOIA Appeal decisions in the D.C. Register, we have sought additional information from the MOLC since the information from Mr. Nolen was relayed to you in letter dated July 8, 2024. The undertakings by the MOLC to implement its preceding plans were addressed in two emails from Mr. Nolen to Chief Counsel Neal on October 30, 2024. The actions taken by the MOLC are bolded beside each plan as follows:

1. The [MOLC's] decisions needed were prepped into a specific format prior to publication to the D.C. Register. They [had] currently identified 1008 decisions for publication during [that] timeframe. [R]oughly 600 of those ha[d] been prepped into the required format – **Done. [A]ll of our decisions have been prepped for posting (over 1000+)**;
2. [The MOLC] ha[d] been in discussions with the Register about the volume of the decisions to publish and [they were] also working with [the *Register*] regarding a publication schedule, i.e. a timetable for posting, as opposed to overwhelming the

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<sup>27</sup> Substituted for "Secretary." 1 DCMR § 412.8.



*Register* all at once with 1000+ decisions, for which they [would] need to review for compliance (the format, etc.) – **[W]e are working with the Register to publish opinions – sending them over in manageable batches;** and

3. Mr. Nolen suspect[ed] that even after getting through the preliminary administrative processes, there [could] be 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 – **[T]he [R]egister is posting decisions. It is not a sizeable amount right now, but we are moving in the right direction.**

While the MOLC has taken steps to complete the plans relayed by Chief Counsel Neal to you in letter dated July 8, 2024, it is obvious based on the volume of the backlog and publication batches, the MOLC delayed up to on/or about January 27, 2025, in publishing its FOIA appeal decisions in accordance with D.C. Official Code § 2–536(a)(3). Furthermore, Mr. Nolen acknowledges that a sizeable amount has not been published. This was prior to publication of its FY2020 to FY2024 FOIA appeal decisions on its website. The application of the preceding subsection of the statute will be further discussed under the following subheadings concerning proactive disclosure requirement, searchability, and the sufficiency or lack thereof of the MOLC’s recommendation to address the delay in publication of its FOIA appeal decisions. I will also address whether the publication of the appeal decisions on its website satisfies D.C. Official Code § 2–536.

#### *B. Proactive Disclosure Requirement of the D.C. FOIA*

On March 1, 2023, I issued guidance<sup>28</sup> regarding how to comply with D.C. FOIA when publishing public comment submissions to the proposed [a public body’s] website. In that instance, I cited D.C. Official Code § 2-536(a)(5), which is a specific subparagraph of the proactive disclosure requirement of D.C. FOIA, which 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, this subparagraph does not appear to be applicable in the present case.

On October 3, 2024, I issued a Proactive Disclosure Compliance Checklist to assist FOIA Officers and staff with their duties.<sup>29</sup> This list presents the categories of information to be specifically made available to the public without a written request for the information, as per D.C. Official Code § 2-536. The said list includes the preceding subparagraph, D.C. Official Code § 2-

<sup>28</sup> OOG Memorandum guidance regarding “Compliance with the District of Columbia Freedom of Information Act When Publishing Public Comment Submissions to the [public body’s] Website, March 1, 2023.

<sup>29</sup> <https://www.open-dc.gov/documents/proactive-disclosure-requirements-under-dc-foia-checklist>.

536(a)(3), which applies to your concern with MOLC’s adherence with the statute. It is as follows: “. . . [f]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”<sup>30</sup> *Id.* (emphasis added).

OOG’s examination of D.C. Official Code § 2-536 as it relates to the MOLC’s proactive disclosure obligations and the latter’s FOIA Officer’s interpretation and current application is that D.C. Official Code § 2-536(a)(3) is the relevant authority obligating public disclosure of its FOIA appeal decisions.<sup>31</sup> The MOLC’s FOIA appeal decision making aligns more with the latter subsection as opposed to § 2-536(a)(5), which covers “Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement

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<sup>30</sup> § 2-536. Information which must be made public.

(a) Without limiting the meaning of other sections of this subchapter, the following categories of information are specifically made public information, and do not require a written request for information:

(1) The names, salaries, title, and dates of employment of all employees and officers of a public body, except for any employee or officer of a public body who is a participant, as that term is defined in § 4-555.01(12), in the Address Confidentiality Program established by [§ 4-555.02](#), and submits a request to the Department of Human Resources (“Department”), through a process to be established by the Department, that their information not be made public.

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

**(3) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;**

(4) Those statements of policy and interpretations of policy, acts, and rules which have been adopted by a public body;

(5) Correspondence 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;

(6) Information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies;

(6A) Budget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions;

(7) The minutes of all proceedings of all public bodies;

(8) All names and mailing addresses of absentee real property owners and their agents;

(8A) All pending applications for building permits and authorized building permits, including the permit file;

(9) Copies of all records, regardless of form or format, which have been released to any person under this chapter and which, because of the nature of their subject matter, the public body determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(10) A general index of the records referred to in this subsection, unless the materials are promptly published and copies offered for sale.

(b) For records created on or after November 1, 2001, each public body shall make records available on the Internet or, if a website has not been established by the public body, by other electronic means. This subsection is intended to apply only to information that must be made public pursuant to this subsection.

(c) For the purposes of this section “absentee real property owners” means owners of real property located in the District that do not reside at the real property.

(d)(1) Notwithstanding any other provision of law, no document or information described in subsection (a)(6A) of this section that was created on or after December 7, 2004, shall be exempt from disclosure pursuant to [§ 2-534\(a\)\(4\)](#) and [\(e\)](#).

(2) In addition to making such document or information public information pursuant to subsection (a) of this section, a public body shall provide any document or information described in subsection (a)(6A) of this section that was created on or after December 7, 2004, to a person who has requested to inspect or copy it pursuant to [§ 2-532](#), regardless of the date on which such request may have been made.

<sup>31</sup> October 30, 2024, email from MOLC FOIA Officer Shawn Nolen regarding D.C. Official Code Section 2-536(a)(3) as the authority which governs the MOLC’s proactive publication requirement, although the subparagraph does not refer to *The Register* as the publication site.

responsibilities of the public body ...” While the MOLC’s FOIA appeal decision-making process and a public body’s FOIA request response entail the “determin[ation], or stat[ing of] an opinion,”<sup>32</sup> a public body’s response to a FOIA request does not amount to “regulatory, supervisory, or enforcement”<sup>33</sup> action.

Furthermore, DCMR § 412.1 provides a FOIA requester with the opportunity to either appeal the denial of the requester’s FOIA request to the Mayor [Secretary] or seek immediate judicial review of the denial in the D.C. Superior Court. By virtue of DCMR § 412.7, the Secretary [the MOLC] must make “A written determination with respect to an appeal [and] shall be made within ten (10) days (excluding Saturdays, Sundays and legal public holidays) of the filing of the appeal.” Whereas the Court carries out judicial review of FOIA request denials, the MOLC’s function in making review determination is administrative, as it is not a judicial body. Therefore, I opine that D.C. Official Code § 2-536(a)(3) is the appropriate and applicable authority as it relates to the MOLC in its role as the arbiter of the D.C. FOIA final administrative review process and the opinions published therefrom, and that such opinions are akin to “final opinions” in that regard.

I now turn my attention to your question concerning the MOLC’s proactive disclosure obligation under D.C. FOIA (presumably) in relation to specific information (below) relayed from Mr. Nolen in a letter dated July 8, 2024, from Chief Counsel Neal to you.

### *C. MOLC and DC Register Independent Publication Arrangements*

In addition to your concerns above, you also asked if “. . . publications of opinions in the D.C. Register at a pace set by the agency and the Register is – by itself – satisfactory implementation of the D.C. FOIA proactive publication requirement.”<sup>34</sup> This question arises, presumably, from information passed along to you by Chief Counsel Neal in his July 8, 2024, letter<sup>35</sup> to you, which stated in part that:

[The MOLC] ha[s] been in discussions with the Register about the volume of the decisions to publish and are also working with them 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 will need to review for compliance (the format, etc.).

Your question presents a straight-forward inquiry which incites a relatively simple evaluation of the relevant law. That is, is there any provision within D.C. Official Code § 2-536 which grants exception or exemption to proactively publishing the required opinions? My reading

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<sup>32</sup> D.C. Official Code § 2-536(a)(5).

<sup>33</sup> Ibid.

<sup>34</sup> Email from [REDACTED] to Louis Neal (OOG) on July 8, 2024.

<sup>35</sup> Emailed letter to [REDACTED] the Open Government Coalition from Office of Open Government Chief Counsel Louis Neal regarding “MOLC FOIA Opinions,” July 8, 2024.

of the statutes presents none. Further, the statute does not point to any other statute, regulation, law or policy which would support an extra-statutory arrangement between the MOLC and the DC Register to stagger or create a schedule to submit and publish the MOLC's DC FOIA opinions.

Considering D.C. FOIA does not address any pace or schedule of an agency formed with the D.C. Register to post [FOIA] opinions, such a pace or schedule as described in your Request cannot in and of itself be used to determine whether an agency's (such as MOLC) publication of opinions amounts to satisfactory implementation of D.C. FOIA proactive disclosure requirements. However, based on the rate at which the MOLC publishes its FOIA appeal decisions, and the progress made (prior to publication of the appeal decisions on its website on/about January 27, 2025) with addressing the backlog of publication in the D.C. Register relayed to you in my advisory opinion (OOG-2022-004-AO), letter dated July 8, 2024 from Chief Counsel Neal, and the update of subheading "A" of the preceding discussion, MOLC's disclosure of its decisions do not satisfy DC FOIA proactive disclosure requirement.<sup>36</sup>

Even though prior to MOLC's publication of 1094 appeal decisions to its website in January of 2025, that spans FY2020 to FY2024,<sup>37</sup> the sizeable backlog had undoubtedly set the MOLC afoul of D.C. Official Code § 2-536(a)(3), the recent publications must not be discounted as a step in the right direction. However, to ensure the spirit and letter of the preceding section of the statute are fulfilled and maintained, the MOLC needs to ensure all its FOIA appeal decisions are immediately made publicly available without a written request for the said information. It is considering the danger of having taken one step forward and moving two steps backward as time progresses, I have offered my recommendations below to prevent any further delays in the MOLC's publication of its FOIA appeal decisions. The recommendations are in my written testimony, which I will present on February 5, 2025, to Chairperson Pinto and members of the Committee on the Judiciary and Public Safety (the "Committee").

Your Request contains a follow-up question to the preceding concerning searchability of the D.C. Register for the MOLC's FOIA appeal decisions and how such publication compares with the previous appeal decisions disclosed on the internet at Publications.<sup>38</sup> Your question is addressed below to determine whether the MOLC's publication of its D.C. FOIA appeal decisions in the D.C. Register accords with D.C. Official Code 2-536 (b). In addition, your concern which you communicated to me in an email on January 29, 2025, that the FOIA appeal decisions posted to the MOLC's website in January 2025 are unsearchable will be addressed below.

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

Pursuant to 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

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<sup>36</sup> D.C. Official Code § 2-536.

<sup>37</sup> Email from Shawn Nolen (MOLC) to Louis Neal (OOG) on January 28, 2025.

<sup>38</sup> [Publications | DC](#).

body, by other electronic means.”<sup>39</sup> I find that the preceding subsection applies to the first part of your following paraphrase question. Whether the publication of D.C. FOIA appeal decisions by the MOLC in the D.C. Register affords searchability that meets the requirements of D.C. Official Code § 2-536 (b) and is the Register an adequate substitute for the District’s publication website<sup>40</sup> “Publications?”<sup>41</sup> D.C. Official Code applies to your question because the subsection only applies to information that must be made public under the said subsection. This includes the information/appeal decisions pertaining to your question because the said decisions were written on or after November 1, 2001.

Notwithstanding the requirement for the MOLC to make its appeal decisions “available on the Internet or, if a website has not been established by the public body, by other electronic means,” and the MOLC’s (previously) unfulfilled requirement of proactive disclosure as per D.C. FOIA, self-determined complexity of the search to locate the information is not a basis by itself to deem the MOLC in contravention of D.C. Official Code § 2-536(b). 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.

Next, I turn my attention to the second part of your question presented under this subheading which concerns accessibility of the MOLC’s FOIA appeal decisions in the Register and as previously published on the District’s publication website. This portion of your question paraphrased is as follows: Whether the D.C. Register is an adequate substitute for the District’s publication website<sup>42</sup> “Publications?”<sup>43</sup> 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.<sup>44</sup> This does not mean a certain degree of search required to locate the information amounts to unavailability of the information to the public. Albeit public availability suggests that the information be more readily accessible than not.

In addition, to make an accurate comparison of the MOLC’s disclosure of its FOIA appeal decisions via the District’s publication website “Publication” with disclosure in the D.C. Register requires a side-by-side comparison of the disclosure of the said decisions for an equal period. I do not have the statistics in full, and if the information was available, other supervening factors such as the COVID-19 pandemic would have to be taken into consideration. However, it is evident that

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<sup>39</sup> D.C. Official Code § 2-536(b).

<sup>40</sup> Email from [REDACTED] to Louis Neal (OOG) on July 8, 2024.

<sup>41</sup> [Publications | DC](#).

<sup>42</sup> Email from Frederick Mulhauser (OGC) to Louis Neal (OOG) on July 8, 2024.

<sup>43</sup> [Publications | DC](#).

<sup>44</sup> D.C. Official Code § 2-536(a).

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

In your email to me on January 29, 2025, you provided a link to the MOLC's website with its FOIA appeal decisions of FY2020 to FY2024 and mentioned that the publications are unsearchable. A member of OOG's staff has viewed the website with the preceding decisions and confirms that the ability to conduct keyword search is unavailable. However, the member of staff confirms that the decisions are readily identifiable by appeal numbers. OOG's staff has contacted Mr. Nolen at the MOLC concerning the current searchability issue and has been provided with the following response. "...[W]e are exploring ways to improve this, e.g. speaking with OCTO, or even coming up with another way to post the decisions. Our original plan was to post the decisions to the D.C. Register, but due to the sizeable backlog and the posting procedures (specific formatting, etc. on both our end and their end), it was too time consuming."<sup>45</sup>

Based on the preceding, it is evident that while the MOLC has made progress in clearing its backlog of publishing FOIA appeal decisions, there are other matters such as ease of access to address. My recommendations below are all-encompassing and if implemented, will work to solve the issue of publication in its entirety, which includes having the time and resources to publish the decisions in a timely and accessible way.

The next section of my opinion addresses recommendations to the MOLC's plans to make its FOIA appeal decisions accessible to the public in a timely manner. This touches on the use of another means of publication and increase in hired help, contractual or permanent, and harkens to my prior recommendations of extending the response time for the MOLC to respond to FOIA appeals.

### **III. RECOMMENDATION**

The last portion of your Request necessitates providing recommendation to the MOLC's plans to improve the public disclosure of its FOIA appeal decisions in accordance with D.C. Official Code § 2-536. The following statement is from your Request seeking my recommendation. "And if the MOLC plans are not entirely satisfactory in meeting the legal requirements of timely and accessible publication, the Coalition and the public hoped to hear of further recommendations to address the situation. That is, (1) assistance that might be provided to improve the pace, such as a surge redaction crew, and (2) information for the public about finding appeals opinions in the interim." Any recommendation to align with or buttress the MOLC's plans to improve the timely public disclosure of its FOIA appeal decisions requires taking into consideration the extent to which the previous plans have been implemented. This will open the door to the determination of whether another publication platform is required, and if so, possible suggestion.

As relayed in my advisory opinion (OOG-2022-004-AO), Director Adams of the MOLC stated that the MOLC "should be able to handle the" backlog, "with a little bit of extra help, either

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<sup>45</sup> Email from Shawn Nolen (MOLC) to Joan Lelma (OOG) on January 29, 2025.

on a short-term or on a slightly longer-term basis.”<sup>46</sup> In Mr. Nolen’s response to our inquiry concerning the backlog in July of 2024, no mention was made of new hires, whether contractual or permanent to help with removing the backlog of the MOLC’s appeal decisions that have not been made publicly available pursuant to D.C. Official Code § 2-536. Based on the preceding, I recommend that the MOLC hire contractors to help specifically with processing the FOIA appeal decisions for public disclosure. In addition, where the budget permits, permanent employees would sustain the flow of timely disclosure of the said appeal decisions.

Mr. Nolen states in his October 30, 2024, email response to Chief Counsel Neal’s further inquiry concerning the backlog that the MOLC is “working with the Register to publish opinions- sending them over in a manageable batches ... the register is posting decisions. It is not a sizeable amount right now.”<sup>47</sup> While this is a good step forward in addressing the backlog, I would have recommended prior to the MOLC’s January 2025 publication that the MOLC explore additional means of disclosing its FOIA appeal decisions on the internet, if such is not feasible via the MOLC’s website. It appears based on Mr. Nolen’s penultimate email response to Chief Counsel Neal that the issue was not merely the absence of adequate help to get the decisions ready for public disclosure in the D.C. Register or on the internet, but the number of batches termed “manageable”<sup>48</sup> that are sent to the Register for publication each time suggest the current means of publication is insufficient. Hence, my recommendation prior to the recently reported publication for additional means of public disclosure via the internet.

Even though the recent publication of the MOLC’s FOIA appeal decisions on its website has cleared the backlog, I continue to put forward the following recommendations, which are found in my testimony that I will present February 5, 2025, to the Committee.

There are no appeals of agency FOIA decisions pending adjudication by the MOLC. However, the MOLC should not have to rush to provide a mass publication of its opinions each year before the FOIA reporting period and performance oversight. I recommend that the District reform the FOIA Appeals process to permit the Mayor to reasonably dispose of FOIA Appeals.

The 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. The delay in disposing of appeals is in part due to the short statutory deadline. As a remedy, I suggest an amendment to the D.C. FOIA statute to enlarge the MOLC’s administrative review period. Maryland and the federal government have counterparts to D.C. FOIA, and all of them have longer than ten business days for administrative review. Enlarging time in the District seems reasonable considering these examples.

Under Maryland’s Public Information Act, there is a two-layer administrative-review procedure. An applicant can apply to the Public Access Ombudsman, and then, if the dispute remains unresolved, to the State Public Information Act Compliance Board for a binding

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<sup>46</sup> [youtube.com/watch?v=EGa6sVzR0oc](https://www.youtube.com/watch?v=EGa6sVzR0oc). The MOLC segment of the hearing starts at timestamp 4:09:05. Director Adams begins testifying at 4:29:35.

<sup>47</sup> Email from Shawn Nolen (MOLC) to Louis Neal (OOG) on October 30, 2024.

<sup>48</sup> Ibid.



decision (accompanied by a written opinion posted on the Compliance Board’s website). The Ombudsman’s deadline “to issue a ‘final determination’ that a dispute has been resolved or not resolved” is *90 calendar days*, which may be extended by mutual agreement of the custodian and requester to continue the mediation. The Compliance Board’s outermost deadline is *120 calendar days* from the date of the complaint, which is of course in addition to the Ombudsman’s review period. Under federal FOIA, a requester may appeal from “an adverse determination . . . to the head of the agency,” who has a base period of *20 business days* to decide appeals, plus the authority to extend the period under “unusual circumstances.” I therefore recommend that the D.C. Council consider amending D.C. FOIA to permit the MOLC at least at least 20 business days to complete the FOIA appeals process.

Furthermore, 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.

As part of the D.C. FOIA Ombudsman program, OOG would employ FOIA mediators to work with our existing legal team to ensure that the DC FOIA process is fair. Given the current tendency for the Mayor’s Office of Legal Counsel to develop a backlog in processing D.C. FOIA appeals because of the volume of requests it receives, if instituted, this program would be designed to reduce that load. It would also be designed to avoid costly litigation for disputes concerning requesters and Mayoral agencies, independent agencies, the D.C. Council, and Advisory Neighborhood Commissions. It would necessitate changes to BEGA’s enabling statute and D.C. FOIA to implement this program, of which I have addressed in my written testimony to the Committee, mentioned above.

#### **IV. CONCLUSION**

My conclusions are based on the information gathered concerning the MOLC’s previous backlog of publishing FOIA appeal decisions and recent correspondence concerning MOLC’s publication that erases the backlog. The current timely publication of MOLC’s decisions does not erase the past which you have asked me to address in your request and was the prevailing state at the time of your submission. As such, my previous conclusory recommendation remains and is as follows. “The MOLC should ensure that, at the same time that an opinion is signed and released to the requester(s) and custodian(s), it affirmatively posts the opinion for public viewing.”<sup>49</sup>

In addition, it is imperative that the Mayor seeks a legislative remedy through the D.C. Council to remove the problem of inadequate processing time. I recommend that the Mayor puts forward legislation to the D.C. Council to consider that would amend D.C. FOIA to increase the time limit for the MOLC to process administrative appeals. This along with the D.C. FOIA Ombudsman program proposed in the preceding would have a significant impact on addressing the delay of the MOLC’s publication of its FOIA appeal decisions.

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<sup>49</sup> OOG-2022-004-AO.



Please contact me or OOG staff ([open.govoffice@dc.gov](mailto:open.govoffice@dc.gov)) if you want to discuss this matter further.

Sincerely,



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Niquelle M. Allen, Esq.  
Director of Open Government  
Board of Ethics and Government Accountability