



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



March 4, 2025

VIA ELECTRONIC MAIL



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Mr. Henry Johnson
FOIA Officer
Executive Office of the Mayor
1350 Pennsylvania Ave NW, Suite 300
Washington, DC 20004
henry.johnson@dc.gov

RE: Delays in Processing a D.C. FOIA Request for Information Related to the Mayor's Travel (OOG-2024-004_AO)

Dear 

On May 9, 2024, you contacted the Office of Open Government (“OOG”) to request an advisory opinion concerning the Executive Office of the Mayor’s (EOM) treatment of your District of Columbia Freedom of Information Act (“D.C. FOIA”) request. Specifically, you alleged that EOM repeatedly failed to respond in substance to your D.C. FOIA request, instead sending successive notices extending the deadline for a response, citing “unusual circumstances,” even after narrowing your request in order to help expedite EOM’s production of any responsive records. In your request to OOG, you inquired “whether the EOM decision to cope with delay by invoking multiple extensions is the correct implementation of the law.”¹

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.”² 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 2011.³

After reviewing your request, including copies of email communication between you and EOM; notices of extension issued by EOM; the letter which accompanied EOM’s production of documents; your appeal to the Mayor’s Office of Legal Counsel (MOLC); and the MOLC’s denial of your appeal, I find the following: (1) EOM did not properly notify you in accordance with the notification requirements of 1 DCMR § 405.5 upon expiration of the time limit for the agency to make a determination of the FOIA request at issue; (2) EOM’s failure to provide you with a determination within the applicable time period constituted a denial which would have triggered your appeal rights⁴; and (3) the issue of EOM’s failure to provide you with a timely determination of your December 22, 2023, D.C. FOIA request became moot once the agency issued a

¹ See May 8, 2024, Request for FOIA Advisory Opinion.

² D.C. Official Code § 2-531.

³ Title II of D.C. Law 19-124, effective October 30, 2018 (D.C. Official Code § 1-1162.05c(d)).

⁴ 1 DCMR 405.4.

determination and you availed yourself of your appeal rights. The analysis supporting my findings follows.

I. BACKGROUND

On December 22, 2023, you submitted a D.C. FOIA request to EOM, through the District of Columbia's Online FOIA Portal (FOIAXpress), to obtain any communications by EOM staff between October 1, 2023, and December 1, 2023, regarding the Mayor of the District of Columbia's (the "Mayor") trip to Dubai for the 2023 United Nations Climate Change Conference (COP 28) and her visit to Doha, Qatar with the D.C. Chamber of Commerce.⁵ EOM assigned tracking number 2024-FOIA-02256 to your request.

On January 18, 2024, EOM's FOIA officer, Henry Johnson, sent you a notification of extension which stated:

Due to unusual circumstances as described in D.C. Official Code § 2-532(d), EOM will be exercising a 10-day extension. The need for consultation and/or the need to search for, collect, and appropriately examine a voluminous number of records demanded by your request necessitates this extension pursuant to D.C. Official Code §§ 2-532(d)(2)(A)-(B)). Under the law, the extension does not include Saturdays, Sundays, and public holidays. We therefore expect that we will dispatch a determination or update on the status of your request by February 1, 2024.⁶

On January 31, 2024, you received 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.

On February 2, 2024, you received an email⁷ from Mr. Johnson which stated in relevant part:

I have identified emails and Teams messages which are responsive to your request; however, I have not yet been able to review text messages, WhatsApp, and analogous messaging apps.

Would you be open to narrowing this portion of your request? We are unable to

⁵ January 18, 2024, communication from EOM FOIA states the date of the Requester's FOIA request as December 19, 2023. This date was also listed in communications from EOM on January 31, 2024; February 15, 2024; March 1, 2024; March 15, 2024; and March 29, 2024. A review of the record in FOIA Xpress showed that December 22, 2023, was the correct date of receipt of the request; all calculations on the time limitations of the request are based on this date. EOM corrected the date in their communications to the Requester beginning with the April 17, 2024, notice of extension.

⁶ See January 18, 2024, notice of extension.

⁷ The complaint states that email correspondence came from an "unnamed EOM staff member." Review of the emails in question show correspondence between [REDACTED] and com.foia@dc.gov. My investigation has confirmed that this email account is managed by EOM's FOIA officer, Henry Johnson. Thus, all correspondence at issue in this matter took place between [REDACTED] and Mr. Johnson.

retrieve these items on the backend. EOM has over 300 employees whose government phones must be manually inspected.

I would like to suggest limiting this portion of your request to the Mayor and her Senior Staff. This would include her Chief of Staff, Deputy Chief of Staff, Travelling Chief of Staff, Senior Advisor, and Communications Director – among others. Would this amended scope be acceptable to you? Happy to ensure inclusion of any individual within EOM of particular interest to you.

On February 5, 2024, you responded, by email, agreeing to limit the scope of your request, indicating that all of the staff members mentioned in the February 2, 2024, email were of interest and adding Courtney Hill, “or whoever is running scheduling for the mayor these days,” and Carrie Kohns.

On February 13, 2024, you received an email from Mr. Johnson asking again if you would be open to limiting your request to text and WhatsApp messages. The email further stated that EOM had not received a response from you and notified you that if you did not respond within ten (10) business days (ending on February 28, 2024), your request would be considered closed.

That same day, you responded that you had replied to the February 2, 2024, email and you forwarded a copy of your February 5, 2024, email agreeing to limit the scope of the request. Mr. Johnson responded on February 14, 2024, that your emails had gone to the spam folder. After apologizing for the confusion, he stated, “I’ll move forward with your request right away.”

On February 15, you received another extension notification, which provided a March 1, 2024, date for determination of the request. You reported that you subsequently received identical extension notifications from EOM on: March 1, 2024; March 15, 2024; March 29, 2024; April 17, 2024; and April 30, 2024.

On May 30, 2024, Mr. Johnson sent you a letter stating that documents responsive to your request had been delivered via the FOIA portal and informing you 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).

The letter advised you of your 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

⁸ May 30, 2024, letter from EOM FOIA Officer Henry Johnson to [REDACTED].

On July 24, 2024, you submitted an “Appeal of partial denial – request 2024-FOIA-02256” to the MOLC, in which you challenged EOM’s redaction of forty-four (44) full pages and parts of twenty-three (23) others.⁹

On August 9, 2024, the MOLC issued a decision letter that affirmed EOM’s response to your D.C. FOIA request and denied your appeal. The MOLC also advised you of your right to commence a civil action against the District of Columbia Government in the Superior Court of the District of Columbia if you were dissatisfied with the MOLC decision.¹⁰

II. DISCUSSION

A. Applicable Standards

Under the District’s FOIA laws and regulations, 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.” (D.C. Official Code § 2-531). Any person has the right of access to public records and may inspect and obtain copies of public records (D.C. Official Code § 2-532(a)), unless the requested records are subject to withholding as expressly provided under D.C. Official Code § 2-534.

The regulations implementing D.C. FOIA found in 1 DCMR § 400.1 make clear that all parties to a D.C FOIA request must strictly adhere to its provisions:

This chapter contains the rules and procedures to be followed by all agencies, offices, and departments (hereinafter “agency”) of the District of Columbia Government which are subject to the administrative Control of the Mayor in implementing the Freedom of Information Act, D.C. Law 1-96, 23 DCR 3744 (1977) (hereinafter the “Act”) and all persons (hereinafter “requesters”) requesting records pursuant to the Act.¹¹

D.C. Official Code §§ 2-532(c)-(d) and the D.C. FOIA regulations at 1 DCMR § 405.5 govern the notice that EOM must provide to the requester in such instances. When responding to a FOIA request, a public body 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.” (D.C. Official Code § 2-532(c)(1)).

In “unusual circumstances” the time period to respond to a D.C. FOIA request “may be extended by written notice to the person making such request setting forth the reasons for extension and expected date for determination,” and “[s]uch extension shall not exceed 10 days (except Saturdays, Sundays, and legal public holidays.)¹² Thus, if “unusual circumstances” exist that

⁹ July 24, 2024, D.C. FOIA Appeal by ██████████ to the MOLC.

¹⁰ August 9, 2024, MOLC Decision.

¹¹ 1 DCMR § 400.1.

¹² D.C. Official Code § 2-532(d)(1).

warrant extension of the time period to respond, EOM would have up to twenty-five (25) business days to respond to a D.C. FOIA request.

Further, if EOM fails to comply with a D.C. FOIA request for communications within twenty-five (25) days, that failure “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.”¹³ The D.C. Municipal Regulations further require that EOM provide specific notice to a D.C. FOIA requester upon expiration of the applicable time period to respond. 1 DCMR § 405.5 states that:

When no determination can be dispatched within the applicable time limit, the agency shall nevertheless continue to process the request. On expiration of the time limit, the agency shall inform the requester of the following:

- (a) The reason for the delay;
- (b) The date on which a determination may be expected; and
- (c) The right to treat the delay as a denial and of the appeal rights provided by the Act and this chapter.

The agency may ask the requester to forego appeal until a determination is made.

The following analysis and discussion detail EOM’s application of these rules to your request.

B. Analysis

1. EOM’s Notification to Mr. Koma Invoking an Extension to Issue a Determination Did Not Comport with FOIA’s Requirements.

A notification that an agency is invoking the applicable extension to respond to a request must be in writing.¹⁴ The notice must also include the reason for the extension and the expected date for the determination to be made.¹⁵ Further, 1 DCMR § 405.3 requires that the extension notice set forth the unusual circumstances for the delay in responding to a request. If no determination has been dispatched at the end of the period prescribed by law or the extension thereof, the requester may deem his or her request denied, and exercise a right of appeal in accordance with § 412.¹⁶ DCMR § 405.5 states that “...on expiration of the time limit the agency shall inform the requester of...the right to treat the delay as a denial and of the appeal rights provided by the Act and this chapter.”¹⁷

¹³ D.C. Official Code § 2-532(e).

¹⁴ D.C. Official Code § 2-532(d)(1).

¹⁵ *Id.*

¹⁶ 1 DCMR § 405.4.

¹⁷ 1 DCMR § 405.5(c).

EOM asserted that a 10-day extension was needed “for consultation and/or the need to search for, collect, and appropriately examine a voluminous number of records demanded by your request...” and cited D.C. Official Code §§ 2-532(d)(2)(A)-(B)).¹⁸ In your request for an advisory opinion, you stated that this notification did not explain any facts showing the request met the legal definition of “unusual circumstances.” However, I find that EOM’s stated reason for the delay satisfies the requirements of 1 DCMR § 405.5(a). Here, your D.C. FOIA request was for approximately two (2) months of communications by multiple EOM staff members. The extension notice cited the “need to appropriately examine a voluminous number of records,” and I find that it was reasonable to infer that the requested communications were the voluminous records referred to in the extension notice. That EOM subsequently asked you to narrow the scope of your request supports this. Additionally, EOM provided you with the date on which the determination may be expected (February 1, 2024), satisfying the requirements of 1 DCMR § 405.5(b).

However, the regulations also require that the agency inform you of your right to treat the delay as a denial and of the appeal rights provided by D.C. FOIA and the FOIA regulations (1 DCMR § 405.5(c)). 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.

2. *EOM Failed to Make a Determination to Dispatch the Requested Records Within the Applicable Time Period.*

With the extension, the applicable time limit for the EOM to issue a determination to you 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. EOM did not issue a determination to you within the statutorily extended time period. Upon expiration of the applicable time limit to issue a determination, 1 DCMR § 405.5(a) mandates, among other requirements, that an agency notify a requester of the reason for a delay. You received a second notice of extension from EOM on January 31, 2024. The notification was identical to the January 18, 2024, notice, apart from the new date of determination, which was listed as February 21, 2024. At this juncture, rather than issue an additional notice of extension, EOM should have advised you of your right to treat the delay as a denial and of your appeal rights under FOIA or asked you to “forego appeal until a determination is made.”¹⁹

On February 2, 2024, the day after the expiration of the first extension, Mr. Johnson asked if you would be willing to narrow the scope of your request. You agreed to a narrower scope in a February 5, 2024, email. On February 13, 2024, EOM emailed you again to inquire whether you would be willing to limit the scope of your request. At this time, it was discovered that your February 5, 2024 email had gone to EOM’s spam folder. Following the discovery of your February 5, 2024, email in EOM’s spam folder and your agreement to a narrower scope, Mr. Johnson emailed you on February 14, 2024, and stated, “I’ll move forward with your request right away.” On February 15, 2024, EOM sent you a new notice of extension designating March 1, 2024, as the new determination date. This notice likewise failed to inform you of your right to treat the delay

¹⁸ See January 18, 2024, Notice of Extension.

¹⁹ 1 DCMR § 405.6.

as a denial and of the appeal rights required by D.C. Official Code § 2-537(a)(1) and 1 DCMR § 405.5(c).

D.C. Official Code § 2-532(e) provides that any failure on the part of an agency to issue a timely determination shall be deemed a denial of the request with the right to petition the Mayor to review the deemed denial of the request. Further, D.C. Official Code § 2-537(a)(1) provides the requester with the right to proceed to the Superior Court to seek redress. Also, 1 DCMR § 405.5(c) requires that the agency notify the requester of the right to treat the delay as a denial and of the appeal rights provided under FOIA.

In this matter, EOM did not inform you of your right to treat the delays that exceeded EOM's statutory timeframe for responding as a denial of your FOIA request. The correspondence EOM sent you also failed to provide notice of appeal rights under D.C. FOIA. When EOM requested that you narrow the request on February 2, 2024, the time for EOM to respond to your request was not tolled because the statutory timeframe for issuing a determination had already expired. EOM provided you with notice of your appeal rights in the May 30, 2024, letter that accompanied the final production of the records you requested. However, the inclusion of this information at that time did not absolve EOM of its obligation to provide you with proper notice of your appeal rights and of your ability to treat the delay as a denial under 1 DCMR § 405.5. Therefore, I find that EOM insufficiently notified you of the right to treat the delay as a denial and of your appeal rights under 1 DCMR § 405.5(c).

3. *D.C. FOIA Does Not Provide for the Use of Multiple Extensions.*

As noted above, in unusual circumstances, DCMR § 405.2 allows an agency to extend the time for initial determination on a request up to the time prescribed by applicable law. 1 DCMR 405.3 states that “*An extension shall be made by written notice to the requester...*” Additionally, D.C. Official Code § 2-532(d)(1) states in relevant part that “*such extension shall not exceed 10 days...*” Lastly, DCMR 1 § 405.4 states that the requester may deem his or her request denied if no determination has been dispatched at the end of the period prescribed by law or *the extension thereof* [emphasis added]. The use of singular nouns in the law and regulation governing extensions clearly indicate that an extension is meant to be a one-time occurrence. This is supported by the succeeding provisions of the D.C. FOIA and FOIA regulations which describe the actions to be taken upon the expiration of the applicable time limit.

I would note that EOM could have exercised another extension if their request to [REDACTED] to narrow the scope of his request had been timely. If EOM had made this request on February 1, 2024, as opposed to February 2, 2024, then it would have tolled the initial time to respond until [REDACTED] responded on February 5, 2024. Thus, it would have reset the clock, and EOM could have exercised an additional extension. However, given that EOM's time to respond had already expired by the time they requested that Mr. Koma narrow the scope of his request, there are no facts, applicable law, or regulations in this scenario which support the use of more than one extension by the agency. Accordingly, I find that EOM's provision of multiple letters providing you with notice of their intention to take a statutory extension was erroneous. D.C. FOIA only permits one extension of time and EOM's decision to not timely respond at the expiration of the first extension “shall be deemed a denial of the request” under D.C. FOIA.

4. *EOM's Failure to Provide a Timely Determination of the December 22, 2023, FOIA Request Became Moot Once EOM Issued a Determination.*

Under the well-established doctrine of mootness, case law holds that an issue is moot when there is no longer a case or controversy.²⁰ I find this doctrine applicable to this matter. As discussed at length above, EOM failed to provide you with a timely determination of your D.C. FOIA request and erred in providing you with correspondence that attempted to invoke multiple extensions. Nonetheless, the matter became moot once EOM produced the records that were responsive to your D.C. FOIA request. Furthermore, in response to EOM's production of the responsive records, you availed yourself of your appeal rights under D.C. FOIA. The remedy for EOM's failure to timely produce the requested records would have been for EOM to advise you of your right to treat the continued delay as a denial of your request and to further advise you of your right to appeal this determination to the MOLC or to file a civil action in the District of Columbia Superior Court. Here, you received the records you requested; the letter which accompanied the production of records advised you of your appeal rights; and you have exercised your right to appeal EOM's determination to the MOLC with respect to the records produced. I note that you retain the right to file a civil action in the District of Columbia Superior Court with respect to EOM's May 30, 2024, determination letter that accompanied the production of the records you requested. However, I find that there is no longer a case or controversy with respect to EOM's issuance of multiple letters providing you with notice of their intention to take a statutory extension for D.C. FOIA request 2024-FOIA-02256.

III. CONCLUSION

D.C. Official Code § 2-532(d)(1) requires that EOM provide "written notice to the person making such request setting forth the reasons for the extension and expected date for the determination." The regulations implementing D.C. FOIA, found in 1 DCMR § 400.1 *et seq.*, make it clear that all parties to a FOIA request must follow these provisions in the processing of FOIA requests. 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. In this matter, 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.

Although EOM's improper notification to the requester was made moot by the production of the requested records specific to this D.C. FOIA request, OOG advises that, in future, EOM provide requesters with correspondence concerning extensions that comports with D.C. FOIA based on the recommendations below.

²⁰ The mootness doctrine prohibits deciding a case if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." (*Clarke v. United States*), 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (internal quotations omitted).

IV. RECOMMENDATIONS

To ensure compliance with the provisions of D.C. FOIA, OOG makes the following 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.

If you have any questions or concerns about this advisory opinion, please contact me at niquelle.allen@dc.gov.

Sincerely,



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