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**Testimony of the**

**D.C. Open Government Coalition**

by

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Before 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”

October 21, 2021

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Thank you for the opportunity to offer comments on the proposal in Bill B24-0356 to improve transparency in policing. Two of the bill’s sections will enhance public access to records of complaints, investigation of complaints and discipline imposed as a result—by means of amendments removing roadblocks in the Freedom of Information Act (FOIA) and by establishing a new public database.

Police face the dual demands of fighting crime while also obeying the law (a complex set of mandates in the Constitution, statutes and policies). Accountability for police departments and individual officers requires internal and external attention to setting sound policy, managing the work to be sure it conforms, and evaluating the results including close study of problem incidents. Public trust rests on solid information demonstrating policing is both effective and lawful. Unfortunately, full and accurate information is always at risk given the high political stakes involved for elected officials, police leadership, and individual officers.

Today’s bill builds on recommendations of the Police Reform Commission in its April 2021 report. The Open Government Coalition briefed the commission on our past decade of work and recommendations.[[1]](#endnote-1) We also submitted materials and held numerous follow-up discussions. Improved public reporting and attention to all kinds of transparency are in many segments of the bill that add a deputy auditor and strengthen the complaint review agency with expanded authority to review police policy, investigate a wider set of police conduct problems, and play a greater role in discipline.

The Coalition thus welcomes this important bill and particularly the initiative to correct longstanding MPD policies that conceal complaints, investigations and discipline. The Police Complaints Board called the present system “opaque” and MPD withheld its details even from the commission.[[2]](#endnote-2) Our points address Sections 5 and 7 of the bill.

1. **The bill makes the correct choice, to make all types of discipline records eligible for release.**

The Police Reform Commission described the growing trend of opening access to police complaint and discipline records, noting approaches vary and recommending full disclosure (all records regarding all complaints).[[3]](#endnote-3) The bill adopts their proposal, and we agree.

One goal of transparent records is to spot officers with histories of misconduct as they move among departments. For that purpose, records limited to sustained (and serious) complaints may be the priority for release. That was the choice of the California legislature when it ordered new access to discipline files in over 500 counties and municipalities employing 70,000 sworn officers.

But another goal is to allow evaluation of complaint investigations and outcomes. For that, access is needed to all complaints, especially since a large fraction are not adjudicated.[[4]](#endnote-4)

That was the approach of the New York legislature and is in the bill. But the potential workload should be noted, as its implications recur in many of the comments that follow. When access via state FOI law opened, in New York City alone there turned out to be 279,000 complaints of all kinds going back decades. Unions are traditionally skeptical of civilian evaluations of police work and sued to stop the New York release especially of unsustained complaints. Federal courts dismissed the claim that members would be harmed by public access to the full set of records.[[5]](#endnote-5)

1. **The definition of covered records needs amplification.**

The bill aims to end past MPD practice of denying discipline records requests under FOIA.[[6]](#endnote-6) It does this (line 331) by simply decreeing that for requests for disciplinary records the exemptions in FOIA do not apply. But in fact, past denials have rested chiefly on only two -- protections for personal privacy and law enforcement records -- yet the bill ends the application of the entire exemption section of the law, D.C. Code § 2-534. The bill then addresses privacy interests (and only of the officer) by new redaction rules for these requests alone. This design raises several issues needing further attention.

The first step is to better define records eligible for this special treatment.

The “disciplinary records” to be analyzed for release without regard to FOIA exemptions are defined (line 334) as those “created in the furtherance of a disciplinary proceeding.” Many OPC complaints result in referral to MPD for retraining. Would records of those be included, since the outcome is not clearly “discipline”? The bill should make clear the intent is to open all records of complaints of police misconduct, wherever filed, wherever investigated (OPC, MPD, etc.), and whether or not any discipline resulted.

Also, the bill should clarify whether all police records (as far back as are retained) are to be open. Logistics of handling requests under a new release mandate may be daunting. The commission reported on policies of purging discipline incident records from officers’ files, but it’s not clear if those are retained elsewhere. If large volumes of records have been retained under a lengthy retention schedule, there will be significant amount of redaction needed and that is always a serious bottleneck.[[7]](#endnote-7) The Council may want to consider setting a shorter limit (than the total years on file) for discipline records available to the public, especially for lesser offenses. If a large backlog develops, no request should be

denied at the retention expiration if it was eligible when received. Or this could be left for review as experience develops, with a mandated report at intervals.

Note the definition of discipline records is used again in defining contents of the database. Uncoupling these may be helpful, as suggested below, #7.

1. **Some FOIA exemptions probably still need to be preserved in the bill.**

Private details are now routinely redacted from requested police records released under FOIA, though often excessively.[[8]](#endnote-8) To replace the privacy exemptions (and associated detailed case law) that will no longer apply, the bill spells out (line 348ff) an alternative limited set of allowable redactions such as the officer’s minor infractions and a few personal details.

But since “disciplinary records” include “any record created in furtherance of a disciplinary proceeding” (line 335), the investigation files will contain a great deal more beyond the officer’s own personal details (line 352ff) that are protected by the bill’s new redaction rules.

Records of other persons that should be considered for privacy protection include some body camera video, some victim autopsy details such as photos, and witness interview details.

Other exemptions to consider adding back include:

* delaying release during pending investigations (and to avoid misuse of investigation holds, the law should allow only short extensions (60 days) renewable only upon public written explanation by a police official or prosecutor, or when charges are filed);
* limiting release to facts alone in privileged communications of police officials with agency attorneys.
1. **Consider providing for efficient handling of requests in cases where investigation records of an incident span several agencies.**

An incident may be investigated by a police department, one or more investigative agencies and a prosecutor. Those pursuing the full story of any incident will request records from all. Parallel and duplicative workloads would follow, with different offices possibly redacting the same files. At worst, inconsistent releases could result from different redaction rules. This could be avoided by requiring designation of a lead agency to handle review and redaction once for the body of common records.

1. **Limiting fees should be considered in view of likely volumes of records.**

We recommend by statute waiving all or most fees for misconduct records requests. They are squarely within the essential government accountability public interest purpose of open records laws. Waiver could extend at least to costs of search, review and redaction. Without fee relief, access to what are likely to be extensive records and video will be out of reach for many. MPD in recent years has quoted extraordinary fees for expensive redaction of body worn camera video.

1. **A special response deadline may be needed.**

FOIA requests must be answered within 15 days, but many already take longer. In 2019, almost 3,000

requests, or over a quarter of the total, took 16 or more days, and the figure doubled in the disrupted pandemic year of 2020 according to the mayor’s annual FOIA reports. Disregarded laws breed public cynicism, especially when there is no effective remedy (FOIA appeals opinions directing agencies to take action are not binding).

As suggested throughout these comments, the new workload of requests under the bill may tax the D.C. FOIA system already struggling to fulfill its legal obligations. Especially in high profile use-of-force cases the file will be enormous (as described in note vii from experience already in California). A special deadline for this class of requests (as enacted for BWC requests) may be useful. But such a decision could also wait until any special deadline can be set using data on the new requests.

1. **The bill’s proposed public database needs clarification of records contained.**

The database will be more or less difficult to create depending on what is in it. The bill as introduced requires (line 383) that the database include an officer’s “disciplinary history and records…consistent with” the definition of records used in the mandatory release section (line 334ff). Preparing redacted versions of all disciplinary records as defined there, for all officers going back as far as the record retention rules provide, will be a major undertaking.

However, a database may be useful for many with basic data elements rather than records. See the database developed by the NY ACLU to give brief details of the hundreds of thousands of NYPD complaints released.[[9]](#endnote-9) It is the digital equivalent of a library card catalogue—a guide to contents, glimpses of individual items, and a guide for those who will then check out full titles; all the records are available on request, so the database need not be burdened with the exact same contents.

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We appreciate the chance to offer views on this important step forward in open government and look forward to working with the committee on further development of the bill.

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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.

1. ENDNOTES

 For example, see testimony of Coalition President Tom Susman before this committee last year. “The Council should by statute clarify that the public interest in accountability justifies access to complaint and discipline investigation files. This step was taken by California and New York legislatures and should be taken here. The head of the D.C. Office of Police Complaints agreed in a recent press interview, stating ‘It would add a lot to community trust if the community was aware what kind of discipline was being handed out to MPD officers.’’’ Available at: <https://dcogc.org/wp-content/uploads/2020/10/TMS-DOCGC-testimony-MPD-BWC-10-15-20-12.doc>. [↑](#endnote-ref-1)
2. “Opaque.” See *Discipline* (D.C. Police Complaints Board, Policy Report #21-2, Oct. 14, 2020), p. 1 (finding D.C. police discipline “an opaque system that can appear to the community as being too lenient”). Available at: <https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Discipline.FINAL_.PDF>.

“Withheld from Police Reform Commission.” See *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission* (April 1, 2021), p. 157 (“The Commission was not able to review files for specific investigations conducted by the OPC and the MPD, nor did we have access to MPD disciplinary records….and we might have learned more had MPD’s processes been more transparent.”).

A recent review of the field agreed. “Law enforcement agencies and their internal investigations have typically been shrouded in secrecy and public suspicion. The fundamental goal of civilian oversight is to have an independent entity bring transparency to this historically opaque process.” Michael Vitoroulis, Cameron McEllhiney, and Liana Perez. *Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Oversight Practice*s, p.14. (Washington, DC: U.S. Dep’t of Justice, Office of Community Oriented Policing Services, 2021). Available at: <https://cops.usdoj.gov/RIC/Publications/cops-w0952-pub.pdf>. [↑](#endnote-ref-2)
3. *Decentering Police*, p. 175 (Recommendation 9). [↑](#endnote-ref-3)
4. The D.C. Office of Police Complaints receives roughly 800 complaints in a year. Around half are dismissed on the merits without adjudication (possibly because body worn camera video is available in three quarters of complaints). Only adjudication of the evidence can lead to sustaining a complaint, and only 18-24 have advanced to that stage in recent years. OPC annual reports are available at: <https://policecomplaints.dc.gov/page/annual-reports-for-OPC>. [↑](#endnote-ref-4)
5. See the database of 279,000 complaints here: <https://www.nyclu.org/en/campaigns/nypd-misconduct-database>. The court action was *Uniformed Officers Ass’n. et al. v. Bill DeBlasio*, 20-CV-2789. It ended in the U.S. Court of Appeals for the Second Circuit with a Summary Order, February 16, 2021 (refusing to enjoin the law ending an exemption for police discipline records since the court found no likelihood of harm to future employment from release of unsubstantiated complaints, nor any likelihood of threats of physical harm from angry citizens). The court wrote: “Unions have not sufficiently demonstrated that those dangers and risks are likely to increase because of the City’s planned disclosures. In arriving at that conclusion, we note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers.” Available at: <https://www.courthousenews.com/wp-content/uploads/2021/02/nypd-discipline-ca2.pdf>. [↑](#endnote-ref-5)
6. The Office of Police Complaints formerly released citizen complaints under FOIA. For reasons never explained, the Office changed course some years ago and now says it can neither confirm nor deny even the existence of complaints, to preserve officers’ privacy. Mitch Ryals, “D.C. Office of Police Complaints Records Leave Much to Be Desired.” *Washington City Paper,* September 3, 2020. Available at: <https://washingtoncitypaper.com/article/308805/d-c-office-of-police-complaints-records-leave-much-to-be-desired/>. Such an extraordinary response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. This response, colloquially known as a “Glomar denial” was first judicially recognized in the national security context. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether the CIA could refuse to confirm or deny its ties to Howard Hughes’ submarine retrieval ship, the *Glomar Explorer*). The D.C. Mayor’s Office of Legal Counsel has upheld these denials in administrative appeals, for example No. 2015-58 (May 4, 2015), and that position has never been tested in court. The legislation proposed in B24-0356 is needed to end this use of the privacy exemption and make clear the policy of the District of Columbia that all complaints, investigations of misconduct, and disciplinary results if any shall be open. [↑](#endnote-ref-6)
7. For perspective on the potential workload, we interviewed an individual who worked in a California law enforcement agency that had to respond to requests under the state’s disclosure requirement prescribed by legislation known as SB1421. He told the Coalition it was common that a complaint file for a serious incident could include thousands of pages. Included would be officer personnel records, police reports, interview transcripts from officers as well as witnesses and informants, radio dispatch transcripts, criminal histories of victims and others, autopsy reports with attached photographs and lab tests, forensic analyses (clothes, blood, hair, bullets, etc.), as well as records generated in internal processing of the case to determine discipline for any policy violations, and records of investigations by any external bodies. Body worn camera data could include video from as many as a dozen officers at the scene for minutes or hours. Reviewing and redacting the file of records not even counting video in one such case could take days of staff time, according to this person. [↑](#endnote-ref-7)
8. For example, MPD hires a contractor to remove many details before releasing body worn camera video under FOIA. The redaction follows unpublished rules and the results lack a sound legal basis, according to an advisory opinion of the Office of Open Government issued in response to a Coalition complaint. MPD declines to follow the opinion. Opinion available here: <https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020>. [↑](#endnote-ref-8)
9. See <https://www.nyclu.org/en/campaigns/nypd-misconduct-database>. [↑](#endnote-ref-9)