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November 14, 2022

Hon. Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Bill 24-203 — “Medical Examiner Records Privacy Act of 2022”

Dear Chairman Mendelson:

Bill 24-203, the Medical Examiner Records Privacy Act of 2022, is on the consent agenda for first reading at the Council’s legislative session tomorrow. On behalf of the D.C. Open Government Coalition, I am requesting that the bill be moved to the non-consent agenda so it can be amended, or that you refer it back to the Committee on the Judiciary and Public Safety for further consideration.

The public, journalists and researchers will lose any meaningful access to investigatory records of an important public safety agency if the Council passes this bill as written because, contrary to what the committee says, the Office of the Chief Medical Examiner’s (OCME) case files, and the broad range of records they contain, will be excluded from the Freedom of Information Act (FOIA). The bill designates two types of records as outside the exclusion — external examination and autopsy reports, which together often include 10 to 20 pages of findings and notes, but states that the public may obtain information in only 10 data fields in those reports.

Bill 24-203 is antithetical to the public policy clearly stated in the FOI Act that “all persons are entitled to 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. The FOI Act presumes that government records are public, but allows agencies, under well-defined exemptions, to withhold sensitive information and records. If an agency misapplies exemptions, a requester can obtain administrative or judicial review and relief.

The Committee claims this bill improves public access by “recogni[zing] that there will be instances where the public’s need to know about the circumstances of an individual’s death outweighs the privacy interests of the decedent’s family.” Report on B24-0203, the “Medical Examiner Records Privacy Amendment Act of 2022” (Committee Report), 2.

It readily acknowledges the strong public interest in OCME investigations:

As the events of January 6, 2021 at the U.S. Capitol demonstrated, public access to external examination or autopsy reports are needed to provide the public with the necessary context and information. For example, initial reporting into the death of U.S. Capitol Police Officer Brian Sicknick stated that Mr. Sicknick died a day after sustaining injuries during the riot. The autopsy performed on Mr. Sicknick by OCME later revealed that he died of natural causes the day after engaging with rioters. Information generated by OCME can also be crucial in informing the public on shootings by law enforcement and other deaths where the public’s interest in knowing the circumstances of the decedent’s death is great.

Committee Report, 5 – 6. (footnotes omitted) Therefore, it asserts, “exempting all OCME records and files from disclosure and forcing members of the press to obtain access to such records and files through a lawsuit, as the bill initially proposed, unfairly tilts the balance toward individual privacy interests.” *Id.* at 6.

In fact, this bill “tilts the balance toward individual privacy interests” further than current law or the original proposal. It completely eliminates the public’s right of action in court to obtain records in all OCME cases. Under this bill, it would be almost impossible for D.C. residents, news media and researchers to perform their duty as watchdogs over government.

The committee recognized the public’s need for context to understand suspicious deaths. But it cannot explain how disclosure of information in the 10 data fields from external examination and autopsy reports would satisfy that need. Eight fields provide personal identifiers and statistical markers, and two — Cause of Death and Manner of Death — provide terse conclusions.¹

The Council should amend the bill by rewriting Sec. 2(b) to read in relevant part:

...

(c-1)

- (1) Except as provided in subsection (c-2) of this section, the records and files maintained pursuant to subsection (a) of this section shall be public records under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*), ...

This change will preserve the public’s right-to-know and protect personal privacy because the FOI Act requires the OCME to balance those interests and others on a case-by-case basis. D.C. Code § 2-534(a)(2), (3) and (6). In cases where the OCME misapplies exemptions, requesters will be able to vindicate their right-to-know through administrative and judicial appeals.

The public’s ability to oversee the OCME is important because, to fulfill its mission, the agency

¹ For example, in a 2004 murder case, the autopsy report listed six gunshot wounds and other trauma to the decedent’s body, the Cause of Death field read, “gunshot wounds of torso injuring heart, liver, gastrointestinal tract and iliac arteries,” and the Manner of Death field read, “Homicide.” *U.S. v. Dwight Grandson*, Dkt. No. F-5751-04.

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.² By making OCME case files secret under the dubious claim that doing so will protect privacy, this bill will reduce public oversight of the agency and thereby erode public confidence in it.

The OCME’s primary function is to investigate suspicious deaths, including violent deaths, deaths of individuals wanted by or in the custody of the D.C. government, deaths that may have been caused by medical malpractice or negligence, deaths from diseases that pose a threat to public health or resulted from workplace exposure, and deaths of government wards. D.C. Code § 5-1405(b).

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. 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).

It is beyond debate that the OCME’s case files are public records as currently defined in D.C. Code § 2-502(18), and the deaths documented in them are of great public interest and concern. That such files may contain medical records, photographs of decedents’ bodies, and recordings — video and audio — of autopsies, does not justify categorizing all OCME case files as confidential.

Events over the past several years, including deaths of civilians at the hands of police, deaths of veterans due to failures at Veterans 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. D.C. Code § 2-531, *et seq.* Those files contain records prepared by OCME employees in performance of their investigatory duties 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.

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 federal 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.”

In 31 states, medical examiner and/or coroner case files as public records subject to disclosure.

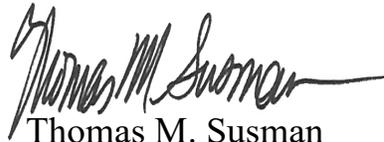
² Failures at the Department of Forensic Sciences, and the fallout from them, dramatically illustrate this. <https://www.washingtonpost.com/dc-md-va/2021/10/15/dc-agencies-launch-post-conviction-reviews-light-crisis-department-forensic-sciences/>.

Laws and precedents in those states 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. Only 12 states exempt medical examiner and/or coroner records from disclosure.

Therefore, enactment of Bill 24-203 as written will put the District in the small minority of jurisdictions nationwide.

The Council should amend this bill to clearly state that OCME case files are subject to the FOI Act, or it should return it to the Judiciary Committee for reconsideration. If you have any questions, please call me.

Yours truly,

A handwritten signature in black ink that reads "Thomas M. Susman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Thomas M. Susman

President

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