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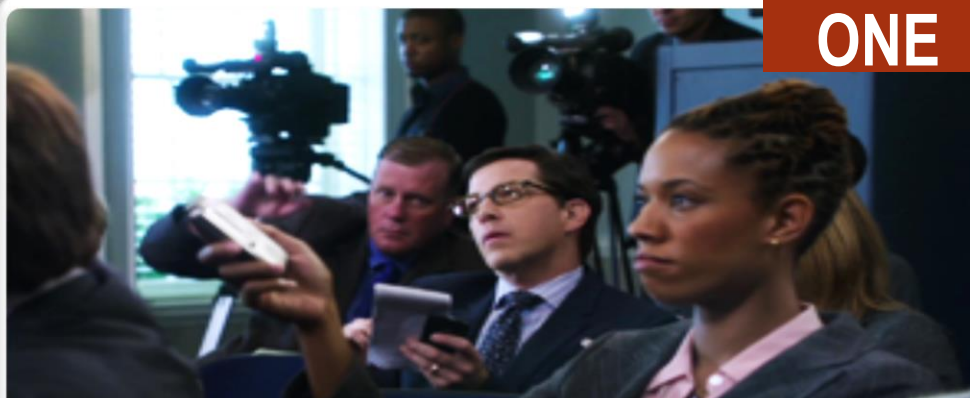
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# THE OPENGOVIST



## DIRECTOR OF OPEN GOVERNMENT'S MESSAGE

The Office of Open Government (OOG) has one primary charge related to the D.C. Freedom of Information Act (FOIA)– to advise on its implementation. Well, what does that mean? To OOG, that means we give advice to anyone who asks us about FOIA. We love to talk about D.C. FOIA and we have been doing it a lot lately. D.C. FOIA is the gateway to that information. OOG also helps D.C. FOIA Officers and government officials provide that information. We educate them about the importance of what they do and the best way to do it.

True public servants have no problems with opening their doors and files. OOG helps to empower them and facilitate their ability to make government more open and transparent. D.C. FOIA provides exemptions for those times when it is necessary to keep information from the public – like when there is a legitimate privacy issue. Ultimately, OOG strives to convince government officials that opening the door to the agency is preferable to the Courthouse doors (virtual or actual).

In the spirit of OOG's role as D.C. FOIA educators and advisors, this issue provides a lot of information on D.C. FOIA. We provide updates on public meetings, OOG's activities, and news in the area of open governance. I hope you enjoy this issue of *The Opengovist*.

In Service,  
Niquelle Allen, Esq.  
Director of Open Government



**OFFICE OF OPEN GOVERNMENT  
BOARD OF ETHICS AND  
GOVERNMENT ACCOUNTABILITY  
441 4<sup>TH</sup> STREET NW,  
WASHINGTON DC 20001**

# Legislative Update

**D.C. FOIA TOLLING LEGISLATION.** The FOIA Tolling Emergency Amendment Act of 2020 (A23-0555), was signed by the Mayor on December 22, 2020. It expired May 21, 2021. During the Legislative Session held on December 15, 2020, the Council of the District of Columbia approved on second reading the FOIA Tolling Temporary Amendment Act of 2020 (Bill 23-1108). These measures adjusted the agency response time to FOIA requests during the public health emergency. They restarted the FOIA response clock as of January 15, 2021, but allowed for an extension of FOIA deadlines when the need to conduct an on-site review of records presented a significant risk to health or safety during the COVID-19 pandemic. The January 15, 2021 start date ensured that any requests received since March 11, 2020 (the first day of the declared Public Health Emergency) do not immediately come due. On January 13, 2021, the Mayor signed, the FOIA Tolling Temporary Amendment Act of 2020 (DC Act 23-0595). On February 1, 2021, it was submitted for Congressional Review. It became effective as D.C. Law 23-0267 on March 16, 2021.

On January 22, 2021, the Office of Open Government (OOG) sent a memorandum to D.C. FOIA officers to ensure they are informed of these new deadlines that included suggested form letter for D.C. FOIA officers to send to requesters notifying them of the impact of these changes on their FOIA request. The FOIA Portal that receives online FOIA requests was also adjusted to reflect changes in the FOIA law.

These changes expired on July 25, 2021 because the Mayor did not extend the Public Health emergency past this date.

**ELECTRONIC RECORD CLARIFICATION LEGISLATION.** On March 1, 2022, the Council enacted emergency legislation to clarify “that communications created or received electronically in the course of official business are subject to existing record retention obligations.” The Council’s intent is to ensure that electronic communication such as WhatsApp are subject to D.C. FOIA. The measure became law on March 28, 2022 (D.C. Act 24-355) and will be effective through June 25, 2022. A temporary measure was enacted by the Council on April 5, 2022, as a non-germane amendment to Bill 24-691.



## What’s New at OOG?

**BEGA’s Chairperson Receives Prestigious GWAC Award.** On February 17, 2022, BEGA’s Chairperson Norma Hutcheson received the Charlotte E. Ray Award from the Greater Washington Area Chapter, Women Lawyers Division, National Bar Association (GWAC). GWAC is a network of African-American women attorneys dedicated to the professional development of its members. The organization is committed to improving the quality of life in the District through a variety of activities, including educational programs and community service projects. Chairperson served as President of the organization from 1999 through 2001 and as a past chair for GWAC’s charitable arm, GWAC Foundation, Incorporated. Director Allen is also a member of GWAC. OOG extends its congratulations to Chairperson Hutcheson and acknowledges her contributions to the District of Columbia and surrounding area through her outstanding community service. Learn more about the event here.

**BEGA Names Ashley Cooks as Ethics Director.** Ashley Cooks became the Director of the Office of Government Ethics on December 2, 2021, after serving in an Acting Director capacity since May 2021. OOG congratulates Director Cooks on her latest accomplishment! Read more about Director Cooks [here](#).  
**“Digging Into D.C., Part 2: How to Use FOIA to Access Police Records.”** On October 12, 2021, the D.C. Open Government Coalition (D.C. OGC), the D.C. Library Association, and OOG sponsored a free training session for members of the public about the best ways to get public information from the D.C. Metropolitan Police Department. Webinar panelist included:

- Amy Phillips, DC Public Defender;
- Mitch Ryals, Reporter, Washington City Paper;
- Michael Perloff, ACLU of the District of Columbia;
- Catherine Young, DC Resident who has struggled to piece together information from the police shooting in 2018 of her son D’Quan Young; and
- Miranda Spivack, journalist and open government expert, D.C. OGC Board Member, Moderator.

## Upcoming Trainings

**On April 20, 2022, the OOG will conduct an Open Meetings Act training for the Health Benefits Exchange Executive Board.**

**In August 2022, OOG will be training District of Columbia Advisory Neighborhood Commissioners (ANCs) on FOIA. This biannual training is co-sponsored with the Office of ANCs.**

**OOG provides OMA and FOIA training courses upon request. Please contact us [atopen.govoffice@dc.gov](mailto:atopen.govoffice@dc.gov) to schedule a training session with OOG. All trainings will be conducted remotely due to the COVID-19 pandemic until further notice.**

# Freedom of Information Act

## *OOG's Advisory Opinions*

### **Does D.C. FOIA Apply When D.C. Government Employees Use Text Messages?**

The Office of Open Government (OOG) issued an Advisory Opinion, on March 16, 2022, regarding the applicability of the District of Columbia Freedom of Information Act (D.C. FOIA) to District of Columbia government (the "District") employees' and officials' use of text messages to conduct government business (#OOG 2022-001). The opinion clarifies that all texting protocols potentially generate public records that are subject to D.C. FOIA. Currently, there is no government-wide guidance on the retention of text records or the use of personal devices to conduct government business through text messages. OOG recommends that the D.C. Mayor issue an Order to: (1) recognize that text messages concerning government business are public records, even if they are stored on a private device; (2) retain these texts for purposes of D.C. FOIA; (3) strongly discourage employees from texting using personal devices to transact public business and doing so only in rare instances where access to their District provided device is, for practical reasons, not available; (4) require an employee in instances where personal devices are used to transact public business, to separate and retain such records; (5) require employees to execute an affidavit attesting to search efforts conducted for responsive records on personal devices; and (6) prohibit the use of ephemeral text messaging applications to conduct government business.

### **Does OCTO's FOIA Portal Help or Hinder D.C. FOIA Processing?**

The Office of Open Government (OOG) released an Advisory Opinion (AO), on February 17, 2022, regarding the Office of the Chief Technology Officer's (OCTO) Online FOIA Portal, known as "FOIAXpress." (#OOG-2021-008-M) The Advisory Opinion discusses whether FOIAXpress' operations hinder D.C. Freedom of Information Act processing. The AO found that there are some features of FOIAXpress that do directly hinder individuals from receiving "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees," so OCTO should make adjustments to the system if the District is going to continue using it to process FOIA requests. The AO recommends that OCTO make the following adjustments to improve the functionality of FOIAXpress: (1) That the "Request type" drop-down menu be removed so that requesters are not confused by the option of "FOIA-OIG;" (2) That OCTO continue to promote the "Open Data Portal" and consider replacing the "Reading Room" feature "Open Data Portal" in its entirety to eliminate redundancy; (3) The prompt removal of the "Attach Consent Here" field from the request-submission form; (4) That the "Agency Open Government and FOIA Contact Information" site be complete and current and that OCTO supply a link, via the PAL landing page, that refers requesters to FOIA Officers' contact information; and (5) The prompt removal of references to provisions of 5 U.S.C. § 552 (the federal FOIA statute) and its subdivisions.



## ***D.C. FOIA Litigation***

### **D.C. FOIA Lawsuit Alleging the Metropolitan Police Department Maintains a Watchlist.**

On February 3, 2022, criminal-defense lawyer Amy Phillips sued the District in the United States District Court (Case No. 1:22-cv-00277) for Civil Rights violations (commonly called "Section 1983"). Phillips alleges that the Metropolitan Police Department (MPD) has subjected her, and will subject her in the future, to delays, burdens, and denial of her FOIA requests that are unique to her, because her work-product and anticipated work-product has the potential to (and in fact did) embarrass MPD. Ms. Phillips alleges that the MPD maintains a watchlist of those who use D.C. FOIA requests to the detriment of the MPD. She alleged, "Once on the list, the requesters face hurdles that the general public avoids: They may be charged money for public information that others get for free, they may have their requests delayed, or they may have their requests denied outright." Phillips attached a declaration of former MPD Freedom of Information Officer, Inspector Vendette T. Parker (retired), concerning "an unofficial, unwritten policy that required the MPD FOIA Officer to notify the former Chief of Police and Chief Operating Officer of any FOIA request originating from the media, certain identified individuals, or requests for certain records. Ms. Phillips asserts that the "watchlist" treatment unconstitutionally abridges her freedom of speech.



## OOG's Advisory Opinions

### Are D.C. Employees' Personnel Records Exempt from Disclosure?

On November 2, 2021, the Office of Open Government (OOG) issued advisory opinion #OOG-002.10.18.21\_AO, concerning whether the personal privacy exemption under D.C. FOIA would apply to the request for transcripts of two University of the District of Columbia (UDC) faculty members. Review of the matter led OOG to conclude the following: (1) that the privacy interest an employee maintains in their personnel files, including transcripts and documents reflecting their age, are not outweighed by the public interest in disclosure of the information; and (2) that UDC may lawfully withhold the documents pursuant to Exemption 2, D.C. FOIA's personal privacy exemption (D.C. Official Code § 2-534(a)(2)).

## FOIA REPORTS

**D.C. MAYOR'S REPORT TO THE D.C. COUNCIL ON BODY WORN CAMERAS.** On January 31, 2022, the Mayor submitted her FOIA Report regarding Body Worn Cameras to the D.C. Council. Section 3004 of the Body-Worn Camera Regulation and Reporting Requirements Act of 2015, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 5-116.33), requires Mayor Bowser to provide the Metropolitan Police Department's (MPD) biannual report on the Body-Worn Camera (BWC) program. The current report provides data for the following reporting requirements for the time period of January 1, 2021, through June 30, 2021. MPD provided data on 3,140 BWCs in the report and between January 1 and June 30, 2021, MPD received 310 FOIA requests for BWC footage. MPD granted none in full; 126 were granted in part; and 71 were denied in full. Read the full report [here](#).

**OFFICE OF ATTORNEY GENERAL FY 2020 LITIGATION FOIA REPORT.** On January 31, 2022, pursuant to D.C. Official Code § 2-538(c), the Office of the Attorney General transmitted its annual report to the Council for specified data pertaining to litigation arising under the D.C. FOIA for the previous fiscal year. The report contains reflects the exemptions claimed, disposition of and cost assessed for thirty-one cases litigated during FY 2021. Read the full report [here](#).

## Curtain Call

**Featured Public Body Profile:** The Commission on African Affairs. The Commission on African Affairs (the "Commission") was established to advise the Mayor, the Council, the Director of the Office on African Affairs, and the public on the views and needs of the African communities in the District of Columbia. The Commission is comprised of 15 public voting members appointed by the Mayor, with the advice and consent of the D.C. Council. The Commission members serve 3-year terms. The Commission meets every other month and produces annual report that includes an analysis of the needs of the African communities in the District. The Commission meets on the first Wednesday of the month and its next meeting will be held virtually via WebEx on May 4, , 2022. Also note the Commission currently has 5 vacancies. If you would like to serve as a member of the Commission or would like to recommend someone to serve, please contact the Mayor's Office of Talent and Appointments [here](#). To learn more about the Commission, visit the Mayor's Office of African Affairs' [website](#) and [Facebook page](#).



# OPEN MEETINGS ACT

**OMA Complaints Resolved.** OOG receives complaints regarding violations of the OMA and investigates and resolves those OMA complaints. OOG recently resolved several OMA complaints concerning public bodies' virtual meetings by issuing OMA Advisory Opinions:

**DC Housing Authority:** On February 2, 2022, the Director of Open Government issued an Advisory Opinion (AO) resolving Complaint #OOG-2021-0003-M that alleged the DC Housing Authority Board of Commissioners (DCHA) violated the OMA by improperly following emergency meeting procedures and meeting in closed session without providing the proper public notice. The AO discusses D.C. Official Code § 2-575(b) and D.C. Official Code § 2-577(d).

**Historic Preservation Review Board:** On January 5, 2022, the Director of Open Government issued an AO resolving Complaint #OOG-2021-0007-M\_8.10.21, concerning the Historic Preservation Review Board's ("HPRB") compliance with the OMA. The complaint alleged the HPRB violated the "Record of meetings" provision because the HPRB's "Record of Action" summaries for its July 1, 2021, and July 24, 2021, public meetings differed from the findings and recommendations made during the public meetings. AO found that the Record of Action is a summary prepared by HPRB and is not required by the OMA.

**Public Charter School Board:** On January 4, 2022, the Director of Open Government issued an AO resolving Complaint #OOG-2021-0002-M\_4.30.21, concerning the District of Columbia Public Charter School Board's ("DC PCSB") compliance with the OMA. The Complaint concerned public meeting notices and records. The AO dismissed the Complaint and provided the rationale for the dismissal.

**OMA Training Video.** Public Charter School Boards of Trustees' meetings are subject to the Open Meetings Act. OOG facilitated three training sessions for members of those public body members and their staff members. The sessions were held in December 2020 and designed provide instruction and answer questions on the OMA for these public bodies. The first training session, facilitated by the Office of Open Government's Chief Counsel, Johnnie Barton, gives detailed instruction of the Open Meetings Act and Open Meetings Regulations. The second training session, facilitated by the Director of Open Government, Niquelle Allen, provided instruction of the Open Meetings Act and Open Meetings Regulations along with Q&A. Both may be viewed here: <https://www.open-dc.gov/documents/oma-training-public-charter-schools-boards-trustees>

**Parliamentary Procedure Training.** OOG partnered with Susan Leahy, a board dynamics and Robert's Rules of Order expert, to provide several webinars on Parliamentary Procedure. The first was introduce the new Robert's Rules Made Simple training portal—principally for the use of public bodies' Administrative Points of Contact—on September 14, 2021. On September 23, 2021, we presented a webinar to the Chief Medical Examiner on the fundamentals of Parliamentary Procedure. On November 19, 2021, we presented a webinar to public bodies and D.C. agencies on "Meeting Fundamentals: Bylaws and Minutes." OOG also provides a training portal on Parliamentary Procedure. If you are a member of a DC public body subject to the OMA or an administrative point of contact that supports a public body, you may sign up for the portal. Please contact OOG Attorney Nicholas Weil for more information. Learn more about the portal [here](#).

**Open Meetings Act COVID-19 Legislation.** On October 5, 2021, the Council enacted D.C. Act 24-0181, the Post-Public Health Emergency Protections Extension Emergency Amendment Act of 2021. The emergency legislation amends the Opening Meetings Act during the period from March 11, 2020 until December 31, 2022: (1) to deem meetings open to the public when the public body takes steps reasonably calculated to allow the public to view or hear the meeting while the meeting is taking place, or, if doing so is not technologically feasible, as soon thereafter as reasonably practicable; and (2) to waive the physical posting of public notice requirements. The emergency act expired on January 23, 2022. The Council also enacted D.C. Act 306, the Post-Public Health Emergency Protections Extension Congressional Review Emergency Amendment Act of 2022, and D.C. Law 24-83, the Post-Public Health Emergency Protections Extension Temporary Amendment Act of 2021, that contains these same provisions. The Congressional Review emergency and temporary provisions expire April 24, 2022, and October 13, 2022, respectively.

# Contact Us...

OOG provides advice to agencies, members of public bodies, and the public on the Open Meetings Act and the Freedom of Information Act. For assistance, please reach us via telephone at 202-481-3411 or via email at [opengovoffice@dc.gov](mailto:opengovoffice@dc.gov)



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