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October 21, 2021

Hon. Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Bill 24-203 — "Medical Examiner Records Privacy Act of 2021"

Dear Councilmember Allen:

Thank you for requesting the D.C. Open Government Coalition's[1] input regarding Bill 24-203 and testimony given earlier this year by the Office of the Chief Medical Examiner (OCME). In our view, the proposed amendments to the OCME enabling statute and the D.C. Freedom of Information Act (FOIA) are contrary to the public policy of the District of Columbia and are unnecessary to protect legitimate privacy interests of D.C. residents. We ask the Committee to reject the proposed amendments.

To foster public trust, the FOI Act guarantees "all persons … 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. Code § 2-531. To fulfill its mission, the OCME must have the trust of D.C. residents that its staff is competent, that its findings are supported by evidence and medical science, and that it is unbiased.[2] By making OCME case files secret under the dubious claim that doing so will protect privacy, these amendments will reduce public oversight of the agency and thereby erode public confidence in it.

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[1] The Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

[2] Failures at the Department of Forensic Sciences, and the fallout from them, dramatically illustrate this. https://www.washingtonpost.com/dc-md-va/2021/10/15/dc-agencies-launch-post-conviction-reviews-light-crisis-department-forensic-sciences/.

The OCME's primary function is to investigate suspicious deaths, including violent deaths, deaths of individuals wanted by or in the custody of the D.C. government, deaths that may have been caused by medical malpractice or negligence, deaths from diseases that pose a threat to public health or resulted from workplace exposure, and deaths of government wards. D.C. Code § 5-1405(b).

To facilitate performance of that function, the OCME has authority, backed by the Superior Court, to subpoena information and records, including medical records, from a broad range of individuals and entities. D.C. Code § 5-1407. In carrying out its forensic investigative duties, the OCME must maintain case files and make them available to the mayor, law enforcement agencies, the U.S. Attorney, and "[a]ny other person with a legitimate interest" in them. D.C. Code § 5-1412(b) and (c).

It is beyond debate that the OCME's case files are public records as defined in D.C. Code § 2-502(18), and the deaths documented in them are of great public interest and concern. That such files may contain medical records, photographs of decedents' bodies, and recordings — video and audio — of autopsies, does not justify categorizing all OCME case files as confidential in their entirety.

Events over the past several years, including deaths of civilians at the hands of police, deaths of veterans due to failures at Veteran's Administration facilities, COVID-19 deaths due to failures at long-term care facilities, drug overdose deaths and more, demonstrate why OCME case files, must remain presumptively public under the FOI Act. D.C. Code § 2-531, *et seq.* Those files contain records prepared by OCME employees in performance of their investigatory duties that document their findings and the integrity of their expert opinions. Because they were not created by a physician or health care provider to diagnose, treat or predict the course of illness or injury, such records are not medical records that are confidential under federal statutes and regulations.

To the extent that OCME case files include medical records obtained voluntarily or by subpoena from medical professionals and health care providers, the FOI Act provides ample means to protect them in whole or part from disclosure. If access to particular records is restricted by federal or D.C. law, they are exempt from disclosure pursuant to § 2-534(a)(6). In addition, they may be exempt under § 2-534(a)(2) or (3) if they are part of an active investigation by a law enforcement agency, the Council or the Office of Police Complaints, or if disclosure would cause a "clearly unwarranted invasion of [the decedent's] personal privacy."

In their testimony, the chief medical examiner and the OCME's general counsel make several arguments in favor of amending D.C. Code § 5-1412 to specifically exempt OCME case files from disclosure under the FOI Act, and an amendment to § 2-534 that would create a new, unnecessary FOIA exemption that reiterates what the OCME statute says.[3]

Dr. Francisco J. Diaz, the chief medical examiner, testified that amendments in Bill 24-203 will

[3] If the Council were to enact the proposed amendment to the OCME statute, there would be no need for the proposed FOIA exemption because § 2-534(a)(6) already bars disclosure under the FOI Act of records made confidential by another D.C. statute, in this case amended § 5-1412.

"help to protect the privacy of families who suffer the loss of a loved one under the jurisdiction of OCME," and "will clarify that OCME case files are confidential, in line with privacy protections for death certificates and medical records." He claimed these amendments "balance[e] public interest" when, in fact, they strongly favor perceived privacy interests over the public's right to know about the operations of their government.

As discussed above, OCME case files are the work product of medico-legal professionals employed by a public safety agency of the D.C. government. They are not medical records, although they may contain confidential medical records obtained from treating physicians and health care providers. Nor are they death certificates, which include confidential medical information, and in a vast majority of cases are prepared by treating physicians or health care providers in compliance with statute.[4]

In fact, laws and precedent in many states clearly distinguish autopsy reports from death certificates, declaring the former public records and the latter confidential records. *See, e.g.*, Arizona. Autopsy reports and records of coroner's inquests are public records subject to disclosure under open records laws or other statutes in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas and West Virginia. Statutes or judicial opinions block disclosure of autopsy photos and recordings in Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, North Dakota and South Carolina.

In short, 31 states treat medical examiner and/or coroner case files as public records subject to disclosure. They recognize that some portions of those records may be withheld under well-defined exemptions to protect the integrity of law enforcement investigations and criminal proceedings, to protect medical data provided by physicians and health care providers, and under limited circumstances to protect personal privacy.

Dr. Diaz asserts that "[t]he amendment is necessary to address the current vague and ambiguous language permitting access to OCME case files if one has a 'legitimate interest.' … 'Legitimate interest' is used nowhere else in the District law and only leads to confusion and conflict."

That provision, § 5-1412(c), makes it possible for the decedent's relatives, their lawyers, insurance companies and others to obtain OCME case files for use in litigation and for other purposes without having to go through the FOIA search, review and redaction process. Whether a requester has a "legitimate interest" in access to the complete file has no relevance when the OCME receives a FOIA request for records in one or more of its files. There are well-defined procedures and precedents under which every D.C. agency determines whether requested

[4] In at least 13 states, death certificates are public records subject to disclosure under open records laws, and in three of them the cause of death must be redacted before disclosure of the records. At least three states release non-medical information from death certificates. Seven states bar public access for periods ranging from 25 to 100 years after death.

records, or portions of them, are exempt from disclosure, and there is no justification for absolving the OCME of its duty to apply those procedures in response to FOI requests.

Rodney K. Adams, the OCME's general counsel, makes several arguments to justify these amendments. He says medical examiners are physicians bound by the Hippocratic Oath to protect the medical privacy of patients, and by extension of patients' families. Mr. Adams likens OCME case files to medical records prepared by treating physicians and health care providers that are confidential pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA). He takes a very narrow U.S. Supreme Court holding that death scene photos are exempt from disclosure and inflates it into an expansive claim that OCME case files should be non-public records to protect family privacy.

Neither medical ethics nor medical confidentiality principles require OCME case file secrecy

Physician–patient confidentiality is an integral part of the U.S. healthcare system designed to encourage candid, complete communications between patients, their doctors and treatment facilities. Although D.C. medical examiners are physicians, there would be no practical benefit from extending to them principles of physician-patient confidentiality.

OCME staff do not treat patients; they conduct medico-legal investigations into suspicious deaths, just as the Department of Forensic Sciences conducts forensic examination of other evidence and the Metropolitan Police Department investigates crimes. Assistant medical examiners conduct tests and file reports that are not medical records as defined by HIPAA.

In the course of its investigations, the OCME often obtains medical records from physicians and health care providers. It does not rely on patient confidentiality to obtain complete, accurate information. If it cannot obtain voluntary compliance with requests for medical records, it has the power to subpoena records. Medical records in OCME case files remain protected by HIPAA, and therefore are exempt from disclosure under the FOI Act because they are made confidential by federal law.

The bottom line is that it would not advance the cause of physician-patient confidentiality to make OCME case file secret, and refusing to do so will neither jeopardize the OCME's access to needed information nor the perceived privacy interests of decedents or their families.

The OCME over-inflates a narrow Supreme Court holding to justify its overreach

Mr. Adams asserted that "[t]he U.S. Supreme Court and Circuit Courts of Appeal have resoundingly upheld the privacy rights of decedents and their survivors in the context of medical examiner records and other information related to their death being sought under the federal Freedom of Information Act. Citing *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004).

Indeed, *Favish* held that a decedent's relatives have a privacy interest cognizable under the federal FOI Act's law enforcement exemption, 5 U.S. Code § 552(b)(7)(C), and that under the

exemption the U.S Park Police could withhold death scene photos taken during investigation of Clinton Administration Deputy Counsel Vince Foster's suicide in Ft. Marcy Park. But the Court explicitly intended its holding to be read narrowly, that "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." *Id.* at 170. That conclusion

> does not end the case. Although this privacy interest is within the terms of the exemption, the statute directs nondisclosure only where the information "could reasonably be expected to constitute an unwarranted invasion" of the family's personal privacy. The term "unwarranted" requires us to balance the family's privacy interest against the public interest in disclosure.

Id. at 171.

In support of its argument, the OCME latches onto the Court's conclusion that, to overcome the family's privacy interest, the requester had the burden to demonstrate a connection between the requested records and their utility in uncovering government negligence or malfeasance. In the case of the Foster death-scene photos, unfocused assertions of government incompetence did not satisfy that burden.

But Mr. Adams ignores the Courts statement that

> FOIA is often explained as a means for citizens to know "what the Government is up to." This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

Id. at 171 – 72. "When disclosure touches upon certain areas defined in the exemptions, [] the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Id.* at 172.

In other words, initially the presumption favors disclosure, and an opponent of disclosure must demonstrate that records are exempt because disclosure would cause a clearly unwarranted invasion of personal privacy. The burden shifts to the requester only after a decision to withhold the records.

Bill 24-203 would effectively seal OCME case files, precluding anyone from requesting them under the FOI Act. In addition, contrary to the public policy of the District of Columbia, it would create a presumption against disclosure and put on any requester the nearly insurmountable burden of demonstrating to a Superior Court judge a need for the records.

In *Favish*, the Court held that disclosure of death scene photos in a very high visibility case with strong political overtones posed a clearly unwarranted risk of invasion of relatives' privacy. It did not rule that other records related to the Foster investigation could be withheld, nor did it carve out medical examiner records for special treatment under FOIA.

The Council should reject this bill because the FOI Act, as currently written, provides ample protection on a case-by-case basis for concerns about the privacy of decedents and their families. If you have any questions, please feel free to contact us.

Yours truly

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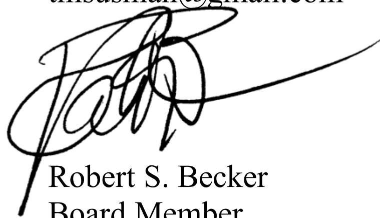

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