

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeals: 2020-063 & 2020-064**

January 13, 2020

VIA ELECTRONIC MAIL

Ms. Claudia Barber

RE: FOIA Appeals 2020-063 and 2020-064

Dear Ms. Barber:

This letter responds to the two administrative appeals you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”), challenging the failure of the Office of Administrative Hearings (“OAH”) to properly respond to two (2) public records requests which you submitted pursuant to DC FOIA. In FOIA Appeal 2020-063, your December 12, 2019 FOIA request sought all communications (correspondence, emails and/or texts) in which a specific individual used a certain word during that person’s tenure with OAH. In FOIA Appeal 2020-064, your December 11, 2019 FOIA request sought all communications (including correspondence, emails and/or texts) about you between two individuals and any other person during a specific time period. With respect to both FOIA requests, OAH responded indicating that your FOIA requests were being put on hold pending your payment of the FOIA costs that you had agreed to pay in connections with an earlier FOIA request. On December 28, 2019, you filed FOIA Appeals 2020-63 and 2020-64. On December 31, 2019, OAH responded to your appeals again indicating that OAH’s processing of these two FOIA requests was suspended, pursuant to D.C. Official Code § 2-532 (b-3), pending payment of the OAH’s search costs in responding to an earlier FOIA request or a request from you for a fee waiver demonstrating how disclosure of the requested records would benefit the general public.¹

D.C. Official Code § 2-532(b-3) states “[n]o agency or public body may require advance payment of any fee unless the requestor has previously failed to pay the fee in a timely fashion, or the agency or public body has determined that the fee will exceed \$250.” We have previously determined that DC FOIA does not authorize suspending the processing of a FOIA request pending payment of an outstanding bill from an earlier FOIA request. Rather, DC FOIA authorizes, OAH to insist on an advance payment for the authorized costs for production in these two FOIA matters. Of course, OAH has to conduct an initial search in order to calculate the amount of the authorized costs that must be paid in advance in the two FOIA matters.²

¹ A copy of OAH’s response to your two appeals is attached to this decision.

² Our previous reasoning has been that an initial search must be conducted to identify the volume of records available which appear to be responsive to the FOIA request. The next phase of the search necessarily consists of a review of those documents to determine which are actually responsive to the request and may be subject to withholding under one or more exemptions recognized by DC FOIA. This does not mean, however, that the agency may charge search fees for the additional time required to analyze identified records and reach a decision whether any given record may in fact

Therefore, we remand these appeals to OAH and direct the agency to conduct the search for records at issue in both FOIA Appeals (2020-063 and 2020-064) and to notify you of the advance payment the agency believes you must pay (in the absence of a waiver of the costs) in order to obtain the responsive records from the two searches.

If you are dissatisfied with OAH's response on remand, you are free to file a separate appeal to challenge that response. This is the final decision of this Office in response to both appeals. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia in the Superior Court of the District of Columbia in accordance with D.C. Official Code § 2-537.

Respectfully,

Mayor's Office of Legal Counsel

cc: Maia Ellis, Assistant General Counsel
OAH (via email)

be withheld under one or more exemptions under DC FOIA. That phase of the process of responding to a FOIA request should not properly be treated as part of the "search," and therefore, the agency's time committed to that exercise may not be included in the recoverable search time.