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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 Executive Administration and Labor
Council of the District of Columbia

Performance Oversight Hearing — Board of Ethics and Government Accountability,
Office of Open Government

On behalf of the D.C. Open Government Coalition, thank you for giving us the opportunity to provide our assessment of the Office of Open Government (OOG) in the past year, and transparency deficits the Council should empower the OOG to address going forward. I am a member of the Coalition board, and a Ward 4 resident.

As I appear before you today, I feel great frustration about the state of D.C. government transparency. The OOG is not the source of my frustration — it is doing the best it can with the cards it has been dealt.

I am frustrated because, after nearly 25 years of working to improve public access to records under the Freedom of Information Act (FOIA) and meetings under the Open Meetings Act (OMA), agencies and public bodies routinely fail to comply with those laws. When they don't publish records as mandated by D.C. Code § 2-536, erroneously deny FOIA requests, or deny the public access to meetings, D.C. residents often have no reasonable means to hold those agencies and public bodies to account.

I am frustrated because the Bowser administration and the Council seem to be more parts of the problem than they are parts of the solution. I am here today to ask this committee to become part of the solution

THE DISTRICT'S TRANSPARENCY LAWS ARE BADLY IN NEED OF REPAIR, AND THE COUNCIL'S OVERSIGHT OF THEM NEEDS TO CHANGE

The Committee on Executive Administration and Labor oversees the OOG, which primarily is responsible for implementing and enforcing the OMA. With regard to the FOI Act, the OOG's authority is limited to issuing advisory opinions, which some agencies, notably the Metropolitan Police Department (MPD) and the Office of Administrative Hearings (OAH), refuse to follow. This committee also oversees the Executive Office of the Mayor (EOM), where the mayor's open government director works; the Mayor's Office of Legal Counsel (MOLC), which is supposed to promptly adjudicate FOIA administrative appeals; and the Office of the Secretary (OS), which archives the District's records and sets records management policy. But FOIA oversight is the purview of the Committee of the Whole, to which no entity charged with administering and enforcing the statute reports.

One of my colleagues, Fritz Mulhauser, testified before you a few weeks ago about the backlog of FOIA administrative appeals that grew to more than 300 cases since the pandemic began in 2020. Reportedly, the MOLC has reduced the backlog of cases awaiting adjudication, but in violation of D.C. Code § 2-536, and in disregard of an OOG advisory Opinion, it has published no opinions on its website issued since early 2018. [Delays in Freedom of Information Act Administrative Appeal Decisions](#), No. OOG-2022-004_AO (June 29, 2022). In effect, over the past five years, the MOLC has developed a body of secret law — decisions elucidating the administration's interpretation of the FOI Act that are inaccessible to individuals denied access to records, who mount administrative or judicial appeals.

Both statutes provide for administrative appeals, which D.C. residents can file at no cost, without a lawyer's assistance, and, at least in theory, can obtain adjudication relatively quickly. But neither statute provides an administrative remedy in all cases. Under the FOI Act, the MOLC can order subordinate agencies to disclose records, but it cannot order independent agencies, appointed boards or commissions to do so, and it has no jurisdiction to review FOIA denials by the Council or Advisory Neighborhood Commissions (ANC). The OOG can issue advisory opinions in FOIA appeals brought against executive and legislative bodies, but cannot enforce its opinions. The OOG can order appointed boards and commissions to comply with the OMA, and can sue in Superior Court to enforce its orders. But it lacks authority to adjudicate OMA complaints against ANCs, and as a practical matter, the Council.

The bottom line is that if the Council, an ANC, an independent agency, appointed boards or commission refuses to disclose public records, the requester must bear significant expense and delay to litigate an appeal in the Superior Court. If the Council or an ANC violates the OMA, a person denied access to a meeting has no remedy at all because the court lacks jurisdiction to interpret Council rules governing access, and the only obligation imposed on ANCs is that they meet in public to cast votes.

For several years, the Coalition and the OOG have called attention to these issues and have proposed modest amendments to the FOI Act and OMA that would remedy some of them. I will make those requests again this year to you:

- Amend the OMA to make it apply to ANCs.

- Amend the FOI Act to empower the OOG, at a minimum, to adjudicate administrative appeals from ANCs.
- Amend the Board of Ethics and Government Accountability (BEGA) enabling statute to give the OOG the same tools to investigate complaints that the Office of Government Ethics (OGE) has — including subpoena power.
- As Niquelle Allen, the OOG director, will tell you, the OMA needs updating to permanently provide procedures for virtual and hybrid meetings.

But the Council has not seriously considered improving either statute since 2010, when it enacted the OMA and created the OOG. Because Council oversight of the FOI Act, the OMA, and the agencies charged with implementing and enforcing them is so fragmented, it is very difficult to bring to the floor substantial amendments to either law. In addition, when Counsel members have proposed FOIA amendments, notably exemptions sought by executive agencies, they rarely, if ever, have asked the OOG whether the amendments are necessary and whether they are properly drafted.

IMPROVING TRANSPARENCY WILL REQUIRE MUCH MORE THAN AMENDING THE FOI ACT AND OMA

The FOI Act requires public bodies to affirmatively publish records that residents are likely to use often, so they don't have to file FOIA requests and wait for responses. That reduces the workload of FOIA officers and the expense of processing requests. When processing requests, public bodies need to be able to retrieve and review responsive records quickly and efficiently, regardless of whether they were created five days or five decades ago, or whether they originated as digital or paper records.

The Council and executive agencies began the transition from paper to digital records at least two decades ago, albeit without coordinating their efforts. There are no standard design requirements to guide acquisition and implementation of information management systems, and no single agency is tasked with ensuring the suitability of systems public bodies purchase. For a decade, the executive branch has used a seriously deficient, badly designed FOIA portal, selected by the Executive Office of the Mayor (EOM) and the Office of the Chief Technology Officer (OCTO). But those entities have refused to engage with the OOG to select a more suitable replacement.

The OANC and individual ANCs have no centralized system to store records, and when commissioners leave office, they routinely take with them all government records stored on their personal devices. Many ANCs don't have websites on which to post documents, meeting agendas, minutes and recordings of virtual meetings. Many commissioners use personal email accounts and send texts from personal devices. Furthermore, according to OANC Director Kent Boese, some commissioners refuse to allow searches of their email accounts for records responsive to FOIA requests. As a result, many FOIA requests made to ANCs are denied, not because no responsive records exist, but because the government does not possess the records, and apparently has no ability to demand them from current or former commissioners.

To improve transparency and reduce its cost, the D.C. government needs to modernize systems the executive and legislative branches use to maintain, preserve, secure and retrieve their public records, whether they are data sets, documents, emails, text messages or are in other formats. In addition, the district needs to begin the lengthy process of digitizing its paper records to facilitate retrieval and greatly reduce the cost of storing them. In 2022, Committee on Human Services Chairwoman Brianne Nadeau said BEGA should

develop a budget and process to determine how to digitize records and include community partners to help identify the next steps in achieving this goal.... BEGA will need to work collaboratively with stakeholders to determine a clear plan to digitize decades worth of records. The Committee also recommends that BEGA work with the Office of the Chief Technology Officer ... with the goal of laying a groundwork to make digital records accessible on agency websites. In doing so, BEGA should assert its expertise and share open government best practices with OCTO.

[Report and Recommendations of the Committee on Human Services on the Fiscal Year 2023 Budget for Agencies Under Its Purview](#), 93 (Apr. 20, 2022).

We ask this committee to support legislation to create an Information Technology and Transparency Commission comprised of executive and legislative branch representatives, and outside experts in records management and security, public engagement technology, and transparency. The goal would be to develop a government-wide strategy to implement standards-based records management and public engagement systems that include transparency as a critical design criterion. Using as a model the legislation that create the Police Reform Commission, the Coalition has drafted a proposed bill for your consideration. *See attached.*

We look forward to working with the Committee on Executive Administration and Labor to strengthen the FOI Act and the OMA, to provide resources the OOG needs to perform its unique role as the government-wide champion for transparency, and to increase access to public records and meetings.

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.

D.C. Government Information and Transparency Commission

Sec. 1. Government Information and Transparency Commission

- (a) There is established, supported by the Council's Committee _____, a D.C. Government Information and Transparency Commission ("Commission") to examine the District government's institutions, laws, practices, procedures, regulations and technology that provide for creation, storage, retrieval and public access to government records and data, and public engagement with the government; and to provide evidence-based recommendations for: (1) improving, reforming, and revising those institutions, laws, practices, procedures and regulations; and (2) a long-term capital improvement program to acquire and upgrade technology needed to implement those recommendations.
- (b) (1) The Commission shall be comprised of 20 members, at least one-half of whom shall be from outside the District government.
- (2) Commission members shall be drawn from among the following entities/categories:
- (A) District government agencies, including OCTO;
 - (B) The Council of the District of Columbia and its professional staff;
 - (C) The Office of Open Government;
 - (D) The Office of the Attorney General for the District of Columbia;
 - (E) The Office of the Secretary;
 - (F) The Department of General Services, Contracting & Procurement Division;
 - (G) Consumers of government information, including media, researchers, community organizations and the business community;
 - (H) Experts in design and implementation of public engagement technology;
 - (I) Experts in design, implementation and security of records and data management systems;
 - (J) Experts in records management; and
 - (K) Experts in government transparency law and policy.
- (3) The Chairman of the Council, no later than _____, shall:
- (A) Appoint the Commission members.
 - (B) Designate a member who is not employed by the District government as the Commission's chairperson
 - (C) Designate the Director of the Office of Open Government and the Chief Data Officer as the Commission's vice-chairpersons.

(4) The Council shall authorize the [Office of Open Government/a non-governmental organization] to provide staff support for the Commission, and shall appropriate \$_____ for that purpose.

(c) (1) The Commission shall submit its recommendations in a report to the Mayor and Council no later than _____.

(2) The report required by paragraph (1) of this subsection shall include but not be limited to analyses and recommendations on the following topics:

- (A) Specific proposals for government-wide procedures governing creation, acquisition, storage, retention, retrieval and disclosure of District government data and records
- (B) Design criteria and requirements that facilitate compliance with procedures described in (A) that all District public bodies, executive and legislative, must follow when developing or acquiring records management and public engagement platforms.
- (C) Specific proposals to upgrade existing records management and public engagement platforms, and acquire new technology to enhance internal use, public access and engagement in the 21st century.
- (D) The feasibility of implementing mechanisms to ensure compliance with records management and public access laws and regulations among executive branch subordinate and independent agencies, boards and commissions, the Council and Advisory Neighborhood Commissions, and to provide an administrative review process in instances of non-compliance.
- (E) Specific proposals to improve the D.C. Freedom of Information Act (FOIA) Portal and to promote open data and proactive disclosure of information.
- (F) Analysis of whether the FOIA and Open Meetings Act (OMA), as currently implemented, provide the public the robust access to the operations of the D.C. government guaranteed by D.C. Code §§ 2-531, *et seq.*, and 2-572, *et seq.*, and if not, specific proposals to update and/or reform those statutes.
- (G) Specific proposals to strengthen the Office of Open Government's role in promoting training, compliance, enforcement, administration, and government-wide oversight of the D.C. FOIA and OMA.
- (H) Specific proposals for effecting proactive public disclosure of useful records and databases.
- (I) Best practices for governmental offices, entities, and independent agencies for efficiently administering the .D.C FOIA.
- (J) Specific proposals for greater uniformity among executive branch independent and subordinate agencies, boards and commissions, the Council and ANCs in processing of FOIA requests and imposition of processing and duplication fees.

- (d) The Commission shall comply with the D.C. Freedom of Information Act and Open Meetings Act.
- (e) The Commission shall sunset upon the delivery of its report or on _____, whichever is later.

[DC Access to Info Comm'n Draft]