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**Supplement to Testimony of the**

**D.C. Open Government Coalition**

by

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Submitted for the record of the

Council of the District of Columbia, Committee on the Judiciary & Public Safety

on

Bill B24-0356, “Strengthening Oversight and Accountability of Police Amendment Act of 2021”

November 4, 2021

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The following texts offer language in areas in Sections 5 and 7 on opening police discipline records where our hearing testimony suggested clarification. In addition, we offer two other points:

* We agree with the testimony of the D.C. Auditor opposing the mandatory search committee (line 47ff) if a new Deputy Auditor is proposed in the final bill. But if a committee is retained, it should include public members as well.
* Treatment of the D.C. Department of Corrections is inconsistent in the bill, and we encourage the committee to explore the issue to resolve its full or partial inclusion. The new Deputy Auditor is to review DOC policy and practice (line 75). Yet the new Office of Police Accountability will not handle complaints about correctional officers’ use of force or other misconduct. Correctional officers’ discipline records are included in the release section (line 336) but not the database section. Legislation in California and New York led to release of correctional officers’ records along with those of other law enforcement employees. (For example, see a [database](https://www1.nyc.gov/assets/doc/downloads/xls/MOS_Discipline_01012020-08212020_Web.xlsx) for the first half of 2020 of NY City Department of Corrections officer discipline.)

1. **The bill makes the correct choice, to make all types of police discipline records eligible for release (not limited to certain incidents or certain outcomes of investigation).**
2. **The definition of covered records needs amplification.**
3. **Sec. 5 (4) should be expanded to make clear the breadth of records intended to be released. The Coalition recommends a new subsection (d-1)(2) beginning at line 334ff reading as follows:**

(2) For purposes of this section, the term “disciplinary records” that shall be released pursuant to this subsection includes

(A) personnel records and any other records maintained by any agency comprising

all complaints, allegations and charges against an MPD or HAPD officer whatever the subject, however received and investigated, and however resolved (including records relating to an incident in which the officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident);

(B) name of officer complained of or charged;

(C) investigative reports;

(D) photographic, audio, and video evidence;

(E) transcripts or recordings of interviews;

(F) autopsy reports;

(G) all materials compiled and presented for review to a prosecutor or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer’s action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take;

(H) transcripts or recordings of, and exhibits introduced in, any trial or hearing on any complaint or charge;

(I) documents setting forth recommended findings, findings, or final disposition of any disciplinary proceeding including findings of fact and analysis of the officer’s conduct and appropriate discipline; and

(J) copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to an appeal or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

1. **A subsection on time limits is needed. Fairness to officers, public interest, and workload should be considered and the legislation should be clear about how far back to extend record access. We couldn’t suggest such a date or dates as we lack facts on what is retained now in the police departments, and whether that is set by law, regulation or internal policy (which affects details of new law on keeping records as well as searching and releasing them). The Coalition recommends the committee get detailed facts before markup by asking the MPD, HAPD and OPC to describe the full extent of discipline and complaint records held in employee and complaint files, and also the same held in any additional records kept in agency files separate from employee and complaint files. The Police Reform Commission noted reports of “purging” of discipline from employee files, and recommended that end. But whether the information and records are retained is unclear.[[1]](#footnote-1)**

**Better data will allow specifying files to be disclosed and time frames, especially the key question whether the bill should set a limit how far back agencies must search and disclose. The bill could even specify both an absolute historical cutoff (for example “retain records of local service as long as a D.C. officer is a police officer anywhere”) plus different release treatment of records of incidents of greater and lesser gravity and depending on how far back they occurred.**

**Record retention is very important to clarify. Without clarity, the way is open for litigation over the Council’s intent on extent of records covered. Police organizations elsewhere have litigated aggressively over such details to slow implementation of laws they opposed in general.**

1. **Some FOIA exemptions (affecting other interests beyond the officer involved) probably still need to be preserved in the bill.**
2. **We recommend an expanded redaction section (d-1)(3) beginning at line 346 as follows:**

(3) When providing records pursuant to subsection (d-1)(1), the agency shall redact a record only for the following purposes:

(A) To remove technical infractions. “Technical infraction” means a minor rule violation, solely related to the enforcement of administrative departmental rules that (i) do not involve interactions with members of the public, and (ii) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

(B) To remove an officer’s personal data or information such as a home address, telephone number, identities of family members, or use of any employee assistance program, mental health service, or substance abuse treatment unless such use is mandated by a disciplinary proceeding disclosable under his section, but not the name and work-related information of any officer.

(C) To preserve the anonymity of whistleblowers, complainants, victims, and witnesses.

(D) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause a clearly unwarranted invasion of personal privacy that outweighs the strong public interest in records about possible misconduct and use of force by officers.

(E) Where there is a specific, articulable, and particularized reason to believe that disclosure of part or all of the record would pose a significant danger to the physical safety of the officer or another person.

(F) To protect privileged communication between agency officials and their attorneys.

1. **Law enforcement routinely invokes an exemption in existing D.C. FOIA, D.C. Code § 2-534(a)(3), to deny requests as “investigatory,” often for long periods creating doubt whether actual investigation continues or that is simply an available pretext. Review on appeal has been ineffective as the mayor’s appellate office often defers to agency officials’ blanket conclusory statements. With § 2-534 deleted by the bill, as applied to discipline records, we encourage adding back improved text to allow only limited investigative holds. Equivalent limits should also be added to the main text of D.C. FOIA law when there is an opportunity.**

**We recommend a new section (d-1)(4) as follows to limit and require written justification of both criminal and administrative investigation holds as well as holds when charges are tried:**

(4) An agency may withhold a record of an incident that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the misconduct or use of force occurred or until the prosecutor determines whether to file criminal charges related to the misconduct or use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency’s determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who engaged in misconduct or used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency’s determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who engaged in the misconduct or used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about misconduct or use of force by officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(B) If criminal charges are filed related to the incident in which misconduct occurred or force was used, the agency may delay the disclosure of records or information, whose release could deprive a person of a right to a fair trial or an impartial adjudication, until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time has expired to withdraw the plea.

(C) During an administrative investigation into an incident covered by this section, the agency may delay the disclosure of records or information until the investigating agency determines whether the misconduct or use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency’s discovery of the misconduct or use of force, or allegation of misconduct or use of force, by a person authorized to initiate an investigation.

1. **Limiting fees should be considered in view of likely volumes of records.**
2. **A full statutory fee waiver would rest on an uncertain assumption—that all discipline records requests will meet the public interest criterion in D.C. Code § 2-532(b). But the possibility of a broad fee waiver for discipline records (so that fees are not a barrier to public information) is a policy decision for the Council. Again, we lack data to suggest details (such as what will be the size and processing effort for requests under this new statute). We suggest a mandatory report back from the agencies. Limited redaction allowed in released discipline records, including body-worn camera video, intended to be less than in the present situation where the usual MPD redaction is excessive and hence costly (see above #3) should limit that element of cost and delay. Electronic records (which should predominate in recent files) should not entail any “copying.” Agency differences in fees charged is another longstanding problem with D.C. FOIA, and should be addressed in general by broader FOIA legislation needed as discussed several times above, mandating the Office of Open Government to develop a government-wide fee schedule. For now, we propose a new section should be added as (d-1)(5) as follows:**

(5) Copies of records subject to disclosure pursuant to this section shall be made available upon the payment of fees according to D.C. Code § 2-532. The MPD and OPA shall submit to the Council ninety days after the end of the first year of experience after the effective date of the Act a report on requests for discipline records under the Act, identifying requesters by type, file sizes released, costs and fees, with recommendations on any changes needed.

1. **A special response deadline may be needed.**
2. **If the bill seems likely to generate a large workload, an extended deadline is needed to avoid the current problem of requesters greatly disappointed with FOIA response delays. Compare the special 25-day deadline provided for body-worn camera video in D.C. Code § 2-532(c)(2A). A new section could be added as (d-1)(6) as follows:**

(6) Except to the extent temporary withholding for a longer period is permitted pursuant to (d-1)(4), records subject to disclosure under this section shall be provided at the earliest possible time and no later than 45 days, except Saturdays, Sundays, and legal public holidays, from the date of a request for their disclosure.

1. **The bill’s proposed public database needs clarification of records contained.**
2. **The database required in Sec. 7 of the bill as introduced, line 376ff, will take a long time to create owing to redactions likely needed in many records. This is because line 383 suggests all records are to be included—the same records and to the same extent as required to be released (line 334ff). That definition (as clarified in #1 above) is unworkable for the contents of a database and should be rethought.**

**A selected set of data elements will serve the public better -- a clearer, faster-loading finding aid, with full files available on request, as in the New York City database** [**here**](https://www.nyclu.org/en/campaigns/nypd-misconduct-database)**. We propose a hybrid plan with some elements specified in the statute and detailed plans to be worked out (with a response required by a time certain and with a requirement for user and expert involvement and review of examples elsewhere).[[2]](#footnote-2) The bill as introduced set the December 2023 publication date. Other intermediate planning dates involve months in 2022 when executive and levgislative work may be disrupted by the election year and the start of new mayoral and Council terms. We left out specific dates.**

**We recommend a revised section 7, identified as amending the mandatory, proactive publication section of D.C. FOIA, D.C. Code § 536, as follows:**

Sec. 7

1. By December 23, 2023, the mayor shall publish a searchable database of sworn officers in MPD and HAPD accessible to the public on the Internet without registration or charge.
2. The database shall at a minimum contain for each officer

(1) Rank and shield history;

(2) Department commendations, recognition or awards;

(3) Trainings, including in-service, promotional, and other modules;

(4) Disciplinary history, with dates, including each complaint or charge, the outcome for each including disciplinary actions taken, and the status of any open investigation.

(c) Considering users’ views and other issues, the mayor shall submit a proposed plan for the database to the Council within 180 days of the effective date of the Act.

(d) The plan shall include timelines and agencies’ responsibilities for creating the contents of the database (including how far back in time the data will extend and how it will be updated regularly), testing the database, and evaluating its usability by the public.

(e) The Mayor shall establish and consult with an advisory group to consider relevant examples of such databases elsewhere and provide recommendations for the proposed plan required by subsection (c) of this section. The advisory group shall consist of one representative from each of the following agencies and organizations, and any three additional organizations chosen by the mayor:

(1) Metropolitan Police Department

(2) Office of Police Complaints (or, to be renamed Office of Police Accountability)

(3) Housing Authority Police Department

(4) Fraternal Order of Police

(5) American Civil Liberties Union of DC

(6) DC Open Government Coalition

(7) Reporters Committee for Freedom of the Press

(8) Public Defender Service

(9) Office of the Attorney General

(10) Office of the United States Attorney for DC

(11) Electronic Privacy Information Center

(f) The Mayor shall submit the proposed plan required by this section to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 45-day period of review, the proposed plan shall be deemed disapproved.

1. “MPD should stop automatically purging ‘adverse actions’—the most serious level of discipline—from officers’ personnel records after three years. They should be permanently recorded, and when disciplining an officer MPD should be able to consider any previous adverse actions against that officer. Even lesser ‘corrective actions’ should not be automatically purged; officers should be required to demonstrate changed behavior.” [Commission Report,](https://lims.dccouncil.us/downloads/LIMS/47659/Introduction/B24-0356-Introduction.pdf) p. 26. [↑](#footnote-ref-1)
2. In the bill as introduced, Sec. 5 applies to MPD and HAPD but the database in Sec. 7 of the draft does not mention HAPD. The revised text suggested here in 7(a) and 7(e) includes HAPD officers in the database and HAPD therefore involved in database plans. We don’t know if HAPD records will now support such a database. [↑](#footnote-ref-2)