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Testimony of  
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On behalf of the D.C. Open Government Coalition  
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Before the Committee on the Judiciary and Public Safety  
Of the Council of the District of Columbia

Performance Oversight Hearing — Office of the Chief Medical Examiner

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Thank you for inviting the D.C. Open Government Coalition to testify today regarding performance of the Office of the Chief Medical Examiner (OCME) over the past year. I am a member of the Coalition’s board and a Ward 4 resident.

The OCME’s mission is to “investigate and certify all deaths ... that occur by any means of violence (injury), and those that occur without explanation or medical attention, are related to drugs, of persons in custody, or which pose a threat to the public health.”<sup>1</sup> In addition, it investigates deaths of individuals who are wards of the District in foster care, group homes, and mental health facilities; deaths of infants, children, domestic abuse victims, persons with disabilities, and nursing home residents. Not all OCME cases are related to deaths. In 2019, it analyzed evidence law enforcement agencies collect in cases where drivers were suspected of being under the influence of alcohol or drugs (DUI), and in cases in which drugs or alcohol may have been used to facilitate sexual assaults.<sup>2</sup>

The OCME investigations involve crimes, domestic violence, substance abuse, police misconduct, neglect and mistreatment of vulnerable individuals, and failures of the social safety

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<sup>1</sup> <https://ocme.dc.gov/page/ocme-faqs>.

<sup>2</sup> According to the OCME’s 2019 Annual Report, the latest available on its website, it accepted 1,343 cases for investigation, conducted autopsies in 936 of them, and analyzed evidence in 404 DUI cases and 104 sexual assault cases.

[https://ocme.dc.gov/sites/default/files/dc/sites/ocme/agency\\_content/OCME\\_2019\\_web.pdf](https://ocme.dc.gov/sites/default/files/dc/sites/ocme/agency_content/OCME_2019_web.pdf).

net. It collects and analyzes medical and toxicological evidence for use in criminal and civil judicial proceedings, and its employees provide expert testimony in such proceedings.

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. It can overrule the wishes of a decedent's family, and require an autopsy.<sup>3</sup> 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).

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.<sup>4</sup>

To foster public trust, the Freedom of Information Act (FOIA) 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. It is beyond debate that the OCME's case files are public records as defined in D.C. Code § 2-502(18), that deaths documented in them are of great public interest and concern, and that the files shed light on the operations of government and regulated non-governmental entities and individuals.

Nonetheless, the OCME has asked the Council to enact amendments to its enabling statute and the FOI Act that would make it virtually impossible for a member of the public or news media to obtain access to OCME case files. It proposes a blanket exemption of its case files from disclosure under the FOI Act, a requirement that anyone seeking access to one or more files must initiate action in the Superior Court, and mandates a virtually unachievable standard of proof necessary to obtain court-ordered access.

The OCME argues that its case files may contain medical records, photographs of decedents' bodies, and recordings — video and audio — of autopsies. It asserts that medical examiners have medical degrees, and like doctors who treat patients should be covered by the physician-patient privilege. It claims that these amendments are needed to protect the privacy of decedents and their families. Finally, it claims existing law provides a confusing standard for when case files may be disclosed.

The Council should reject the OCME's proposed amendments because they will reduce public oversight of the agency and thereby erode public confidence in it, and because the justifications given for them are dubious at best. Regardless of language in the OCME statute, the FOI Act and court precedents interpreting it provide ample guidance to protect medical records and personal privacy.

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<sup>3</sup> <https://ocme.dc.gov/page/ocme-customers-served>.

<sup>4</sup> 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/>.

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. To demonstrate the importance of public access to OCME case files, I have attached to my written testimony a letter the Reporters Committee for Freedom of the Press sent this committee December 21, 2021. It describes how large and small, national and local news media have used autopsy and coroners’ reports and related records to inform the public about major law enforcement, public health and human rights issues. It enumerates legislative and judicial actions in several states to increase public access to records like those the OCME wants to keep secret.

In evaluating the proposed amendments, it is important to remember that the OCME is a public safety agency, not a health care provider. Although its medical examiners possess MD degrees, they are medico-legal investigators, not physicians who treat patients. The documents OCME employees prepare at taxpayer expense are investigatory records 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.

However, 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 the federal Health Insurance Portability and Accountability Act (HIPAA). 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.

The OCME asserts that amendments in Bill 24-203 will “address the current vague and ambiguous language permitting access ... if one has a ‘legitimate interest,’ ” in the records. That provision, § 5-1412, 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. In responding to a FOIA request, the “legitimate interest” requirement must be read in conjunction with § 2-531, the unambiguous public policy of the District that the public has a legitimate interest in OCME case files. But that does not mean the OCME must release complete files, or even complete documents from a file to the requester.

In response to a FOIA request, the OCME must apply reasonably clear standards to determine which records may be withheld to prevent clearly unwarranted invasions of privacy, impairment of criminal prosecutions, or because they are by law confidential. It must then disclose non-exempt records. Those are the standards applied by every other District agency when it receives FOIA requests, and there is no reason to give the OCME a pass.

There certainly is no reason to force a D.C. resident or news outlet to bear the considerable expense and delay entailed in filing suit in Superior Court to gain access to OCME case files. Such a requirement would be especially problematic because the proposed amendments reverse the burden of proof to gain access. Under the FOI Act, the public has a presumptive right of access, and the “burden is on the public agency to sustain its action.” § 2-537(b). The proposed amendments would place an almost insurmountable burden on the requester by creating a strong presumption that disclosure would invade personal privacy.

The OCME has asserted that the amendments “will clarify that OCME case files are confidential, in line with privacy protections for death certificates.” 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 (Star Pub. Co. v. Parks, 875 P.2d 837 (Ariz. 1994))*. 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

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.

We ask that the Council reject the OCME’s legislative proposal because, the District’s FOI Act, as currently written, provides ample protection on a case-by-case basis for concerns about the privacy of decedents and their families.

We look forward to working with the Judiciary Committee in the future on access to records of the OCME and other public safety agencies. Thank you.

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Formed in March 2009, the D.C. Open Government Coalition seeks to enhance public access to government information and transparency of government operations of the District. We believe transparency promotes civic engagement and is critical to a responsive and accountable government. We strive to improve the processes by which the public gains access to government records and proceedings, and to educate the public and government officials about the principles and benefits of open government. Visit our website, [www.dcofc.org](http://www.dcofc.org).

For additional information call Robert Becker, 202 306-2276..