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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 Government Operations and Facilities
Of the Council of the District of Columbia

Public Roundtable — Strategic Plan for the Office of Advisory Neighborhood Commissions

On behalf of the D.C. Open Government Coalition, thank you for giving us the opportunity to address what a strategic plan for the Office of Advisory Neighborhood Commissions (OANC) should include to increase ANC transparency sustainably. I am a member of the Coalition board, and a Ward 4 resident served by ANC 3/4G.

Since the 1990s, when government entities began the transition from paper to digital records , and from file cabinets to electronic record management systems, a major goal of public records legislation has been to mandate publication of records for everyone online, and reduce the need for disclosures to individuals in response to FOIA requests. The D.C. Council enacted D.C. Code § 2-536 in 2000 in “the belief that open access to information ... is crucial to promoting responsibility and accountability in government.”¹ It said,

a written request for information is unnecessary when the information is specifically required to be made public. This section has been expanded to include records that have been released and are likely to be requested in the future, and an index of all records that are available under the section.... Additionally, ... information that is required to be

¹ Bill 13-829, the “Freedom of Information Amendment Act of 2000”, Committee Report, 1. https://lms.dccouncil.us/downloads/LIMS/8288/Committee_Report/B13-0829-Committee_Report1.pdf.

made public under this section must be available on the internet or by other electronic means....

Id., at 2.

I helped draft the 2000 amendments and several subsequent D.C. FOIA bills, and over two decades I have learned that improving information infrastructure is a fundamental requirement to achieve greater public access to District government records. Beginning in the 1990s, executive agencies and the Council, with varying degrees of success, have leveraged information technology to manage, preserve, secure and retrieve their records and data to comply with the FOI Act.

But the Districts 40 ANCs, which are public bodies of the District government, and the nearly 300 commissioners who serve on them, each an elected District official, have been left to their own devices — literally and figuratively — to keep track of their public government records — documents received from within and outside the government, and those they create. Historically, they have used personal computers, cell phones, messaging apps, cloud storage accounts, and commercial internet service providers (ISP). They have government email addresses, but we know at least some commissioners use personal email accounts to conduct government business.

The OANC website provides no policies, manuals, training materials or regulations governing records management, preservation or security. It offers a single training document from the Board of Ethics and Government Accountability (BEGA) instructing commissioners to use only their government email accounts to conduct ANC business. But the site provides no guidance regarding preservation of text messages and communications over social media apps.

The OANC provides each commissioner the Advisory Neighborhood Commissioner Handbook (ANC Handbook), updated annually, but that document offers no guidance on public records management or FOIA compliance. The handbook is not publicly available on the OANC website. The OANC website, unlike sites of virtually all executive branch bodies and the Council, has no FOIA page and does not identify its FOIA officer to facilitate public access.

In 2020, the Council created a Technical Support Fund administered by the OANC for “[p]lanning, development, or procurement of a mobile or computer application to assist [commissioners] with outreach and engagement with their constituents,” to supplement existing funding for “communications access services,” and to provide remote meeting, audio-visual, printing and website services for ANCs. *See* D.C. Code § 1-309.13a(c), enacted in D.C. Law 23-149, the Fiscal Year 2021 Budget Support Act of 2020.

In testimony last month at the performance oversight hearing, OANC staff reported that they have negotiated a contract for the Office of the Chief Technology Officer (OCTO) to provide services mandated by § 1-309.13a. But two years into the pandemic, several ANCs still lack the technologies the fund is supposed to provide, and the OANC has not disbursed any funds to remedy their deficiencies.

For our purposes today, it is important to note that:

- The 2020 legislation does not address essential information infrastructure needs discussed above;
- The Office’s responses submitted before the oversight hearing to this committee’s pre-hearing questionnaire, demonstrate that the OANC does not consider providing such services to be its duty in support of ANCs and commissioners; and
- Needed Enhancements at the Office of Advisory Neighborhood Commissions (ACTOS Report), 1, prepared “as a framework for the strategic plan” by the Advisory Committee to OANC for Services (ACTOS), only glancingly addresses some of our concerns. *See Recommended Future Support Services from the OANC, D. Help Commissions Operate Efficiently. Id.* at 8 – 9.

Establishing a sustainable information ecosystem for ANCs and defining the OANC’s duties to support it are essential components of the strategic plan

ANCs are public bodies of the District government, made up of commissioners elected by D.C. residents to represent their neighborhood. Like the Council and executive agencies, they are obligated to retain, preserve, secure and disseminate public records in compliance with the FOI Act, D.C. Code § 2-531, *et seq.*; and D.C. Code § 1-309.11(g). Like Executive Branch agencies, ANCs are subject D.C. Code § 2-1701, *et seq.*, governing public records management. *See* D.C. Code § 2-1714(a).² But because they lack even rudimentary records management systems, it is doubtful that they are in compliance.

The strategic plan should direct the OANC to:

- Acquire and implement a common electronic records management system for ANCs, and require the Office, commissioners and ANC staff to use that system for all official business. That system should be designed to securely store, preserve, and facilitate retrieval of all ANC records, including, but not limited to, documents, data, emails, text messages and social media communications.
- Develop policies and procedures for implementing records management in compliance with § 2-1701, *et seq.*
- Develop a plan for staffing the OANC and/or ANC offices to support records management efforts.
- Develop a training program to be administered annually to all commissioners and staff regarding use of the system and their duty to preserve records.
- Create a Help Desk to resolve issues system users encounter.
- Ensure on a continuing basis that all commissioners and staff preserve public records in compliance with policies, regulations and D.C. law.
- Provide electronic devices for use in conducting official business or a procedure for obtaining access to personal devices used to transact such business.
- Provide staff assistance to ANCs responding to FOIA requests.

² The Council is exempt from those requirements pursuant to § 2-1714(b)(1), but addresses records management by rule. *See* RULES OF ORGANIZATION AND PROCEDURE FOR THE COUNCIL OF THE DISTRICT OF Columbia, Art. VIII — Council Records, 88, PR24-001.

In the strategic plan, the Council should:

- Set a deadline for full implementation, and intermediate milestones the OANC must meet in accordance with the mandate.
- Identify funding necessary to implement the strategic plan and fund ongoing records management operations.
- Establish criteria by which it will evaluate the OANC's progress toward implementation, and later, commissioner and staff compliance.

Allow FOIA administrative appeals to the Office of Open Government (OOG)

There is an issue unrelated to the strategic plan that the Council should address to improve compliance with the FOI Act. It should amend the statute to give the OOG authority to adjudicate administrative appeals after an ANC or the OANC has denied a FOIA request.

Currently, a requester denied access by an executive agency, board or commission may appeal to the mayor. In recent years, in response to such appeals, the Mayor's Office of Legal Counsel (MOLC) has ruled in the requester's favor in more than 50 percent of a cases. In those cases, requesters were spared the considerable expense and delay of having to file suit in the Superior Court.³

ANCs, like the Council, are legislative bodies over which the mayor has no adjudicative authority. But D.C. Code § 2-1162.01a gives BEGA authority to adjudicate matters involving all D.C. government employees and elected officials, and D.C. Code § 2-1162.05c(d) gives the OOG authority to issue advisory opinions in response to FOIA violations.

Giving the OOG the ability to adjudicate administrative appeals from ANCs' FOIA denials would be an incremental expansion of the Office's authority, and would provide requesters a low-cost, relatively rapid procedure to vindicate their right of access.

Include ANCs under the Open Meetings Act

For years, several ANCs have fully complied with the OMA without difficulty. The pandemic forced others to become more transparent, but they still do not fully comply with less stringent requirements of § 1-309.11.

Every year, the OOG receives complaints that ANCs met without giving adequate notice, held secret meetings, or failed to make recordings of meetings or minutes publicly available. The ANC Handbook, 38, may be to blame in such instances because it instructs that D.C. Code § 1-207.42,

³ The OOG receives complaints every year from FOIA requesters about denials issued by the OANC or an ANC, and can do nothing more than issue advisory opinions asserting that records should have been disclosed.

does not ban Commissioners from meeting privately.... The District’s Open Meetings law ... exempts ... ANC[s] from the definition of public body. Accordingly, ... Commissioners ... may meet privately to discuss what items to put on the agenda or to share their ideas about agenda items. However, no votes may be taken, and no “official” decisions may be taken at such closed sessions. In accordance with the Home Rule Charter, any votes taken at such sessions are null and void. A better and less misleading name for the law that pertain to ANC[s] might be the “Official Decisions Law.”

“Official” decisions or action in this context means advice or recommendations to other government officials or agencies. It is “ok” to take votes on *administrative* actions such as deciding what room to hold the monthly meeting in, where to post the meeting notices, or what color paper to print the agenda on, in unpublicized “Executive Committee” or “Committee of the Whole” meetings.

In response to each complaint, the OOG must tell a District resident it cannot help because it lacks jurisdiction. It must tell the resident his or her only recourse is to sue the ANC in Superior Court, and there is no remedy unless the ANC voted on a matter in a meeting from which the public was excluded. § 1-207.42.

The OMA’s requirements are not burdensome, and there is no rational justification for excluding ANC[s] from a statute to which every other elected and appointed public body must comply. Nor is there a rational justification for preventing the OOG from assisting residents when ANC[s] violate transparency laws.

We look forward to working with this committee to confirm a new executive director for the OANC and to formulate a plan to modernize the Office and ANC operations. Thank you.

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.

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