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Testimony of

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On behalf of the D.C. Open Government Coalition

April 6, 2022

Before the Committee on Human Services

Council of the District of Columbia

Budget Oversight Hearing — Board of Ethics and Government Accountability,

Office of Open Government

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On behalf of the D.C. Open Government Coalition, thank you for giving us the opportunity to explain why the Council should increase the Board of Ethics and Government Accountability (BEGA) Fiscal Year 2023 budget to improve D.C. government transparency. The Office of Open Government (OOG) needs more resources than the mayor’s *status quo* budget provides to better serve D.C. residents and to address pandemic-related agency lapses. I am a member of the Coalition board, and a Ward 4 resident.

In the BEGA performance oversight hearing in February, we highlighted several areas in which the OOG, if given authority and resources, could greatly improve public-body compliance with the Freedom of Information Act (FOIA) and Open Meetings Act (OMA). We now ask the Council to fund:

* Establishment of a Transparency Task Force to examine the District’s transparency statutes, records management infrastructure, and public engagement technology; and to propose amendments to modernize the FOI Act and OMA, improvements to the FOIA portal, and technology upgrades to facilitate public access to records and meetings.
* OOG development and implementation of a strategy and timetable to bring all public bodies into compliance with the affirmative disclosure requirements of D.C. Code § 2536.
* Creation of a FOIA administrative appeal to the OOG for requesters wrongly denied access to records by Advisory Neighborhood Commissions (ANC) or the Office of Advisory Neighborhood Commissions (OANC).
* Application of the OMA to ANCs.
* Development and implementation of policies governing retention of text messages related to government business, sent or received by District officials and employees on government-issued or personal devices.

The Council created the OOG in 2010 to be the government-wide authority on transparency issues — straddling the boundary between the executive and legislative branches to increase public access to government records and meetings. But the current administration, and to a lesser degree its predecessor, put the Office of the Chief Technology Officer (OCTO) in charge of data policy and transparency systems, denying the OOG a leadership role in decisions critical to its mission and the broad scope of the Office’s authority.

The Executive’s assertion of control over such decisions has had significant negative consequences for transparency:

* Acquisition and retention of FOIAExpress as the District’s FOIA portal — OCTO acquired the software without consulting the OOG, and has repeatedly renewed the contract, most recently at a cost of $750,000 for three years. The portal provides access to records of subordinate agencies, but because OCTO lacks authority to require participation, virtually all independent agencies have opted out. Our experience over many years, based on use of the portal, efforts to train D.C. residents to use it, and discussions with agency personnel is that FOIAExpress serves neither the public nor government well. But, citing the cost for retraining agency personnel, OCTO has repeatedly refused to evaluate highly rated platforms used in other jurisdictions as potential replacements for FOIAExpress.
* Since the Council enacted § 2-536 in 2000, OCTO had designed websites for virtually all executive agencies, but most agencies’ sites do not provide the broad range of content the statute requires them to publish online. The Office of Administrative Hearings (OAH) is among the most egregious scofflaws; having failed to publish online thousands of opinions issued over several years, it has yet to comply with the Council’s Fiscal Year 2022 budget directive to put those opinions online. The Mayor’s Office of Legal Counsel (MOLC), which adjudicates FOIA administrative appeals and must publish opinions online, has posted none issued since early 2018.
* When the pandemic began, the MOLC stopped processing FOIA appeals, creating a backlog of more than 300 cases, many of which remain undecided over a year after the Council reinstated the FOI Act’s statutory deadlines. The MOLC has provided no plan to reduce the backlog, and has requested no funds for additional staff to process the appeals. If the mayor were willing to delegate to the OOG authority to decide backlogged appeals, the Office would need additional staff resources.

***The Council should increase the OOG budget to improve transparency***

# Create a Transparency Task Force

The Council should fund creation of a Transparency Task Force including members drawn from the executive and legislative branches, District residents, community advocates, and individuals with expertise in government transparency and related technologies. The task force should be chaired by an outside expert, and its operation should be coordinated by the OOG. It should have authority to address transparency deficits of independent and subordinate agencies, the Council, boards and commissions, and among Advisory Neighborhood Commissions (ANC).

# Fully implement D.C. Code § 2-536 government-wide

The FY 2023 budget should include funding for the OOG to develop a plan to bring all public bodies — legislative and executive — into compliance with § 2-536, and to set a deadline for reaching that goal. It should include OOG staff to advise public bodies regarding technology needs and systems to publish and keep online records current.

# Provide an administrative appeal from ANC FOIA denials

The Council should amend the FOI Act to authorize the OOG to adjudicate administrative appeals from decisions made by ANCs and the OANC, and to fund that change in the FY 2023 budget. Because ANCs, like the Council, are legislative bodies over which the mayor has no adjudicative authority, District residents wrongly denied access to ANC records have no administrative remedy. They must sue in the Superior Court to challenge the denials, a process that is costly and time-consuming.

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.

# Bring ANCs under the OMA

In the OANC performance oversight hearing before the Government Operations & Facilities

Committee, staff and ANC witnesses agreed with the Coalition’s call to bring ANCs under the OMA. The Council can amend the statute after completing the budget process. But it should appropriate funds in the FY 2023 budget the OOG will need to implement the change, including training, advisory services to public bodies and the public, and adjudicating OMA complaints. It is especially important to increase OOG resources now because the redistricting plan the Council adopted earlier this year will add 50 new commissioners to the current roster of about 300.

We look forward to working with this committee to improve transparency at all levels of the D.C. government.

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.

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