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November 6, 2019

Honorable Muriel Bowser
Mayor
District of Columbia
Washington, DC

Subject: Use of Messaging Apps by District Employees for Official Business

Dear Mayor Bowser:

I am writing you on behalf of the D.C. Open Government Coalition to request that you issue an order prohibiting all District employees from using private text messaging services to transact public business. Recognizing that there may be emergencies requiring use of such apps, your order should direct those employees who must use private text messaging for public business in an emergency to ensure that copies of messages or screen-shots are sent to the employee's District-provided email account.

Recent media reports have asserted that from time to time District employees use WhatsApp for official business. (See, for example, Martin Austermuhle, "D.C. Officials Using WhatsApp for City Business May Skirt Open Records Laws" (Oct. 8, 2019), *available at* <https://wamu.org/story/19/10/09/d-c-officials-using-whatsapp-for-city-business-may-skirt-open-records-laws/>.) We understand that a FOIA request appealing a denial of access to WhatsApp messages is currently pending before your Office of Legal Counsel.

A similar issue arose when District employees were discovered using their private email accounts for public business. At that time, Mayor Gray issued Mayor's Order 2012-102 to "ensure that all emails sent or received by District employees in which those employees are transacting public business be captured on servers managed by" the District "and available to Freedom of Information Act ("FOIA") requests as well as to investigative demands, litigation-related requests, and all other email search requests" That Order is attached to this letter.

That year, members and staff of the D.C. Council (to whom the Mayor's order did not apply) were reported to be using personal emails to transact public business. The D.C. Open Government Coalition sued the Council in Superior Court pursuant to the D.C. FOIA requesting injunctive relief and a declaration that Councilmembers' emails related to public business are public records, even when stored in personal accounts, and must be disclosed under the FOIA. To settle that suit, the Council agreed to a consent order obligating it to establish rules requiring Councilmembers and staff to use government-provided email accounts for public business. The consent order stipulated that "if there is a reasonable basis to believe that some or all of the reasonably described records responsive to a particular FOIA request are to be found in a non-

governmental email account of a Council employee, including the Chairman and each Councilmember, the FOIA Officer will take steps to identify and collect such materials in response to the FOIA request . . .” (Order Granting Stipulation of Dismissal and Consent Order, *D.C. Open Government Coalition v. Council of the District of Columbia*, 12 CA 8118B (D.C. Superior Ct. Jan. 28, 2013).)

The D.C. FOIA provides a right of access by any person to “any public record of a public body.” D.C. Code § 2-532. This and similar language in freedom-of-information statutes at the federal level (on which D.C.’s FOIA is modeled) and across the states has been interpreted as applying to personal email accounts used by public employees and officials for public business. *See Competitive Enterprise Inst. v. Office of Science & Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016). Plainly the rationale and legal arguments underlying application of the D.C. FOIA to personal emails used for public business apply with equal – if not greater – strength to instant messages transmitted by WhatsApp and other similar software.

One crucial reason to prohibit District employees from using messaging apps is the nearly impossible challenge of ensuring that text messages are preserved and can be searched in responding to FOIA requests and other legal demands. You should therefore prohibit use of third-party instant messaging apps, especially if the apps delete messages immediately after they are read or preserve messages only for a short time, since that makes it impossible to guarantee preservation of public records as required by law.

We understand that even messages sent and received on District-issued devices are not captured and saved on a District-controlled server. Since the District does not have access to servers used by third-party vendors, it cannot effect retrieval of employees’ government-related communications from those platforms. Solutions are available from third-party vendors that can capture text messages and automatically copy them to a government-controlled server; until such a system is in place in D.C., the only responsible course of action consistent with current law is to prohibit use of text messages for public business.

The District of Columbia should not wait to be sued before ruling that the D.C. FOIA requires public access to employees’ private text messaging accounts when used for public business. Texas recently amended its Public Information Act to state that text messages are subject to public scrutiny, codifying a ruling that the State Attorney General had issued a decade ago determining that public business discussed on a personal device is public information. Missouri spent over \$200,000 to defend its former governor’s use of a self-destructing text message app. A Georgia official has faced criminal charges for using text messaging for public business to evade public scrutiny in violation of the state’s open records law.

Use of private texting apps by government officials in other states has led to damaging adverse publicity for the officials and their governments. Litigation is ongoing in various states to ensure that text messages used for public business are available under state FOI statutes. And use by White House officials of instant messaging apps has led to extended controversy at the federal level about related issues of preservation of records and future access. *See* letter from Rep. Elijah Cummings to White House Counsel Pat Cipollone, March 21, 2019, *available at* <https://apps.npr.org/documents/document.html?id=5777681-Cummings-Letter-To-White-House-On-Kushner>.

The D.C. Open Government Coalition strongly urges you to immediately prohibit the use of WhatsApp and other text messaging apps by District employees for public business while procedures are developed or solutions are acquired to ensure that any such use results in the forwarding of messages for retention by the government.

The D.C. Open Government Coalition is a 501(c)(3) organization that seeks to enhance the public's access to government information and ensure the transparency of government operations of the District of Columbia. (www.dcofc.org.) We are proud to have worked with you a decade ago to achieve enactment of the District's Open Meetings Act and the establishment of the Office of Open Government, and we look forward to working with you and your staff on this important subject.

Yours truly,



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Attachment: Mayor's Order 2012-102