D.C. Open Government Coalition

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November 30, 2022

Hon. Charles Allen
Chairman
Committee on the Judiciary & Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Bill 24-320 — "Comprehensive Policing and Justice Reform Amendment Act of 2022"

Dear Councilmember Allen:

The Judiciary and Public Safety Committee Wednesday is scheduled to mark up Bill 24-320, the Comprehensive Policing and Justice Reform Amendment Act of 2022. The D.C. Open Government Coalition strongly supports provisions of this wide-ranging legislation that open law enforcement records to D.C. residents. But we have serious concerns about whether two major provisions will live up to the Council's goal to increase transparency and increasing public confidence in law enforcement.

The attached document includes the Coalition's suggested changes to further improve transparency of the Metropolitan Police Department (MPD), the Housing Authority Police Department (HAPD), and Office of Inspector General (OIG).[1] In this letter I will focus on the two areas of greatest concern to the Coalition — the provisions for the mayor's release of police body-worn camera (BWC) videos related to police use-of-force and officer-involved-death events, and those making public records of law enforcement disciplinary complaints.

BWC VIDEOS SHOULD BE PUBLIC IN ALL OFFICER-INVOLVED-DEATH AND USE-OF-FORCE INVESTIGATIONS

The bill orders the mayor to publicly release BWC videos recorded by officers "directly involved" in officer-involved-death and police use-of-force incidents. Bill 24-320, § 103(c)(2). But it gives victims of police violence and relatives of deceased victims the power to veto the

[1] Most of our comments are based on the attached committee print issued before Thanksgiving, and cites below to sections and line numbers refer to that document, not the revised committee print released at about 2 p.m. November 29, 2022.

public's access. In our view this veto power, applicable to a small but important set of cases, opens the door to secrecy that inhibits important public information, and should be reconsidered. We fear government pressure on families may thwart the legislation's purposes — restoring public confidence in law enforcement and holding law enforcement officers accountable. § 103(c)(2)(A).[2]

Although the Freedom of Information Act (FOIA) is separate from this new directive to the mayor to release BWC video in certain cases, FOIA principles are instructive. That act does not give non-governmental actors power to deny the public access to public government records. In some circumstances a person or entity required to submit records to the government may object to disclosure of those records or portions of them. For example, a company may have to disclose proprietary information to a regulatory agency, and would suffer economic harm if the agency discloses the information. But the decision about disclosure, and whether to invoke a FOIA exemption, rests solely with the agency, and cannot be delegated to the non-government party.

We understand the sensitivity of cases in which civilians are injured or killed by law enforcement officers, particularly those involving excessive or even illegal uses of force. But the Council is enacting this permanent legislation to restore public confidence in law enforcement by removing the cloak of secrecy that until recently surrounded use-of-force and officer-involved-death investigations.

The veto provision unfortunately invites abuse, and we unhappily suggest that warning in light of MPD's long-standing effort to frustrate transparency about uses of force and public access to BWC videos. It took years of litigation to overcome MPD's deliberate avoidance of the statutory requirement to release stop and frisk data. MPD's next line of resistance was BWC video; which the administration initially supported by proposing to exclude the videos from the definition of public records, and to allow public release only at the mayor's discretion. The Council rejected that approach, and required rules for access under FOIA. But, according to the Office of Open Government, MPD now responds to FOIA requests for BWC video through a slow and costly process that releases unintelligible video that have been excessively redaction based on incorrect reading of privacy law.[3]

The bill's provisions for police contact with families regarding video release highlights the opportunity for officials to suggest they use the veto. Yet the situation is a significant conflict of interest, particularly in cases raising questions about whether officers failed to follow established procedures.

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[2] This appears to be a numbering error because § 103(c)(2) has subparagraphs (A) and (B) (Lines 166 – 180). and the veto provision is then numbered (2)(A) and (B) (Lines 181 – 193). It is my understanding that the Nov. 29 committee print corrects this error.

[3] Dkt. No. OOG-002-10.1.19-AO, Office of Open Government, Nov. 5, 2020, https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020.

When family members disagree about whether BWC videos should be released, the bill provides for court resolution in a scheme that shows further weaknesses of the veto concept. Under § 103(c)(2)(B) (Lines 189 – 193), the mayor would ask the Superior Court to settle the question of release. But the bill provides no specification of the role of the government in the matter — whether it is an advocate for disclosure or for one of the parties.

If a party were to ask the court to block disclosure in response to a FOIA request, the government would oppose that because the statute creates a clear presumption in favor of public access to all non-exempt government records. But, because release of BWC videos under this bill is not governed by the FOI Act, and in light of the mayor's historic opposition to the public's right to obtain any BWC videos, it is very likely that the administration would side with relatives opposing disclosure.

This dispute resolution process suffers from two additional flaws — it establishes the wrong standard of review, and it sets no deadlines for the mayor or the court. Under FOIA, when courts must determine whether an agency properly applied the privacy exemption, the court must balance the competing interests — the claim that disclosure would be a "clearly unwarranted" intrusion on privacy versus the strong presumption in favor of disclosure. In this bill's court resolution scheme, we see no voice for the public interest — especially if the mayor may become an advocate for relatives opposing disclosure, and the court is directed to release video only if doing so is "in the interests of justice." See Lines 192 – 193. The "interests of justice" standard is applicable when weighing litigants' competing interests, but is poorly suited to balancing competing concerns about personal privacy and the public right to know about potential police misconduct.

Finally, the mayor must release BWC videos within five business days after an officer-involved-death or use-of-force incident. Absent a firm deadline, the need to litigate such a dispute and obtain a resolution in Superior Court will cause very significant delays in disclosure.

PUBLIC ACCESS TO LAW ENFORCEMENT DISCIPLINARY RECORDS

We strongly support provisions that would create a database of complaints involving D.C. law enforcement officers, and require disclosure under the FOI Act of records of investigations of those complaints. However, we urge revision of the proposed FOIA amendments to make clear that they encompass all relevant records, and that the law enforcement and personal privacy exemption cannot be invoked to withhold those records. We propose expanding the scope of cases in the database, and re-evaluation of the project's implementation.

The FOIA amendments should be redrafted

The bill should begin with the assumption that under the FOI Act, all government records are presumptively public unless they are designated confidential by another statute, a court order, or a common law or judicial privilege. That would make it unnecessary to create a list of the types of records subject to disclosure under the statute. In states that recently opened police disciplinary records, opponents have slowed implementation by litigating minor statutory ambiguities, for example, arguing that records not specifically enumerated are not to be disclosed.

To address this issue, the committee should amend lines 1453 – 1483. They should be rewritten as follows, and inserted as a new definition into D.C. Code § 2-539.

> "(3) "Disciplinary record" means any record created or acquired in relation to investigation of any complaint of misconduct, regardless of the nature of the complaint or the outcome of the inquiry by the Office of Police Complaints, the MPD, HAPD, or OIG;
>
> "(4) When providing records pursuant to subsection §§ 2-532 and 2-534(3)(G) of this subchapter, the responding agency may withhold or redact:
>
> "(A) Records related to technical infractions, solely pertaining to the enforcement of administrative departmental rules that do not involve interactions with members of the public and are not otherwise connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities;
>
> "(B) Records related to the medical history of the officer or complainant, except in cases where the medical history is a material issue in the basis of the complaint;
>
> "(C) The personal contact information of the officer, complainant, or a member of the public, including their home addresses, personal telephone numbers, and personal email addresses;
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> "(D) Any social security numbers;
>
> "(E) Information that preserves the anonymity of whistleblowers, complainants, victims, and witnesses; and
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> "(F) The officer or complainant's use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy, unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection.".

The language in the committee print at lines 1450 – 1452 should be revised and inserted into the existing exemption for law enforcement investigative records at § 2-534(a)(3):

> "(G) Nothing in this section shall prevent the disclosure of disciplinary records, as defined in § 2-539(3) of this subchapter, of officers within the Metropolitan Police Department ("MPD"), the District of Columbia Housing Authority Police Department ("HAPD"), or the Office of the Inspector General ("OIG")."

The scope of the database and its implementation are problematic

Bill 24-320, § 135 calls for the Office of Police Complaints to "maintain a publicly accessible database that contains the following information related to sustained allegations of misconduct, as determined by the Office of Police Complaints or the Metropolitan Police Department…"

The scope of that requirement is too narrow in three respects. First, it should include the three agencies covered in other parts of the bill. Elsewhere, the bill expands the OPC's and Police Complaint Board's portfolio to address complaints against HAPD officers and OIG investigators, yet the database this section creates would include disciplinary actions only involving MPD officers. The database should include complaints concerning law enforcement officers in all three entities, and § 135(b) should be amended to require the HAPD and OIG to furnish necessary records.

Second, other proposed amendments address situations in which an OPC hearing officer recommends disciplinary action, but the police chief rejects those recommendations. It is of great public interest and concern to know about cases where the OPC/Police Complaint Board found grounds for discipline, but MPD, the HAPD or the OIG chose not to discipline offending officers. Although the last phrase quoted above appears to encompass determinations made by the OPC or the MPD, the phrase "sustained allegations of misconduct" can be interpreted as mandating inclusion only of disciplinary cases in which officers actually were sanctioned. The database should be a collection of complaints, whatever the outcome.

Third, the utility of the database is compromised if it doesn't go back in time. The pre-Thanksgiving committee print required the OPC to include all disciplinary cases arising from incidents that occurred after January 1, 2017. The most recent version would include only cases arising from incidents after the effective date of the law, which could be well into 2023. Because patterns of behavior over time are critical for individuals harmed by police misconduct, journalists who cover criminal justice, and lawyers who represent civil and criminal litigants, the exclusion of past records would limit the database's usefulness for years to come. If technical challenges loom large at the outset, the bill should at least require a phased approach to adding older records.

It will be a major undertaking for the OPC to create and maintain this database, but the bill provides no personnel or technology resources to accomplish the task. We understand that this is not an appropriations bill, but it sets a December 2024 deadline for completion, and the next fiscal year is 10 months away.

We have one final observation regarding the FOIA implications of the database. As described in this bill, the database is a tool for identifying cases in which law enforcement officers have been disciplined, not a means of gathering the facts and circumstances of individual incidents. For journalists, criminal defense lawyers, civil litigants and D.C. residents who need to know about officer misconduct, it will be very useful, but merely a first step in a lengthy FOIA journey.

That journey will be made difficult by existing portions of the D.C. Code into which these amendments fit. For example, D.C. Code § 5-1104(d-2)(5) states: "A Freedom of Information Act request for public records collected pursuant to paragraph (1) of this subsection may only be submitted to the MPD." *See, also,* D.C. Code § 5-1107(h-2)(4).

It is common for government agencies to share records, and for requesters to obtain records from one agency that were created by another. In those situations, the agency processing the request has at least three options. It can make an independent determination whether an exemption

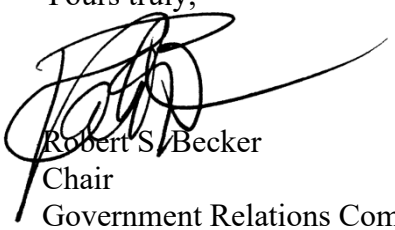
applies and withhold exempt information, it can ask the originating agency whether it should assert the exemption, or it can refer the request to the agency that created the records.

In dealing with FOIA requests for records related to law enforcement disciplinary cases, the OPC should be trusted to exercise its judgment on a case-by-case basis regarding disclosure. It should not be required in all cases to reject requests and insist that the requester start over by filing with the law enforcement agency that created responsive records.

We note that the November 29 committee print includes creation of an advisory body to assist the OPC regarding public access to the database and disciplinary records. One of its tasks should be to recommend ways to alleviate these statutory roadblocks.

Thank you for considering our input on this large piece of legislation. If you need additional information please call me.

Yours truly,



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