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Testimony of

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Before the Committee of the Whole

Council of the District of Columbia

Performance Oversight Hearing on the Office of Budget and Planning (OCFO)

February 21, 2024

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Thank you for the opportunity to testify regarding the District of Columbia budget process and related work of the OCFO. I am a member of the D.C. Open Government Coalition board and a Ward 6 resident.

The Council adopts the budget and prudently must consider the costs of proposed actions. Our concern is the fiscal impact statement (FIS) process used in the D.C. Council as a binding source of cost information.

Permanent legislation must be accompanied by an FIS, required by D.C. Code § 1–301.47a. The FIS is to include an “estimate of the costs which will be incurred by the District as a result of the enactment of the measure in the current and each of the first four fiscal years for which the act or resolution is in effect, together with a statement of the basis for such estimate.” Statements which show “unbudgeted costs” have a powerful effect, though the term is undefined in the D.C. Code. The proposed law will contain a section that it will not take effect until the amount needed to cover the estimate is appropriated.

Our testimony is based on our review of several FIS, including examination of OCFO records obtained by Freedom of Information Act (FOIA) request. We initially reviewed the FIS for the Comprehensive Policing and Justice Reform Amendment Act of 2022 (the “police reform act”), Law 24-0345 (Bill B24-320, as amended),; we later reviewed another case.[[1]](#footnote-1) The FIS estimated cost impacts from only a handful of provisions of the 26-subtitle police reform bill: mostly for expanded transparency, 11 new staff needed, nine at the Metropolitan Police Department (MPD) and two at the Office of Police Complaints (OPC), at a four-year cost just under $5 million. We conclude that:

* OCFO provided no basis for the estimate in the statement.
* OCFO did not follow its own data and review standards to assure sound estimates.
* Reliance on executive estimate alone is unsound.
* Evaluation of a sample of FIS cases is needed.
* Revision of the FIS process should be considered.

1. **OCFO provided no basis for the estimate in the statement.**

The cost estimate in this case is contained in a few conclusory sentences -- “an attorney is required” or “MPD will need.” The FIS cites no source nor any evidence. This appears to be a violation of the statute which requires “a statement of the basis for such estimate.”[[2]](#footnote-2)

1. **OCFO didn’t follow its own research and review requirements intended to assure sound estimates.**

**Research.** In response to our FOIA request, OCFO provided its file of supporting materials. The total contents were a handful of emails from the executive agencies MPD and OPC.[[3]](#footnote-3) Thus, the Council and the public has no idea where the dollar figures come from—except that they are from the executive branch.

This factfinding appears to violate OCFO internal control standards for research and reporting.[[4]](#footnote-4) Internal guidelines for preparing an FIS do require the analyst to coordinate with District agencies. But also, to “work[] with external experts and other state and local governments, especially for the analysis of new program proposals with which outside entities may have experience.” And the FIS must have “a discussion of the assumptions underlying the analysis and a description of the methodology used in the analysis.”

These internal standards require a broad search for relevant experience—from literature, experts, and other states with legislation like the D.C. proposal at issue. In the case of the proposed expanded FOIA access to police records, California, New York, and Maryland have all done so; their experience with demand and costs would have been relevant. The OCFO record shows no such research.[[5]](#footnote-5)

In oversight testimony on February 14, 2024, addressing general research protocols to assure sound estimates, an OCFO official referred to other steps such as challenging agency figures, consulting agency fiscal officers who are OCFO staff and intended to be independent of the agency, or reviewing estimates later to check whether agency estimates hold up as circumstances change. There is no evidence in the record of any of these steps.[[6]](#footnote-6)

**Review**. According to the same OCFO Manual, quality control is provided by four required reviews: Director of Fiscal and Legislative Affairs, Deputy CFO, Office of the General Counsel, and Chief of Staff (required where the FIS concludes funds are insufficient).

An approval checklist provided by OCFO is unclear if all four required reviews were done. Reviewers got the lengthy FIS the morning of the same day it was sent to the Council and the committee marked up the bill, suggesting no opportunity for exchange.

1. **Reliance on executive estimate alone is unsound.**

Police officials, the police union, and the mayor for years have interpreted privacy exemptions in the D.C. public records law to deny public access to police discipline records. They opposed the Police Reform Commission's proposals to enlarge that access and the 2022 legislation doing so, and they recently proposed to delete the 2022 provisions.

The credibility of the FIS is undercut when the only research for a cost estimate is to consult the very same agency that opposes the law. At the very least, the FIS reporting standard required identifying the assumptions needed to reach the estimate (that largely rests on added staff needs), for example, the added request volume and staff productivity. Nothing in the research record or the published FIS shows any analysis of resources needed to comply.[[7]](#footnote-7)

Credibility is further undercut when the OCFO entirely redacts whatever facts were provided by the executive that appear to be the only basis for the conclusion about “unbudgeted costs.”

Officials may be tempted to defeat plans they oppose by calling them too expensive – confident few listeners will be able to challenge them. The mayor in 2015 argued against public access to video from the proposed MPD body-worn cameras with a prediction of enormous costs--false claims that law-firm experts costing $600 per hour would be needed to review the video before release. Nowhere in the nation was there experience at that time to accurately forecast either public demand or the costs of satisfying it. The Council was undeterred and mandated both access and regular reports on request volume and costs of compliance. The resulting data have refuted the predictions ever since.[[8]](#footnote-8)

1. **Evaluation of a sample of FIS cases is needed.**

The FIS is an exercise in prediction, forecasting uncertain future events; regular evaluation of methods and results is essential.[[9]](#footnote-9) Council members and staff have repeated to us the need for evaluation of FIS methods and Council use of the results, offering many further examples of problems we recounted above.

We offer a second case study of legislation that was first considered over a decade ago to expand insurance for Fire and Emergency Medical Services (FEMS) employees’ work-related illnesses. The proposal eventually passed in 2012 (subject to appropriations—see below) and created a presumption that FEMS personnel who are diagnosed with diseases enumerated in the act (certain chronic illnesses, cancers, and infectious diseases) have an occupational disease that was suffered in the line of duty and are thus entitled, upon meeting certain qualifications, to work in a limited-duty status or to non-chargeable medical leave and administrative pay. Under the proposed law, the District would also cover the full cost of any medical treatment related to a covered injury or illness.

A fiscal estimate thus required actuarial analysis of risky fire and emergency medical work to predict how many new claims would be presented for a wide variety of illnesses and injuries in the three covered categories and to estimate the costs of delivering care for cases of varying severity that could involve limited duty, medical leave, or disability retirement.

The FIS accompanying the 2012 bill estimated costs to be at least $44 million but possibly as high as $80 million.[[10]](#footnote-10) OCFO supported these numbers with one page of text and a handful of footnotes showing sources such as Consumer Reports and experience with some other insurance plans.

The Council, over the years (we’re told), unsuccessfully requested the OCFO revise the 2012 FIS. The large cost estimate was daunting; the law remained unfunded until FY 2017.

The Council added appropriations bit by bit to cover parts of the plan -- cancer in FY17, communicable diseases in FY18, chronic illnesses in FY19. Yet in funding the third, the committee noted not a single claim had been presented under the presumption in the first two categories.[[11]](#footnote-11) None; ever.

In March 2016, OCFO had taken a belated second look at the program’s costs, this time with completely different sources such as other jurisdictions’ similar presumptive disability programs, data showing disease incidence and prevalence among firefighters, and Centers for Disease Control studies of the cost of care for various conditions. The OCFO issued a revised FIS with a cost of $30 million, less than half the original.[[12]](#footnote-12)

Judging from the real-world results, one segment of the second FIS still lacked a solid basis. Using a single source of data (from a D.C. agency), the OCFO predicted for the remaining category of chronic illness, D.C. could expect 500 cases a year that would impose $15 million in treatment costs over the estimate period.

Bottom line: cost estimates proved incorrect even after revision attempting better analysis. In FY22, FEMS reported not hundreds a year but a total of three cases with any of the three kinds of presumptive disability in the latest year.[[13]](#footnote-13)

The case studies suggest the Council could benefit from evaluating a broader sample of many FIS products and checking cost estimates against the eventual actual costs. Where estimates proved wrong, the assessment should look for root causes in the analytic work and the internal controls intended to assure quality. The Council budget staff or the D.C. Auditor are well-equipped to do such a review.

1. **Revision of the FIS process should be considered**.

Other approaches to cost analysis and linking it to prudent budgeting should be explored. The present scheme originated years ago and may no longer serve its purpose well, considering the big problems uncovered in our case studies (if confirmed on further review).

The D.C. Council should rethink the source of fiscal discipline for balanced budgets to correct the present situation that inherently uncertain FIS estimates (sometimes with slim basis) from the OCFO alone have veto power without transparency or effective challenge from the Council or the public. Congress gets cost impact advice from many sources; the Council could as well while retaining the responsibility of fiscal prudence. The Council Office of the Budget Director has grown, with a capable staff that could do the job. The key is that legislators balance the budget; there must be better ways to do it. Ideas include:

* Require that any FIS provided without a basis shall not be considered.
* Require that any FIS be submitted in time to allow its authors to appear before the Council committee to answer questions about the estimate and its basis.
* Require estimates be allowed from any source when certified by the Council Budget Director.

Thanks for the opportunity to raise the questions that occurred to us from our case studies.

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Since its founding in 2009 as a nonprofit, the D.C. Open Government Coalition has sought 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. Through public education, legislative advocacy, and litigation we strive to improve the laws, policies, and procedures that assure public access to government records (old and new) and proceedings, and to educate the public and government officials about the principles and benefits of open government.

1. B24-320 FIS dated November 30, 2022. Available at: <http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/New%20Folder/FIS%20Comprehensive%20Policing%20and%20Justice%20Reform.pdf>. The second case, about certain expanded D.C. government employee benefits, is described on pp. 4-5. [↑](#footnote-ref-1)
2. D.C Code § 1–301.47a(a)(2). The section was originally added to the D.C. Code by the General Legislative Procedures Act of 1975. It is similar to and different from the Congressional Budget Act of 1974 (CBA) as amended, P.L. 93-344, Section 402. According to the Congressional Research Service (CRS), the CBA requires that a congressional support agency, the Congressional Budget Office (CBO), prepare cost estimates for all bills reported from committee “to the extent practicable.” The CBA also requires that CBO include in its estimates “the costs which would be incurred” in carrying out the legislation in the fiscal year in which the legislation is to become effective, as well as the four following years, together with “the basis for such estimate.” However, unlike D.C., no federal statute confers any special status on CBO estimates. To the contrary, estimation procedures have been the subject of vigorous debate for years. *See* CRS, *Dynamic Scoring in the Congressional Budget Process* (Report R46233, updated March 6, 2023). Available at: <https://crsreports.congress.gov/product/pdf/R/R46233>. [↑](#footnote-ref-2)
3. And the public can’t see what the agencies said as OCFO released the emails with text redacted. The Mayor’s Office of Legal Counsel (MOLC) upheld the denial over our appeal, finding that agencies and OCFO are engaged in a deliberative process, so their communications are exempt from FOIA as privileged exchanges of recommendations about policy. We disagree with the MOLC interpretation of D.C. FOIA Exemption 4 and its federal FOIA counterpart Exemption 5, whose voluminous case law is instructive as the two are similar.

   [↑](#footnote-ref-3)
4. OCFO, *Financial Policies and Procedures Manual*, § 300200, “Fiscal Impact Statements.” Last updated 7/01/18. Attached. (Unpublished; obtained by FOIA request.) [↑](#footnote-ref-4)
5. The standards spell out not only research to be done but also that the analyst “must preserve all background information including phone notes, summary of interviews, emails, and all other documentation that supports the FIS.” In response to our request, OCFO found no records of research other than emails from executive agency officials. If other information was collected in the case of the police bill but not preserved, that would violate the standards as well. [↑](#footnote-ref-5)
6. The OCFO witness, Dr. Fitzroy Lee, did not answer questions about the police reform bill FIS of concern here. He said only that in general, OCFO does not “accept agency data without scrutiny” and checks agency data to see “if it’s meaningful and makes sense.” Dr. Lee said agency interaction is frequent, but he could not cite any examples of pushing back on agency cost figures. Nor could he cite any process for systematic review of FIS accuracy. See Committee on Business and Economic Development, Performance Oversight Hearing, February 14, 2024. Hearing video at <https://dc.granicus.com/MediaPlayer.php?view_id=41&clip_id=8696> (discussion beginning at time stamp 34:00). [↑](#footnote-ref-6)
7. Our Coalition has monitored FOIA processing for years and we have learned the District government does not analyze how requests are handled or variation in cost-efficiency, so agencies probably lacked a sound basis to estimate the impact of the new access legislation. In the police context, it is likely any cost estimate for records processing is driven by time-consuming redaction based on the agency view of the law of privacy protection that been rejected by the D.C. courts and the Office of Open Government. [↑](#footnote-ref-7)
8. On the sky-high estimates, *see* Martin Austermuhle, WAMU (Sept. 14, 2015), <http://tinyurl.com/yvfn8puv>. On the experience that shows how flawed were those early guesses, see the mandated MPD body-worn camera data reports. The latest available figures (from half of 2022) show several hundred requests processed at a cost of $68,000. *MPD Use of Body-Worn Cameras – First Half 2022* (February 2023). Available at: <https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/RC25-0013-BWC_Introduction.pdf>. [↑](#footnote-ref-8)
9. Congress has debated the subject for decades. For example, see the CRS paper on dynamic models (note 2, above), an approach to improve predictions based only on past data by considering how behavior would change under the proposed legislation. Clearly, volume of likely requests for novel FOIA access to police records is hard to estimate from past volume. [↑](#footnote-ref-9)
10. Bill 19-616, FIS dated November 29, 2012. Available at: <http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/FISFireandEmergencyMedicalServicesAmendmentActof2012.pdf>. [↑](#footnote-ref-10)
11. Committee on the Judiciary, FY 2019 Budget Report, p. 135 (citing 2017 FEMS annual report data). Available at: <https://dccouncil.gov/wp-content/uploads/2018/11/Committee-on-the-Judiciary-Public-Safety-FY19-Budget-Report.pdf>.

    [↑](#footnote-ref-11)
12. D.C. Law 19-331, Revised FIS dated March 3, 2016. Available at: <http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/FIS%20-%20FEMS%20Employee%20Presumptive%20Disability%20Amendment%20Act.pdf>. [↑](#footnote-ref-12)
13. Annual one-page FEMS reports on presumptive disability claims are in LIMS. For FY22, see here: <https://lims.dccouncil.gov/downloads/LIMS/52623/Introduction/RC25-0029-Introduction.pdf?Id=158511>. [↑](#footnote-ref-13)