

3901 Argyle Terrace, N.W.

Washington, D.C. 20011

www.dcogc.org

Testimony of

**Robert S. Becker**

On behalf of the D.C. Open Government Coalition
January 31, 2023

Before the Committee on Housing
Of the Council of the District of Columbia

Performance Oversight Hearing — Office of Advisory Neighborhood Commissions

On behalf of the D.C. Open Government Coalition, thank you for giving us the opportunity to provide our assessment of the Office of Advisory Neighborhood Commissions (OANC) in the past year. I am a member of the Coalition board, and a Ward 4 resident in ANC 3/4G.

In performance oversight and budget hearings last year, we identified systemic failures in the OANC and Advisory Neighborhood Commissions (ANC) that make it virtually impossible for D.C. residents to obtain access under the Freedom of Information Act (FOIA) to ANC public records. Those failures arose from the OANC’s historic refusal to engage on transparency issues, which enabled a culture of secrecy in some ANCs, and deprived all ANCs of information and public engagement technology they need to perform their duties under the FOI Act and open meetings provisions of the ANC enabling statute..

## The OANC needs to do more to protect the public’s right of access to ANCs and their records

Since then, the OANC has taken a small step toward addressing the concerns we raised, many echoed by ANC commissioners who testified in those hearings. But its responses to this Committee’s performance oversight questionnaire (Questionnaire) offer no concrete plan to resolve them. Perhaps more troubling is that, in testimony at the January 31, 2023, oversight hearing (Testimony), Kent Boese cast doubt on whether the Office had the authority to bring ANCs into compliance with the FOI Act.

As Mr. Boese noted, due to growth in D.C.’s population over the past decade, 49 new single-member districts (SMD) and six new ANCs have been created. As a result of the election last November, only one-third of current ANC commissioners are incumbents.

In the realm of government transparency, those statistics present problems and opportunities. The primary problem posed by growth in the number of SMDs and ANCs is that two-thirds of commissioners don’t know they, as elected officials, are obligated to preserve records and respond under the FOI Act to requests for access to them. The primary opportunity arises because two-thirds of commissioners have not been indoctrinated into the culture of secrecy former OANC Director Gottlieb Simon cultivated during his 20-year tenure.

The OANC’s responses to the questionnaire allude to the systemic inability to comply with the FOI Act, but provide no commitment to resolve it, or even to find a solution in the near term:

The Office offers the services of FOIA Officer to each Commissions. During the stated period, 11 Commissions have sought same; and, three (3) Commissions have had continuing issues for over a year with several requestors.

Challenges in completing the work include the occasional **failure of Commissions to rally around the Chairpersons to fulfill a documents request of what are usually public records**. Frequently, simply due to lack of time, Commissioners just fail to search their records.

Also, **the search can be impossible in those situations when Commissioners, for ease of use, each opt to use their personal and private devices to maintain their public documents associated** with the office of ANC. Because there is no requirement for Commissioners to use their DC government e-mails, it is difficult for OCTO to select the necessary data from these devices. **Significantly, some Commissioners simply refuse to provide the device falsely citing that it is not government-issue and thus not subject to search.**

Questionnaire, 22 – 23.

Although commissioners are required to participate in ethics and transparency training, the OANC reported that in 2022, only 91 of the 296 commissioners had attended FOIA training presented by the Office of Open Government (OOG) or watched a video of that session. In testimony, Mr. Boese said the OANC lacks authority to require commissioners to use their government email addresses to conduct ANC business. Testimony, 4:38.

To alleviate the problem and exploit the opportunity, it is essential for the OANC, under its new leadership, to educate new and returning commissioners about their statutory obligation to operate transparently — to preserve records, including emails and text messages, and to disclose them under the FOI Act; and to follow open meetings provisions of the ANC enabling statute. D.C. Code § 1-309.11. Neither the OANC responses, nor Mr. Boese committed to enforcing the training requirement or making FOIA compliance a priority.

The OANC took one small step toward providing transparency education — it created the ANC Playbook: A Checklist for New and Existing Advisory Neighborhood Commissions (Playbook). That document does a reasonable job of explaining open meetings requirements — notice of meetings, agendas, minutes and electronic recordings. Playbook 5 – 10.

But the Playbook discussion about preserving and disclosing public records is wholly inadequate. *Id.* 14 – 15. The Playbook, which never mentions the FOI Act, informs commissioners that they “must keep copies of the following: agendas, minutes, resolutions, approved budget, and quarterly financial reports.” *Id.* at 14. The listed documents must be publicly available on the ANC’s website. *Id.* ANCs must sent the listed documents, plus their recommendations to agencies, and their bylaws to the OANC. *Id.* at 15. It advises “Commissions have access to the OneDrive to maintain and archive records.” *Id.* at 14.

Virtually all documents, emails and text messages[[1]](#footnote-2) commissioners create or receive in the course of performing their duties are public records[[2]](#footnote-3) under the FOI Act, even those that may fall under statutory exemptions. But the Playbook identifies only those documents commissioners have an affirmative duty to publish, not the full range of documents which must be preserved for potential disclosure in response to FOIA requests. Furthermore, the Playbook fails to instruct commissioners about their record retention obligations. *See* D.C. Code § 2-1701, *et seq.*

Last year, as chair of the Committee on Government Operations and Facilities, Chairman Robert White directed the OANC to work with the Office of Open Government and our Coalition to improve ANC transparency. The interim director and staff never consulted the Coalition, and based on the information included in the Playbook, we doubt that they consulted the OOG.

## The OANC needs to dramatically improve its information infrastructure to bring ANCs into full compliance with transparency statutes

A year ago, we told the Government Operations Committee that, to protect the integrity of ANCs’ information, to facilitate compliance with the FOI Act, and to ensure public access to meetings, the Council should direct the OANC, in consultation with the Office of Open Government (OOG), to

* Establish a common platform to host all ANCs’ websites;
* Establish a common electronic records management system to store all documents, emails and other data ANCs create or obtain from within or outside the D.C. government.
* Acquire audio-visual equipment ANCs need to live-stream meetings;
* Formulate policies for managing records complying with the FOI Act, and the OMA; and provide ANCs staff support to implement those policies; and
* Train ANC commissioners and support staff to use the new technology.

In the January 31 hearing, Mr. Boese reported on his efforts to address the first and third tasks on our list. He is working with the Office of the Chief Technology Officer (OCTO) to develop websites for the substantial number of ANCs that don’t have them, and to upgrade the OANC website. He noted that OCTO is engaged in a similar effort with D.C. Public Schools (DCPS) to create a platform to host websites for individual schools, and that project could serve as a model for ANCs.

Mr. Boese said the OANC is about to purchase equipment and software ANCs can use to conduct virtual or hybrid meetings.

But neither Mr. Boese nor the OANC questionnaire shed meaningful light on how the OANC intends to ensure preservation of all public records of 54 ANCs and their 345 members, how long it will take to implement such a records management system, or what resources it will need to support and train commissioners and staff. Mr. Boese very generally discussed efforts by the end of this year to create a draft strategic plan, which conceivably might address these issues. Assuming the strategic plan would address records management and transparency, and that the timeline holds, the OANC would finalize its information ecosystem requirements by mid- to late-2024, and the Council would fund them in FY 26. Implementation would not begin in earnest until October 2025.

As we said previously, the OANC has dodged these issues for over a decade, and is far behind the Council and executive agencies. ANCs cannot wait until 2026 for the tools they need now to preserve all ANC records.

If the OANC is determined to make creation of an information ecosystem part of its strategic plan, it needs to propose a serious interim solution that does not depend on offering each commission a OneDrive account where it can archive all of its records, if it chooses to do so.

We urge this Committee to direct the OANC tostart now to build its information ecosystem, or propose an interim solution that will ensure that all public records are persevered and accessible for disclosure in response to FOIA requests.

## The Council should enact amendments to the ANC enabling statute, the FOI Act and the Open Meetings Act

Mr. Boese told you about amendments to the ANC enabling statute he would like the Council to enact, including one to permanently allow ANCs to hold hybrid or virtual meetings. We support that request, and urge you to make ANCs subject to the OMA. Doing so would require removal of all open meetings provisions from § 1-309.11.

As we noted last year, when an ANC denies a FOIA request, the only recourse available to the requester is to sue in Superior Court — an expensive, time-consuming process. That is so because the FOI Act provides an administrative appeal to the mayor when an executive agency denies a FOI request. But ANCs are part of the legislative branch of the D.C. government, and the mayor cannot adjudicate ANC FOIA appeals. Therefore, we request that the Council amend the FOI Act to permit the Office of Open Government to adjudicate administrative appeals after ANCs deny FOIA requests.

We look forward to working with this committee to greatly increase public access to ANC 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. Visit our website, [www.dcogc.org](http://www.dcogc.org).

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

1. [Applicability of D.C. FOIA to Text Messaging](https://www.open-dc.gov/FOIA_AdvisoryOpinion_TextMessages), March 16, 2022 (“text messages, to the extent that their contents are government business, are public records”). [↑](#footnote-ref-2)
2. D.C. Code § 2-508(18) [↑](#footnote-ref-3)