

3901 Argyle Terrace, N.W.

Washington, D.C. 20011

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 Testimony of

**Fritz Mulhauser**

Before the Committee on the Judiciary and Public Safety

Council of the District of Columbia

Public Roundtable on PR25-0384 - Nomination of Pamela A. Smith
to be the Chief of the Metropolitan Police Department

September 27, 2023

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Thank you for giving us the opportunity to testify regarding the appointment of the District’s next police chief. I am a member of the Coalition board and a Ward 6 resident.

Most of the witnesses today will talk about crime — that the crime rate is rising; that crime in D.C. is getting much more violent; or that the MPD is out-of-touch with the communities it is sworn to serve.

We want to talk to you about MPD’s concerted efforts, under the past three chiefs, to avoid accountability to District residents for bad policing practices, as well as for bad acts of individual officers. Because secrecy and lack of accountability are major contributors to community distrust of the department, we hope you will question Interim Chief Smith about specific steps she will take to ensure that the MPD follows D.C. transparency laws, court decisions and Office of Open Government (OOG) advice. Please ask how she will tear down the culture of secrecy in MPD, and demand a commitment that under her leadership the department will, in fact, become more transparent. FOIA processing generally (promptness, accuracy) needs improvement as well.[[1]](#footnote-1)

D.C. residents and public interest organizations, including the Open Government Coalition, have repeatedly challenged the MPD’s refusal to disclose records, electronic recordings and body-worn camera (BWC) videos under the Freedom of Information Act (FOIA), D.C. Code § 2-531, *et seq.* In denying requests, MPD has invoked an expansive, legally unsupported notion of personal privacy, has applied the law enforcement exemption to withhold records beyond its scope, and has slow-walked requests submitted by journalists and lawyers deemed hostile by department executives.

## I. MPD Has Circumvented Transparency Legislation

In the past two years, the Council has twice enacted legislation intended to compel FOIA compliance, and in each instance MPD aggressively sought to circumvent the spirit, if not the letter of the law.

In response to multiple complaints arising from police-involved deaths, the Council enacted

emergency legislation in 2021 requiring MPD to give victims, decedents’ families and the

Council access to BWC videos and other records of the incidents, and to make the videos public.

In response, the MPD made public heavily redacted video clips — not complete videos — from use-of- force and officer-involved shooting incidents. The clips appeared as one or two panes in

“Community Briefings” that appeared to portray a narrative most favorable to the MPD.

That was not what the Council intended and, to overcome MPD’s resistance, in the permanent legislation that took effect a few months ago, it left no doubt that the statute requires release of videos from all officers on the scene. *Comprehensive Policing and Justice Reform Act of 2022* (Police Reform Act), Bill 24-0320. The law aimed to

[r]equire the public disclosure of the names of all subject officers (the officers who committed the acts at issue). Further, … the release should include the BWC recordings of all officers (not just subject officers) that capture any part of the events leading up to the incident, during the officer-involved death or serious use of force, and after the incident.

Committee [Report](https://lims.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042) (Nov. 30, 2022), 18 (on Police Reform Commission recommendations that were accepted, Sec. 103 of the bill, D.C. Code § 5-116.33).

The Police Reform Act also includes provisions making public all officer disciplinary records by ending blanket privacy denials (Sec. 134). But, since the law became effective, MPD has continued its denials, now because the Council did not appropriate funds for added work. The MPD thus ignores that their own prior misinterpretation of law required the corrective legislation, and the agency instead denies requests until the Council acquiesces in its vastly overstated estimate of staffing needs and budgets for an added lawyer and six added FOIA staff to do what should have been done all along.

## II. MPD Has Ignored Court Rulings and OOG Opinions

Since it started using body cams in 2015, the MPD has strenuously resisted public disclosure of BWC video. When it cannot deny a request, the department heavily redacts videos eventually disclosed, including blurring the faces and badges of all uniformed police and emergency personnel. In some instances, it demanded exorbitant fees for redaction. To this day, MPD claims it can obliterate officers’ faces from BWC videos to protect their privacy.

MPD disregards this committee’s finding that:

officers’ faces should not be redacted from BWC footage. Police officers have tremendous power over members of the public…. They can stop and search people, make arrests, and are authorized to carry firearms and, when justified, use deadly force. The unique powers and functions of police officers … require a robust system of oversight to ensure they are not abused or misused.

Committee [Report](https://lims.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042), 19.

MPD refuses to follow the OOG’s interpretation of the FOI Act’s privacy exemption[[2]](#footnote-2) expressed in at least two advisory opinions since 2020, that uniformed officers have no protectable privacy interest in BWC videos.[[3]](#footnote-3) Finally, it ignores the D.C. Court of Appeals holding earlier this year that “there is … a growing consensus of circuit courts holding that there is a First Amendment right to record police activity in public, … which negates officers’ reasonable expectation of privacy in their interactions with the public….”[[4]](#footnote-4)

## III. MPD Has Been Sued for Creating a FOIA Requester Hit List

Last year, Amy Phillips, a D.C. defense attorney, accused the MPD in a suit filed in federal court of maintaining a list of FOIA requesters it deems to be hostile to the Department. In a sworn declaration, Vendette Parker, a former MPD FOIA Officer, said that at the direction of senior MPD officials, she “delayed, denied, or improperly altered” 20 requests “originating from news reporters or people known to be critical of the department, or those containing requests for information with the potential to embarrass the department.”[[5]](#footnote-5)

**IV. Conclusion**

To succeed, any effort to end MPD’s culture of secrecy and its scofflaw approach to FOIA must come from the top. Therefore, we urge this committee, and the full Council when it meets to confirm Interim Chief Smith, to demand that she direct MPD’s general counsel and FOIA officer to abandon their obstructionist practices, follow the law, and improve all aspects of public access to police records under FOIA.

We look forward to working with this committee to ensure that the MPD and other public safety agencies operate transparently. Public accountability is essential to improve public trust. We are happy to answer any questions you may have. For additional information, I can be reached at 202-550-4131.

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.

1. Problems shown in data from the most recent full year of FY 2022 include: **Delay**: Of almost 2,000 requests MPD processed (nearly 20 percent of the citywide total), about 40 percent were late, and over 500 were very late (taking more than 26 days). **End of year backlog**: MPD began the year with over 200 and ended with over 300 (average wait 225 days); only one agency had more. **Denials:** Over 70 percent of requests got adverse MPD responses (denied in whole or part or no records found). The Office of Open Government [held](https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020) in 2020 that MPD incorrectly denied chunks of records (called redaction) due to an incorrect reading of the law of privacy, and the Open Government Coalition cited fresh examples in oversight [testimony](https://dcogc.org/wp-content/uploads/2023/03/MPD-oversight-hrg_230215.pdf) this year. **Appeals**: Disappointed requesters appealed more denials by MPD than by any other agency, and the mayor reversed more decisions by MPD than by any other. **Litigation**: Of 29 active FOIA lawsuits in Superior Court, half were challenging MPD decisions. See 2022 FOIA reports by the [mayor](https://os.dc.gov/sites/default/files/dc/sites/os/page_content/attachments/FY_2022_District_of_Columbia_FOIA_Report_3.16.23.pdf) and [attorney general](https://lims.dccouncil.gov/Legislation/RC25-0012). [↑](#footnote-ref-1)
2. D.C. Code § 2-534(a)(2). [↑](#footnote-ref-2)
3. [Metropolitan Police Department—Body-Worn Camera Footage Under the Freedom of Information Act of 1976, # OOG-2023-002\_AO, Sept. 15, 2023](https://www.open-dc.gov/sites/default/files/OOG-2023-002_AO_MPD_BWC_Sept152023.pdf); [MPD District of Columbia Freedom of Information Act Compliance, OOG-002-10.1.19-AO](https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020). [↑](#footnote-ref-3)
4. *Fraternal Order of Police (FOP) v. D.C.*, 290 A.3d 29, 45 (D.C. 2023) (citations and internal quotations omitted). [↑](#footnote-ref-4)
5. *Phillips v. D.C.,* No. 22-CV-277, Doc. No. 1, Exh. A (D.D.C. *filed* Feb. 2, 2022). See details of the lawsuit at our blog: <https://dcogc.org/blog/d-c-police-officials-manipulated-foia-to-avoid-embarrassment-says-new-lawsuit>. [↑](#footnote-ref-5)