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 **Testimony of the**

 **D.C. Open Government Coalition**

by

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Co-Chair, Coalition Legal Committee

Before the

Council of the District of Columbia, Committee on Public Works & Operations

FY 22 Performance Oversight – Office of the Chief Technology Officer

February 22, 2023

Thank you for the opportunity to provide views on the performance of the Office of the Chief Technology Officer.

Digital technology is behind the scenes for the most part (who knows a major tech depot is buried next to the Third Street freeway tunnel, in a hole dug at the same time the freeway was first built). But it is just as much part of D.C. government as streets and schools and taxes and the jail.

It’s crucial to the public access to open data, open meetings and open records that are our focus. But even more crucial to the delivery of a wide range of services, as everyone learned in the stay-at-home years of COVID-19.

And as we have testified for several years, there is a missing conversation about legislative and executive management of technology in the public interest, considering economy, efficiency, security, reliability and the all-important user experience.[[1]](#endnote-1) Agency-by-agency review isn’t enough; we commend such a deep dive for the committee in coming months, powered by the many requests in last year’s OCTO budget report for followup information to allow the committee’s thoughtful oversight.

We address three points today: several aspects of FOIA and its management and the broadly related issue of digitizing D.C government records, and helping the archives designers imagine a building ready for a 21st century public and the records of its digital government.

1. **FOIA has some key building blocks but needs work.**

The fact D.C. has one system to track and manage FOIA requests across the government is commendable. Most state governments don’t have a centralized system. The central data needs to be

a resource as we work towards a climate in the organization where evidence—empirical information—on performance is valued and seen as essential to good management.

* **Data access**. OCTO has refused our requests for data from the online portal where users submit requests that are routed to 60+ agencies. Staff claim that a database is not subject to FOIA, data in the system belong to user agencies not to OCTO, or that we’re asking for new records to be created. (All are incorrect.) The Mayor’s Data Policy in Order 2017-115 clearly gives OCTO a mandate for a centralized FOIA system and public data on FOIA processing not just in the annual statutory report. OCTO’s responses to our request violate the spirit of the order and arguably the letter of the order. Processing delay and backlogs soared during COVID-19, so the issue remains of public concern and performance data are key to analysis. We are in earnest discussions with OCTO leadership about these staff confusions and hope for the best.
* **Portal review issues unresolved**. We raised user concerns in a formal complaint to the Office of Open Government and their opinion raised many significant points.[[2]](#endnote-2) Follow-up is needed on legal and performance aspects and again we’re in discussions we hope will lead to serious OCTO consideration.
* **New portal?** The same technology used for the new business portal, <https://corponline.dcra.dc.gov>., could be used for a new and improved FOIA portal. OCTO may be interested in modernizing the system which would be great. Open Government Coalition would love to be a stakeholder if such a project were undertaken.
1. **Broader FOIA management follow-up**

The Government Operations & Facilities Committee last year took note in the FY23 budget report of the OCTO director acknowledgement that “current FOI compliance processes and responsibilities are not well defined in the wake of the establishment of an independently elected Attorney General position.”[[3]](#endnote-3)

CTO Parker, the committee wrote, expressed “interest in understanding other states’ digital infrastructure for centralized transparency compliance.” The Committee said it “looks forward to hearing more about OCTO’s research into alternative freedom of information compliance management models, about its consultation with the D.C. Open Government Coalition, and about any recommended statutory changes that may be necessary to enable best practices in this area.” We’re ready to go to work so we hope the consultations begin soon.

These questions, repeated across government, are about how government assures a performance mindset at each of the 80+ mayoral and independent agencies in delivery of not only FOIA but many other digital services. They are a program of work and consultation with OCTO and our community of experts and advocates for the coming months. The Coalition is in touch with similar groups in many other states, so we are well-positioned to provide insight into what works elsewhere. We shared with the Human Services Committee last year some comparisons of other states’ FOIA compliance approaches.[[4]](#endnote-4)

1. **Digitizing District government records**

The Council Human Services Committee last year recommended a start on ambitious plans to digitize D.C. records and linked that to FOIA and proactive web access to records published to be

accessible without need of a request. That would of course work differently (and, we hope, better) if a greater extent of government records were “native digital” material—never having lived as paper.[[5]](#endnote-5)

The committee FY23 budget report called on the Board of Ethics and Government Accountability and the Office of Open Government to start this work, and link it to OCTO. As the committee wrote, BEGA and OOG 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…Because FOIA statutes have not been amended in 21 years, with the exception of the public health emergency, 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 (“OCTO”) in its redesign of dc.gov 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.

We hope the Coalition could be a valued civil society partner as this important conversation goes forward. Digitization will make a huge difference in search and retrieval of public records by the public. We ask the committee to reiterate interest in this via OCTO report language, while we raise the matter with Executive Administration and Labor Committee that now oversees BEGA/OOG.

We note a court decision this year may require proactive online publication of very large amounts of records.[[6]](#endnote-6) As agencies have ignored this obligation, found in the D.C. FOIA, D.C. Code § 2-536 (“Information Which Must Be Made Public”), the decision may pose challenges. When one agency was found in 2016 to have avoided years of required digitization and publication, the remedial cost was millions; across D.C. it’s a budget tsunami.[[7]](#endnote-7) We look forward to hearing from OCTO in our talks in the balance of the year that it has given this some thought.

1. **Helping D.C. archives prepare for proper stewardship of digital government records**

The Government Operations & Facilities Committee in its FY23 budget report addressed concerns that digital records get proper attention in archives planning, now that a new building is on the drawing boards.[[8]](#endnote-8) The report “strongly” encouraged OCTO to coordinate with the Office of the Secretary (that includes the Office of Public Records and Archives), Department of General Services (that manages D.C. government construction), the interested public (including the Council-appointed Archives Advisory Group), and external contractors involved in Archives design and construction “to ensure that the intake, preservation, and accessibility of digital archival materials are consistently considered and addressed in the design of the new facility.”

We work in coalition with the archives advocates, as part of our embrace of public access to government records old and new. They say that OCTO engagement (and application of funds reserved long ago for the purpose) remains a work in progress and that early technical plans by the esteemed Hartman-Cox architects can benefit from greater technical input. In the agency alphabet soup, we lack details what may hinder the necessary collaboration; but it’s vital.

The committee warned again in discussing Department of General Services that government agency silos should not limit the needed discussions necessary to get a great archives facility.[[9]](#endnote-9) The committee rejected DGS insistence “that they will not have a role in preparing digital archives.” The Committee said “this response misses the point. Digital archival infrastructure and research activities will need a physical space designed to accommodate them and DGS’s architect needs to be aware of these requirements.” OCTO can help this all come out right.

The Coalition is working with expert advocates for the archives and asks the committee to help OCTO play the important role (it even has a budget allocation from prior years for the purpose) it should in preparing the archives plans.

For any questions, reach me at: fmulhauser@aol.com or 202-550-4131.

The Open Government Coalition is a citizens’ group established in 2009 to enhance public access to government information and ensure the transparency of D.C. government operations. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings and to educate the public and government officials about the principles and benefits of open government in a democratic society.

We work to maintain the legal foundation assuring open government –- the Open Meetings Act, the Freedom of Information Act, and the mayor’s Open Data Policy — through public education, legislative advocacy, and litigation. For example, the Coalition has an extensive website with practical advice for finding information and a blog on D.C. open government news, holds public forums such as an annual Summit during Sunshine Week in March, testifies to the D.C. Council, and files complaints and court actions to correct agency problems. The Coalition has no staff but does its work through the volunteer efforts of 13 directors, who include reporters, community activists, experts with open government institutions overseas and at the federal level, and attorneys in media law, nonprofit legal services, and criminal defense. The Coalition participates in a National Freedom of Information Coalition where advocates from dozens of states work together on common issues all are facing.

1. ENDNOTES

 See our OCTO oversight testimony last year to Committee on Government Operations & Facilities. Available at: <https://dcogc.org/wp-content/uploads/2022/03/OGC-testimony-on-OCTO-2-17-22.docx>. We drew attention to a White House initiative to improve electronic government services and urged D.C. also to explore creating an Office of Electronic Government with appropriate mission and authority. The sweeping plan was unveiled in an executive order a year ago to improve federal digital activities with feedback from users guiding constant improvement. For D.C we called for a new expectation, enforced by new mandate at the highest level, so that “management of [the government’s] customer experience and service delivery should be driven fundamentally by the voice of the customer through human-centered design methodologies; empirical customer research; an understanding of behavioral science and user testing, especially for digital services; and other mechanisms of engagement.” (uoting *Executive Order on Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government* (The White House, December 13, 2021). Available at: <https://tinyurl.com/yjy9avw9>. [↑](#endnote-ref-1)
2. Office of Open Government, *FOIAXpress Advisory Opinion* (#OOG-2021-008M) (February 2022). Available at: <https://www.open-dc.gov/sites/default/files/OCTO_FOIASystem_AdvisoryOpinion_FINAL%202%2017%2022.pdf>. [↑](#endnote-ref-2)
3. Committee on Government Operations & Facilities FY23 budget report, pp. 110-123. Available at: [https://static1.squarespace.com/static/5bbd09f3d74562c7f0e4bb10/t/625f27bebed5b4634ad3ee43/1650403263232/GOF+FY23+Report+%2B+Recommendations+on+FY23+Budget+-+Circulation+Draft+-+04.19.2022.pdf](https://static1.squarespace.com/static/5bbd09f3d74562c7f0e4bb10/t/625f27bebed5b4634ad3ee43/1650403263232/GOF%2BFY23%2BReport%2B%2B%2BRecommendations%2Bon%2BFY23%2BBudget%2B-%2BCirculation%2BDraft%2B-%2B04.19.2022.pdf). [↑](#endnote-ref-3)
4. The Connecticut Freedom of Information Commission and related law and regulations are exemplary. See <https://portal.ct.gov/FOI>. [↑](#endnote-ref-4)
5. Human Services Committee FY23 budget report, pp. 87-94. Available at: <https://dccouncil.gov/wp-content/uploads/2022/04/DRAFT-FY23-Committee-on-Human-Services-Budget-Report-04.19.22-Circulation2.pdf>. The federal government has planned for a transition of federal records from paper to digital and the experience shows the complexity of the idea and the lead times needed. Original OMB order is here: <https://www.whitehouse.gov/wp-content/uploads/2019/08/M-19-21-new-2.pdf> (ordering agencies to “ensure that all Federal records are created, retained, and managed in electronic formats, with appropriate metadata.”). Postponement to June 2024 is here: <https://www.whitehouse.gov/wp-content/uploads/2022/12/M_23_07-M-Memo-Electronic-Records_final.pdf>. [↑](#endnote-ref-5)
6. The case is *Terris, et al. v. District of Columbia*, (D.C. Court of Appeals, No. 21-CV-543) (argued September 2022). The Coalition led a set of groups that submitted a brief as *amicus curiae* in support of the Superior Court decision ordering publication. The D.C. Council also submitted a brief in support of the plaintiffs and argued. For background, see <https://dcogc.org/blog/new-amicus-brief-by-coalition-supports-d-c-foia-online-publication-requirements-in-novel-appeal/>. [↑](#endnote-ref-6)
7. For the story of DCRA failure to follow online records publishing requirements, see OOG investigation report in 2016, available here: <https://www.open-dc.gov/sites/default/files/OOG%20002_1.29.16%20AO_Redacted.pdf>. The press loved the story, sending reporters to make incognito records requests. The Council had to find $3 million in emergency funds to address the longstanding agency avoidance of legal obligation (and good practice in building agencies nationwide that long since moved building permit files to digital). Drawing on the DCRA lesson, the Coalition testified in 2016 on the need for more vigorous Council oversight. See blog post here: <https://dcogc.org/blog/coalition-testifies-seeking-stronger-oversight-to-correct-foia-failures-at-d-c-dept-of-consumer-regulatory-affairs/>. [↑](#endnote-ref-7)
8. Committee on Government Obligations & Facilities, FY23 budget report, p. 118. Available at: [https://static1.squarespace.com/static/5bbd09f3d74562c7f0e4bb10/t/625f27bebed5b4634ad3ee43/1650403263232/GOF+FY23+Report+%2B+Recommendations+on+FY23+Budget+-+Circulation+Draft+-+04.19.2022.pdf](https://static1.squarespace.com/static/5bbd09f3d74562c7f0e4bb10/t/625f27bebed5b4634ad3ee43/1650403263232/GOF%2BFY23%2BReport%2B%2B%2BRecommendations%2Bon%2BFY23%2BBudget%2B-%2BCirculation%2BDraft%2B-%2B04.19.2022.pdf). [↑](#endnote-ref-8)
9. Id., pp. 136-137. [↑](#endnote-ref-9)