BOARD OF ETHICS AND
GOVERNMENT ACCOUNTABLITY

BEST PRACTICES REPORT 2022

Norma B. Hutcheson, Chair
Charles Nottingham, Member
Felice C. Smith, Member
Darrin P. Sobin, Member
Melissa Tucker, Member

441 4th Street, NW, Suite 830 South, Washington, DC 20001
Phone: 202-481-3411 E-Mail: bega@dc.gov Website: www.bega.dc.gov

The District of Columbia Board of Ethics and Government Accountability ("BEGA" or "Board"), is an independent agency that administers and enforces the District of Columbia government's (the "District") Code of Conduct and the laws that promote an open and transparent District government. BEGA was established in 2012 pursuant to Section 202(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (the "Ethics Act").[1]

In establishing BEGA, the Council determined that the creation of an independent agency with enforcement authority over a comprehensive code of conduct would "promote a culture of high ethical standards in District government" in an effort "to restore the public's trust in its government" after misconduct allegations involving multiple Members of the Council.[2]

The Ethics Act was passed to provide the District with a more robust ethics framework in order to effectively promote a culture of high ethical conduct. The Act sought to subject all employees to the code of conduct, require ethics training for District officials and employees, centralize enforcement authority under BEGA, and allow for the imposition of meaningful penalties for misconduct.[3]

The Ethics Act, along with the BEGA Amendment Act of 2018, established two independent, and co-equal offices within BEGA – the Office of Government Ethics ("OGE") and the Office of Open Government ("OOG").[4] OGE has responsibility for training, advice, and enforcement of the District's Code of Conduct, as well as overseeing the Financial Disclosure System and the Lobbyist Reporting System. OOG is responsible for enforcing the Open Meetings Act ("OMA"), handling and resolving complaints of violations of the OMA, and providing training and advice regarding the OMA.[5] OOG also provides training and advice on compliance with the District's Freedom of Information Act of 1976 ("FOIA").[6] The Board provides oversight over the operations of OGE and OOG, including appointing directors for both OGE and OOG who report directly to the Board and execute each office's respective mission.

BEGA first opened its doors on October 1, 2012, and after more than a decade it continues to advance its mission of promoting an ethical, transparent, and open District of Columbia government. In FY2022 and FY2023 to date, OGE negotiated 11 dispositions resolving Code of Conduct violations; issued 1 show cause order based on the finding of a Code of Conduct violation;

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[1] Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq*.).

[2] *Id.* at 2, 11.

[3] *See generally*, Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011 (Council of the District of Columbia, December 5, 2011) (Ethics Act Committee Report).

[4] The BEGA Amendment Act of 2018 was passed as a subtitle of The Fiscal Year 2019 Budget Support Act of 2018 (D.C. Law 22-168; D.C. Act 22-442, effective October 30, 2018). In addition to clarifying BEGA's structure, the subtitle requires that the Mayor appoint at least one member of the Board with experience in open government and transparency. (D.C. Official Code § 1–1162.03(g)(2)).

[5] D.C. Official Code § 2-571, *et seq*.

[6] D.C. Official Code § 2-573, *et seq*.

issued 2 advisory opinions providing guidance on the ethics rules; provided informal ethics advice for 508 inquires; conducted more than 93 trainings on various ethics topics and trained 2,720 employees and officials using its online trainings. OGE continued its oversight of the District's Lobbyist Reporting System by managing 520 registration reports, 80 registration terminations, and 1,844 lobbying activity reports. OGE also administered the District's Financial Disclosure Statement Program which resulted in 7,444 confidential and public financial statements from employees and public officials for calendar year 2021.

In FY2022 through FY2023 to date, OOG issued six OMA and six FOIA advisory opinions and resolved 12 OMA and FOIA complaints, dismissing six OMA complaints. OOG continued its efforts to train the District's public bodies on the Open Meetings Act and the District's Freedom of Information Act, conducting 19 OMA trainings and 17 FOIA trainings during this same period. OOG also continued to provide administrative support to public bodies on compliance with the OMA through the operation of District's central meeting calendar as well as providing training in parliamentary procedure through its operation of the District's Roberts Rules of Order Training Portal to assist District public bodies with the efficient operation of meetings.

BEGA has continued its outreach to District government employees and officials including through regular trainings, on-demand training programs, and its annual Ethics Week. Ethics Week 2022, "Ethics in Practice," which was held in October 2022, was attended by approximately 500 District employees. The week-long conference was comprised of 13 courses which included a fireside chat with government ethics leaders and a CLE-accredited legal ethics course. Both OGE and OOG presented programs on the operations of their respective offices and conducted courses designed to educate employees on ethics rules, including real life ethics scenarios and open government issues they need to be aware of in their day-to-day work for the District. OGE presented programs such as "Unlocking the Positive Value of Ethics" (198 attendees), "Being Ethical is Harder Thank You Think!" (120 attendees), "BEGA Investigations" (112 attendees), "Financial Disclosure" (102 attendees) and "Ask BEGA" (97 attendees). OOG, meanwhile conducted trainings on the "Open Meetings Act" (91 attendees) and "Introduction to OOG Director and FOIA Course" (89 attendees). BEGA Board Member Darrin Sobin joined an Ethics Week panel of experts on the "Future of Government Ethics" which attracted 67 attendees. Ethics Week was positively received by attendees and BEGA was able to engage with organizations working on ethics and open government issues while educating District employees.

The BEGA Amendment Act of 2018 revised the Board's annual assessment to permit the Board to provide general commentary on best practices to improve the District's public integrity laws and to provide a discussion of open government related issues.[7] Accordingly, by December 31st of each year, the Board shall provide a report to the Mayor and Council with recommendations on

[7] Before the passage of the BEGA Amendment Act of 2018, BEGA was required to address seven specific questions in its annual assessment. Those questions were whether the District should: 1) adopt local laws similar in nature to federal ethics laws; 2) adopt post-employment restrictions; 3) adopt ethics laws pertaining to contracting and procurement; 4) adopt nepotism and cronyism prohibitions; 5) criminalize violations of ethics laws; 6) expel a member of the Council for certain violations of the Code of Conduct; and 7) regulate campaign contributions from affiliated or subsidiary corporations. BEGA has addressed these very specific questions in previous Reports which can be found on BEGA's website, https://bega.dc.gov/.

improving the District's government ethics and open government and transparency laws, including: (l) An assessment of ethical guidelines and requirements for employees and public officials; (2) A review of national and state best practices in open government and transparency; and (3) Amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976.[8]

In anticipation of this report, the Board directed its staff to review both the OGE's and OOG's activities in carrying out their respective missions; research and assess trends in public integrity laws and enforcement; and to confer with government ethics and open government experts. What follows is the Board's 2022 annual assessment (Best Practices Report) along with its recommendations for actions to be taken by the Council and/or the Mayor to further strengthen the District's public integrity and transparency laws.

[8] Section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

I. Assessment of Ethical Guidelines and Requirements for Public Employees and Officials

The Office of Government Ethics serves as the ethics authority for the District. The Director of Government Ethics oversees OGE's small staff of attorneys, investigators, one auditor and administrative support staff as the agency administers the provisions of the District's Code of Conduct. OGE has authority over the District government's workforce, including ethics oversight of the Mayor and the D.C. Council. The primary duties of the OGE are to investigate alleged ethics laws violations by District government employees and public officials, provide informal and binding ethics advice, and conduct mandatory training on the Code of Conduct. OGE is also responsible for oversight of lobbyist registration and activity, and compliance with Financial Disclosure Statement filing requirements for employees and elected officials.

The Ethics Act was passed to provide the District with a more robust ethics framework in order to effectively promote a culture of high ethical conduct. The Act sought to subject all employees to the code of conduct, require ethics training for District officials and employees, centralize enforcement authority under BEGA, and allow for the imposition of meaningful penalties for misconduct.[9]

A. Outside employment/outside representation

A key component of the Code of Conduct is the restriction on outside employment and private representations. The rule serves as a means of avoiding conflicting employment interests held by employees. While the outside employment rule does not strictly ban all outside employment, employees must ensure that their outside employment or activity is not incompatible with the full and proper discharge of their duties and responsibilities. Council employees are prohibited from engaging in outside employment or activity that conflicts or would appear to conflict with the fair, impartial, and objective performance of their official duties and responsibilities.

The outside employment rule provides a non-exhaustive list of activities or employment that are not compatible with government employment, including engaging in outside employment that interferes with the efficient operation of the District government, maintaining a financial interest in an outside entity if there is a likelihood that entity will have business with the District, capitalizing on an official title or position, ordering a subordinate to perform personal services during regular hours, engaging in employment that impairs the employee's physical or mental capacity, or engaging in any outside employment or activity which is in violation of federal or District law, etc. Most commonly, employees who violate this restriction are found to have engaged in outside employment while on duty or using government resources. OGE issued an advisory opinion which further clarifies the restrictions on outside employment and emphasizes the restriction on private representation before the District government, especially for Board and Commission members.[10]

[9] *See generally*, Ethics Act Committee Report.

[10] BEGA Advisory Opinion, Draft Outside Employment and Private Representation, September 8, 2022, https://bega.dc.gov/publication/draft-outside-employment-and-private-representation.

In FY 2022, BEGA issued fines in five investigative matters which an employee violated the outside employment and private representations rule; and two matters which an employee failed to disclose outside employment. In matter 21-0077-P, In re C. Thornton, the employee owned a consulting company and represented a client before the Board of Zoning at three meetings.[11] In matter 20-0003-F, In re H. Iida, the employee worked on a PowerPoint presentation on behalf of a private entity during her tour of duty and using her government email account. The employee used government work product to complete the presentation and allowed the private entity to use her official title when listing her as an author, thereby giving the appearance that the District was a partner of the private entity. The presentation was submitted as part of a grant application which resulted in the award of a hefty grant. For 21-0070-P, In re T. Brooks, the employee engaged in a nail painting business while on duty and using government resources. The employee painted false nails at her workstation, then posted them for sale online. In investigation 22-00001-F, In re M. Redmond, while working virtually as an Assistant Principal for D.C. Public Schools, the employee worked simultaneously, as an Assistant Principal for a school in Rhode Island. The employee took advantage of his telework status with the District by serving in-person at the Rhode Island school during his District tour of duty. In matter 21-0059-P, In re A. Reitnauer, the employee used a government laboratory to conduct a virtual training for a professional association. These investigations only represent a fraction of the outside employment violations that BEGA has investigated and are an even smaller portion of the overall violations committed by employees, considering that some violations of this nature are not reported to BEGA. The unethical conduct that was committed by these employees could have been avoided if they were required to request prior approval to engage in outside employment or activities.

B. Pre-approval for outside employment/activity

Over the course of the last several years, BEGA has engaged in the enforcement process in several matters that involved violations of the Code of Conduct resulting from the outside employment or business activity of the employee. While the recent matter involving former Councilmember Jack Evans was discussed in detail in BEGA's 2021 Best Practices Report, the Board has continued to address the conflicts of interest that arise from outside business and employment activities in the intervening period since the Evans matter was resolved. Since the start of FY 2022, of the twelve public enforcement matters resolved by the Director or the Board, seven involve employees engaging in outside business and employment activities. In these matters, the Board concluded that the employee's activities conflicted with their duties to the district, involved the use of District time or resources for outside activity, or were not properly disclosed as required on the employee's Financial Disclosure Statement. Similarly, OGE staff regularly field requests for informal advice about outside business, employment, or other activities by District employees.

Employees are permitted to engage in outside employment and activities provided that they do not conflict with their work for the District.[12] The current rules, however, do not necessarily provide

[11] OGE's negotiated dispositions are posted on the BEGA website under the enforcement menu, https://bega.dc.gov/publications?type=1461.

[12] *See* 6-B DCMR § 1807.

agencies with the tools to assess whether an employee is engaging in outside activity that may create a conflict with their District employment. While the Council's Code of Official Conduct requires that an employee obtain approval from the employee's supervisor before engaging in outside employment, [13] the District Personnel Manual ("DPM") does not include a similar pre-approval requirement and there is no language in the Ethics Act that mandates this type of disclosure.

The DPM does include a provision that states agencies "may" require disclosure of previous employment relationships and prohibit the employee from engaging in any "procurement action" for one year after the date of initial employment or for as long as the employee continues to receive an economic benefit from the former employer.[14] This provision extends only to "former employers," defined as an employer that precedes the individual's District employment, and leaves the agencies with discretion on the type of disclosure that is required. The Code of Official Conduct for the Council does not include a comparable provision.

Other jurisdictions are more explicit in requiring disclosure and pre-approval of outside activities by government officials and employees. The City of Chicago requires city employees to obtain written permission from their department heads or aldermen to engage in dual employment or outside business activities and also prohibits employees of the Mayor of Chicago and city department heads form having any outside employment.[15] Atlanta's civil service code requires department heads to approve all outside employment.[16] The Revised Municipal Code of the City and County of Denver includes not only a requirement to report outside activity and written permission before engaging in a paid outside job or other business activity, but also an annual written approval to continue the activity.[17]

Adopting a requirement that employees receive written approval prior to commencement or continuation of any outside employment or other activity and at regular intervals thereafter will allow District agencies to have increased visibility into an employee's outside activities in order to more accurately assess whether an activity would create a conflict or the appearance of a conflict with the employee's duties for the District. Employees would also be on notice prior to the receipt of a complaint to BEGA about the potential for any conflict and could take steps to mitigate the conflict or refrain from engaging in the activity if they do not receive the required approval.

C. *Non-criminal prosecution of ethics issues*

At the time BEGA was established, the District lacked a unified system to address potential ethical misconduct by District officials and employees. Instead, the Office of the Inspector General ("OIG") was tasked with investigating waste, fraud, and abuse while the Board of Elections and Ethics enforced a few ethics provisions against public officials and the District's Attorney General

[13] *See* Code of Official Conduct, Rule II(a)(2) (Res. 24-1, § 3; 68 DCR 000228, 000332).

[14] *See* 6-B DCMR § 1805.

[15] Chicago, Ill, Personnel Rule XX, § 3.

[16] Atlanta, Ga., Code of Ordinances § 114-437 (a).

[17] *See* Denver, Co., Revised Municipal Code Chap. 2, Art. IV, § 2-63(a).

gave ethics advice but had limited investigatory and enforcement authority.[18] Since the establishment of BEGA and the consolidation of ethics advice, investigations, and enforcement with the agency, BEGA has continued to work with both OIG and the Office of the Attorney General ("OAG") to coordinate the review and investigation of matters where the offices may have overlapping authority.

During FY 2022, BEGA made a concerted effort to focus on communicating more effectively with OIG on matters that may overlap between the offices. One part of this effort includes conducting regular meetings to exchange information on parallel matters, including matters under investigation by OIG that may include potential ethics violations, matters referred by the Board to OIG, or matters referred by OIG to the Board after investigation. Both agencies are working to streamline the referral process and to coordinate upon intake.

In addition to fast-tracking referrals from OIG,[19] a newer portion of the Ethics Act gives the Board the ability to refer information concerning an alleged violation of the Code of Conduct to the prosecutorial authority with jurisdiction for enforcement or prosecution after the presentation of evidence by the Director of Government Ethics to the Board.[20] While the OAG can also prosecute violations of the Code of Conduct that substantially threatens the public trust,[21] the Ethics Act also provides that its "provisions . . . shall in no manner limit the authority of the United States Attorney for the District of Columbia."[22] This sets up the opportunity for there to be a potential jurisdictional challenge between prosecutorial agencies on matters under the civil enforcement authority of BEGA.

The potential overlap between BEGA's civil enforcement authority, OIG's authority in matters of fraud, waste and abuse, and any potential criminal enforcement by OAG or the United States Attorney is not unique to the District. While the structure of criminal enforcement in the District, in particular the role of the Office of the United States Attorney for the District of Columbia, is unique to the District, these types of parallel or concurrent investigations involving criminal, civil, and administrative bodies are not uncommon in investigations of public officials and government employees.[23]

On the federal level, the House and Senate Ethics Committees often handle matters involving Members or staff that may also be under criminal investigation or subject to civil enforcement proceedings. Similarly, the Department of Justice and states Attorneys General offices handle concurrent proceedings based on the same underlying facts which may be subject to a criminal

[18] Robert J. Spagnoletti & Darrin P. Sobin, *The Dawn of Ethics Reform in the District of Columbia Government?*, WASHINGTON LAWYER 28 (Apr. 2015), https://www.dcbar.org/getmedia/f28dc6bd-7ae2-42da-984f-0acda8a53a00/WashingtonLawyerApril2015.pdf.

[19] D.C. Official Code § 1-1162.13 requires that any referral to BEGA from OIG be treated as a formal investigation.

[20] *See* D.C. Official Code § 1–1162.15(b).

[21] *See id.* § 1-1162.21(b)(2).

[22] *See id.* § 1-1162.21(c).

[23] *See, e.g.,* Robert Shapiro & Daniel Pietragallo, *Cooperation with Federal & Local Partners: Considerations for Attorney General Offices Investigating & Prosecuting Public Corruption*, in THE ANTICORRUPTION MANUAL: A GUIDE FOR STATE PROSECUTORS (Amie N. Ely & Marissa G. Walker, eds., 2021).

prosecution, a civil lawsuit, and administrative proceedings. On the municipal level, the relationship between a city's ethics board and Inspector General's office, as well as the issues they handle, vary widely. The Atlanta Ethics Division is an independent office housed within the city's Office of the Inspector General. [24] The New York Conflicts of Interest Board and the Chicago Board of Ethics both adjudicate completed investigations conducted by their respective city's Inspectors General, but do not have independent authority to conduct investigations of ethics complaints.[25]

BEGA is mindful of the potential for conflicts between the various civil and criminal enforcement authorities that have a role in violations of the District's Code of Conduct and will continue to work with our partners at OIG, OAG, and where appropriate the Office of the United States Attorney for the District of Columbia on matters that may overlap between the offices. We will also continue to track how these matters are handled in other jurisdictions and make any necessary recommendations to the Council.

D. Annual Ethics Training requirement

The Ethics Act requires that BEGA conduct mandatory training on the Code of Conduct.[26] The DPM, however, only requires that individuals required to file public or confidential financial disclosure reports or reports of honoraria undergo ethics training developed or approved by the Board within 90 days of the start of their District employment and on an annual basis.[27] District employees who are not required to file disclosures under the Ethics Act are not required under the DPM to undergo regular ethics training.

As one of the core functions of BEGA, OGE has devoted significant time and resources to its training efforts. In addition to on-demand trainings, OGE conducts monthly trainings on the Code of Conduct and monthly Hatch Act trainings during election years as well as quarterly trainings for Boards and Commissions. Employees can also take trainings through the District's Human Resources portal, Peoplesoft, and BEGA's Learning Management System ("LMS"). The LMS is comprised of 24 ethics courses covering a range of issues from more general ethical principles to the BEGA's general ethics training and the Council's Code of Official Conduct, to topical issues such as gifts, negotiating for employment and post-employment restrictions, conflicts of interests, and financial disclosure. Several of these courses satisfy the training requirements for financial disclosure filers.

With these resources in place, BEGA is well positioned to offer training on a recurring basis to all District employees. The importance of regular mandatory ethics training is reflected in the prevalence of this requirement in other jurisdictions. The City of Chicago, for example, requires an annual ethics training for all lobbyists, employees, City Council members, contactors, and

[24] Atlanta, Ga., Code of Ordinances § 8-101(a)(2) (2012).

[25] New York City, NY, Charter Ch. 68 § 2603 (2010); Chicago, Ill., Municipal Code § 2-156-380(a) (2020).

[26] D.C. Official Code §1-1162.01(a)(5).

[27] District Personnel Manual (DPM) § 1810.2.

appointed officials and face-to-face ethics training every four years for City Council members and employees and Senior Executive City employees.[28] Similarly, the City of Atlanta requires mandatory annual ethics training for all part-time, full-time, and contract employees.[29] Philadelphia includes an annual training requirement for all elected city officers, all cabinet members, city department heads, boards and commissioners members, and their staff as determined by the Board based on position are required to participate in training with the failure to attend mandatory ethics training resulting in a violation of the ethics rules.[30] New York City is less specific, with a requirement that employees are trained upon hiring with agencies required to develop a training plan in consultation with the New York City Conflicts of Interest Board and the mayor's office every two years.[31]

E. Nepotism Statute

In the matter of Gerren Price v. BEGA, the DC Court of Appeals agreed with Mr. Price and reversed the trial court's order affirming BEGA's Final Order finding that Mr. Price violated 6-B DCMR 1806.3 by advancing his sister-in-law through the hiring process at the Department of Employment Services.[32] The Board found that Mr. Price directly or indirectly made a hiring decision with respect to a relative by advancing his sister-in-law's resume in violation of 6-B DCMR 1806.3.

The Court of Appeals concluded that the record lacked substantial evidence that Price participated in a "hiring decision" by "advancing" his sister-in-law's application, concluding that Price's actions were ministerial and non-preferential when he printed out and delivered resumes received by the agency to his team for review and selection of candidates. In its decision, the court determined that BEGA's interpretation of "advance" as used in the regulation was overly broad as it encompassed actions that were not inherently preferential or unfair and would result in "unreasonable sanctions" against District employees who were not using their position to give preferential treatment to a relative. Accordingly, the court vacated the $1,500 fine and restitution in the amount of $26,182.10 assessed by the Board in connection with this violation.

BEGA plans to address the court's concerns regarding the Board's interpretation of what "advance" means in the context of a "hiring decision" under the nepotism regulations while ensuring that the purpose of the regulation is given full effect. In addition to incorporating revised language on this provision in a proposed Comprehensive Code of Conduct discussed in more detail below, BEGA expects to promulgate regulations that would address the court's concerns.

[28] Chicago, Ill., Municipal Code § 2-156-145 (b).

[29] Atlanta, Ga., Code of Ordinances § 2-825(a).

[30] Philadelphia, Pa., Code § 20-606(1)(b)(.3).

[31] New York, NY, Charter Ch. 69 §2603b.2(b).

[32] Price v. Bd. Of Ethics & Gov't Accountability, No. 20-CV-527, 2022 D.C. App. LEXIS 36 (D.C. Nov. 10, 2022).

II. Review of National and State Best Practices in Open Government and Transparency

OOG is composed of the Director of Open Government, a small staff of attorneys, a paralegal and an information technology specialist dedicated to ensuring the District government operations are transparent, open to the public, and promote civic engagement. OOG ensures that the District's public bodies, the District's boards and commissions, and the Council comply with the OMA by providing formal and informal advice to public bodies regarding the OMA's requirements for compliance. OOG also conducts training for public bodies and members of the public regarding the OMA and engages in community outreach. In addition to enforcing the OMA, OOG also ensures that District agencies are complying with FOIA by providing advisory guidance on the implementation of FOIA, as well as assisting members of the public in filing FOIA requests and providing training to FOIA Officers, Advisory Neighborhood Commissioners, and members of the public.

This section discusses several areas where the District may look to federal and state best practices to improve its operations. First, we discuss electronic communications. These records are a large source of the information that the District maintains about its operations. Second, we discuss data privacy. The District and other government and private entities collect and maintain large amounts of personal data from individuals and businesses. We discuss the District's current efforts to protect this information and state government's best practices in data privacy. Third, we discuss FOIA Appeals. The time for responding to FOIA appeals has resulted in a significant backlog in resolving those matters. Neighboring jurisdictions' best practices provide guidance for improving this issue. Fourth, we examine the pandemic related changes to the OMA and FOIA. Other jurisdictions' efforts to mitigate the impact of the pandemic on recordkeeping and meetings are noted.

A. Electronic Communications

The District does not have a current retention policy that addresses records of electronic communications, whether via email, text messages, social media posts, or encrypted apps. To the extent the District agencies are using these alternate methods of communication to conduct official government business, the records produced using these methods should form a part of a request for records under FOIA. Establishing a policy to retain and search these records would facilitate the District's commitment to open and accessible government.

As discussed in BEGA's prior Best Practices Reports, the federal government, through the National Archives and Records Administration ("NARA") has recommended that federal agencies adopt a "Capstone" approach to retention of emails.[33] The Capstone approach relies on the concept that key records are held in senior officials' email records and that retention of those email records

[33] With the issuance of the Managing Government Records Directive (M-12-18), Goal 1.2, federal agencies were required to manage both permanent and temporary email records in an accessible electronic format by December 31, 2016. The issuance of NARA Bulletin 2013-2 established "the Capstone Approach" as an alternative means of managing email, while the transmittal of GRS 6.1 provides disposition authority for the approach. Both issuances provide one way in which Federal agencies can meet the requirements of Goal 1.2 of M-12-18.

indefinitely will allow the agency to capture those key records. It also ensures email records are part of a record retention schedule; has provisions to prevent unauthorized access, modification, and deletion of permanent records; requires that all records are retrievable and usable; requires consideration of whether email records should be associated with related records; and requires the capture and maintenance of metadata.

The Capstone approach benefits from relying on increased automation of the email retention process and less on individual records retention officials to correctly identify and classify emails as permanent records, thereby reducing the risk of unauthorized deletion of emails. It also encourages the use of updated and evolving technology to manage the email retention process. The District may benefit from exploring the Capstone approach as it considers its current policy of retaining its current catalog of emails indefinitely.

BEGA also previously addressed the application of D.C. FOIA to text messages and records produced by ephemeral content applications such as WhatsApp, with OOG issuing a *sua sponte* Advisory Opinion ("AO") the Mayor of the District of Columbia (the "Mayor").[34] OOG issued the AO in response to a number of factors, including: a lack of bright-line policy on text messages as "public records;" public policy developments in D.C. and other jurisdictions, as well as calls from open government advocates on the issue of text messages; the increased use of personal devices for communicating on public business and the proliferation of "ephemeral" text messaging applications; the need to provide for text message record retention; establishing policies and procedures for government personnel to search, retrieve, and provide records responsively to D.C. FOIA requests; and establishing a regime of responsibility between the Office of the Chief Technology Officer ("OCTO") and substantive public bodies for text messages parallel to the current policy for emails—specifically—whereby OCTO provides a preliminary "screening" function and the public body reviews the material for exemptions or redactions.[35]

As an initial matter, the AO confirmed that text messages are "public records" for purposes the D.C. FOIA.[36] The AO also recommended that the Mayor issue a Mayor's Order to address the lack of a coherent policy government-wide for text message use and retention in public business which necessitated the issuance of the AO. OOG recommended that the Mayor's Order prohibit the use of these types of application to circumvent D.C. FOIA or retention law or the appearance of a violation of the records and retention laws. The urgency for resolution of these issues is *inter alia* the nature of the "ephemeral" texting applications which, by design, allow for messaging that is temporary and irretrievably deleted, thus denying a full public record, and potentially thwarting the stated goals of the District—open and transparent government.[37]

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[34] *See* "Applicability of D.C. FOIA to Text Messaging (including Ephemeral-Content Applications, such as WhatsApp) (#OOG-2022-001)." You may access the Advisory Opinion here: https://www.open-dc.gov/sites/default/files/FOIA%20Advisory%20Opinion_Text%20Messages_OOG%202022-001_03162022.pdf.

[35] *Id*.

[36] *Id*., at 2.

[37] *Id*., at 3-5.

Earlier this year, the Council unanimously passed B24-0692, "Fidelity in Access to Government Communications Clarification Emergency Amendment Act of 2022," on an emergency basis, amending the Public Records Management Act to clarify that (1) "public record[s]"— as defined for PRMA purposes—include not just "electronic mail" but also "other communications transmitted electronically, including through any electronic messaging service"; and (2) electronic records "created or received by the District in the course of official business" must not be "destroyed, sold, transferred, or disposed of" by "enabling settings on electronic devices that allow for . . . non-retention or automatic deletion."[38]

The Council reinforces "that communications created or received electronically in the course of official business are subject to existing record retention obligations," finding that the "[u]se of applications[] such as WhatsApp, with their ability to destroy or delete communications or keep them hidden or obscured, is contrary to the District's emphasis on governmental transparency, and makes public access to these records significantly more difficult, if not impossible (in cases where certain communications are deleted)."[39]

The companion temporary measure, D.C. Law 24-0135 will expire on February 10, 2023, and unless new executive or legislative steps are taken matters of public business conducted with "ephemeral" applications on personal devices by government employees will be at risk of irretrievable destruction and become lost to the public record and responsive production for D.C. FOIA.[40] District law and public policy are clear about transparency being the District's position on open government,[41] and the proliferation of ephemeral applications on personal devices coupled with a lack of permanent, modern, and coherent data retention policies represent a two-fold threat to that position.

B. Data Privacy

The Consumer Personal Information Security Breach Notification Act of 2006 ("Data Breach Law")[42] requires companies to notify consumers when a breach occurs affecting the consumers' personal information.[43] The Data Breach Law defines data breach and gives examples of how a data breach may occur.[44] Data breaches may occur from hacking, or a data breach may simply result from an employee mistake.[45] The Data Breach Law specifically lists categories of personal

[38] *Id*., at 5(quoting Bill 24-0692, § 2 (amending provisions codified at D.C. Official Code §§ 2-1701(13), 2-1706(a)(1)).

[39] *Id*., at 5.

[40] *Id.*, at 3-6, 13-15.

[41] *Id.*, at 2.

[42] D.C. Law 16-237, applicable as of July 1, 2007 (enacted D.C. Official Code § 28-3851 *et seq.*).

[43] D.C. Official Code § 28-3852.

[44] *See id.* § 28-3851(1).

[45] OAG, "What Is a Data Breach?" *at* https://oag.dc.gov/about-oag/laws-legal-opinions/requirements-districts-data-breach-notification.

information.[46] A social security number, driver's license number, and medical information are just a few of the categories listed.[47]

The Data Breach Law does not give a specific timeline on notification to the consumer or OAG when a breach occurs; instead, it generally states that consumers and OAG must be notified "in the most expedient time possible" and "without unreasonable delay."[48] The Data Breach Law does, however, specify how consumers should be notified of a breach. Businesses must detail what information was obtained in the breach and contact information for the following: the company making the breach notification, consumer reporting agencies, the Federal Trade Commission, and OAG.[49] Information on how to request a security freeze must also be included.[50]

If a data breach notification is necessary for 50 or more District residents, a business must contact the OAG with little or no delay.[51] The business is required to report the following to OAG:

- "The name and contact information of the person or entity reporting the breach;"
- "The name and contact information of the person or entity that experienced the breach;"
- "The nature of the breach of the security of the system";
- "The types of personal information compromised by the breach;"
- "The number of District residents affected by the breach;"
- "The cause of the breach, including the relationship between the person or entity that experienced the breach and the person responsible for the breach, if known;"
- "[R]emedial action taken by the person or entity to include steps taken to assist District residents affected by the breach;"
- "The date and time frame of the breach, if known;"
- "[A]ddress and location of corporate headquarters, if outside of the District;"
- "Any knowledge of foreign country involvement; and"
- "A sample of the notice to be provided to District residents."[52]

Several states have implemented their own data and consumer protection laws. California has three laws addressing consumer protection and privacy – the California Consumer Privacy Act of 2018,[53] the California Privacy Rights Act of 2020,[54] and the Genetic Information Privacy Act.[55]

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[46] D.C. Official Code § 28-3851(3)(A).

[47] *Id.*

[48] *See id.* § 28-3852(a), (b-1).

[49] *See id.* subsec. (a-1).

[50] *See id.* subsec. (a-1)(3).

[51] *See id.* subsec. (b-1).

[52] *See id.*

[53] California Civil Code Div. 3, Pt. 4, Title 1.81.5.

[54] Proposition 24 (Calif.) (approved by electors Nov. 3, 2020).

[55] California Civil Code Div. 1, Pt. 2.6, Chap. 2.6.

New York has two relevant statutes – the Stop Hacks and Improve Electronic Data Security Act (SHIELD Act)[56] and the New York privacy act.[57] Eight other states have at least one law in place to address consumer data: the Massachusetts Information Privacy and Security Act;[58] Virginia's Consumer Data Protection Act ("VCDPA");[59] Pennsylvania's Consumer Data Protection Act;[60] the Colorado Privacy Act;[61] the Utah Consumer Privacy Act;[62] Connecticut's Act Concerning Personal Data Privacy and Online Monitoring;[63] Illinois's Biometric Information Privacy Act;[64] and the Maine privacy law, "An Act To Protect the Privacy of Online Customer Information".[65]

Virginia's law provides a model for the District that appropriately balances the individual's privacy rights and corporations' ability to reasonably conduct business and the District should consider adopting it as part of its data protection framework. The VCDPA, effective January 1, 2023, governs the collection and processing of personal data from Virginia residents. It sets out key rights, such as the right to opt-out of having personal data sold to third parties or used for targeted advertisement.[66] The VCDPA does not provide a private right of action; enforcement is exclusively in the authority of the VA Attorney General.[67] The law calls for fines of up to $7,500 per violation and applies to all entities "that conduct business in the Commonwealth or produce products or services that are targeted to residents of the Commonwealth and that" either "(i) during a calendar year, control or process personal data of at least 100,000 [Virginia] consumers or (ii) control or process personal data of at least 25,000 [Virginia] consumers and derive over 50 percent of gross revenue from the sale of personal data."[68]

The VCDPA excludes state agencies, entities governed by GLBA and HIPAA, not for profit companies, and colleges and universities.[69] It also adopts the European Union's General Data Protection Regulation standard – protecting "personal data" (not "personal information"), defined as "any information that is linked or reasonably linkable to an identified or identifiable natural

[56] 2019 N.Y. S5575B.

[57] 2021 S6701B.

[58] *See* The 192nd General Court of the Commonwealth of Massachusetts, 2022 S.2687.

[59] Code of Virginia Title 59.1, Chapter 53 (§§ 59.1-575 – 59.1-584).

[60] *See* Pennsylvania General Assembly, 2022 PA HB2257.

[61] *See* Colorado General Assembly, 2021 SB21-190.

[62] *See* Utah State Legislature, 2022 S.B. 227, Consumer Privacy Act.

[63] Connecticut Public Act 22-15.

[64] 740 Illinois Compiled Statutes 14/1.

[65] *See* Maine Revised Statutes 35-A § 9301.

[66] *See* Code of Virginia § 59.1-577.A.

[67] *Id.* § 59.1-584.A.

[68] *Id.* §§ 59.1-576.A, -584.C.

[69] *Id.* § 59.1-576.B.gibsondunn.com/virginia-passes-comprehensive-privacy-law

person," but excludes employment data and pseudonymous data.[70] Consumer rights included in the VCDPA are access, correction, deletion, data portability, and anti-discrimination rights.[71]

The VCDPA also requires that covered entities obtain consent before processing a Virginia consumer's sensitive data.[72] This is "defined as including 'personal data revealing racial or ethnic origin, religious beliefs, mental or physical health diagnosis, sexual orientation, or citizenship or immigration status'; genetic or biometric data processed for the purpose of uniquely identifying a natural person; the personal data collected from a known child; and precise geolocation data."[73] The VCDPA defines consent "as a 'clear affirmative act signifying a consumer's freely given, specific, informed and unambiguous agreement to process personal data relating to the consumer' and may include 'a written statement, including a statement written by electronic means, or any other unambiguous affirmative action.' "[74]

There are several key elements of the VCDPA that serve as a model for data privacy regulation in the District: it requires that covered entities implement data minimization and technical safeguards – specifically they must " 'establish, implement, and maintain reasonable administrative, technical, and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data,' as appropriate to the volume and nature of the personal data at issue";[75] "limits the collection and processing by controllers of personal data to that which is reasonably necessary and compatible with the purposes previously disclosed to consumers";[76] and provides that "controllers of personal data must obtain consent from consumers before processing personal data collected for another stated purpose."[77]

C. FOIA Appeals

If a FOIA requester has its request denied by a D.C. agency, the requester may appeal the denial of the request to the Mayor. She has delegated this responsibility to the Mayor's Office of Legal Counsel ("MOLC"). The MOLC has a large backlog of FOIA appeals to resolve and we examine other jurisdictions that may provide solutions for the District to resolve the MOLC's backlog.

D.C. FOIA and its regulations[78] require recordkeeping and reporting to enable oversight of the appeals mechanism. The reporting requirements follow: "On or before February 1 of each year,

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[70] Gibson, Dunn & Crutcher LLP, Virginia Passes Comprehensive Privacy Law, *at* gibsondunn.com/virginia-passes-comprehensive-privacy-law (Mar. 8, 2021).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 1 DCMR § 415.1.

the Mayor [or her designated agent[79]] shall request from each public body and submit to the Council[] a report covering the public-record-disclosure activities of each public body during the preceding fiscal year. The report shall include: . . . (4) The number of appeals made pursuant to section 207(a),[[80]] the result of the appeals, and the reason for the action upon each appeal that results in a denial of information . . . ."[81]

The Mayor submitted the FY2021 report[82] to the D.C. Council on March 11, 2022. This report, which included FOIA Appeal Summaries and a FOIA Appeal Log, states that, of the 519 appeals submitted to the MOLC in FY2020 and FY2021, **46% (239 out of 519) were overdue at the end of FY2021** (*i.e.*, as of October 1, 2021).[83]

Also, while there are summaries in the Mayor's annual FOIA reports, it does not appear that the full text of any recent FOIA-appeal decision by the MOLC is available on-line. It appears that the MOLC has not affirmatively released FOIA-appeal opinions in the *D.C. Register* since the November 1, 2019, issue, which published many decisions at once.[84] On its FOIA Appeals page,[85] the MOLC invites the reader to a link that produces FOIA decisions as a search result, but that search yields no decisions more recent than FOIA Appeal 2018-078, decided on March 7, 2018. While D.C. FOIA and its regulations do not require that MOLC decisions appear in the *D.C. Register*, the MOLC must at least make the decisions publicly available, such as by posting the decisions to its website.[86]

The delay in disposing of appeals is in part due to the statutory deadline being too short. As a remedy, BEGA suggests an amendment to the FOIA statute to enlarge the MOLC's administrative review period. The District's surrounding jurisdictions—Maryland, Virginia, and the federal

[79] D.C. Official Code §§ 2-502(1)(A), 2-539(a)(5).

[80] *Id.* § 2-537(a).

[81] *Id.* § 2-538(a).

[82] *Available at* https://os.dc.gov/page/annual-reports.

[83] *See* "FY2020 Final FOIA Report" at 178–98;" FY2021 District of Columbia FOIA Report" at 207–16. Of course, not all FOIA requests are equally complex, so not all appeals are equally time-consuming to evaluate and decide.

[84] *See* 66 DCR 014580–014799 (Nov. 1, 2019) ("FOIA Appeals" numbers 2019-51 to 2019-162 (not entirely inclusive)).

[85] https://dc.gov/page/freedom-information-act-foia-appeals (last visited Dec. 16, 2022).

[86] D.C. Official Code § 2-536(a)(3), (b) (section 206 (a)(3) and (b), of D.C. FOIA) (requiring affirmative posting of certain "records created on or after November 1, 2001," including "[f]inal opinions" and "orders, made in the adjudication of cases").

government—have counterparts to D.C. FOIA, and all of them have longer periods of administrative review than ten business days.

Under Maryland's Public Information Act,[87] there is a two-layer administrative-review procedure.[88] An applicant can apply to the Public Access Ombudsman and then, if the dispute remains unresolved, to the State Public Information Act Compliance Board for a binding decision (accompanied by a written opinion posted on the Compliance Board's website).[89] The Ombudsman's deadline "to issue a 'final determination' that a dispute has been resolved or not resolved" is *90 calendar days, which may be extended* by mutual agreement of the custodian and requester to continue the mediation.[90] The Compliance Board's outermost deadline is *120 calendar days* from the date of the complaint, which is of course in addition to the Ombudsman's review period.[91]

The Virginia Freedom of Information Advisory Council issues advisory opinions on request.[92] Though the advisory opinions are not binding, public bodies are required to "cooperate with" the Advisory Council, which "hopes to resolve disputes by clarifying what the law requires and to guide future practices."[93] "Because of the diligence required to respond thoroughly and accurately to each question, response time may vary depending on the number of inquiries received by the office at any given time as well as the complexity of [a] particular question. Nonetheless, the [Advisory] Council will strive to respond to [a] request within *14 business days*."[94]

Under federal FOIA, a requester may appeal from "an adverse determination . . . to the head of the agency," who has a base period of *20 business days*[95] to decide appeals, plus the *authority to extend* the period under "unusual circumstances."[96]

BEGA recommends that the D.C. Council consider amending D.C. FOIA to permit the MOLC at least 20 business days to complete the FOIA appeals process. Our neighbor Maryland provides an even longer period of review, so extending the review period for a longer period of time would also be reasonable.

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[87] Ann. Code of Md., art. General Provisions, title 4.

[88] *See generally* Office of the (Md.) Attorney General, MARYLAND PUBLIC INFORMATION ACT MANUAL at 5–4 to 5–11 (16th ed. 2021), *available at* marylandattorneygeneral.gov/OpenGov Documents/PIA_manual_printable.pdf.

[89] *Id.* at 5–4 (citing Equitable Access to Records Act, effective July 1, 2022 (Laws of Md., 441st Sess., Chap. 658)).

[90] *Id.*

[91] *See id.* at 5–10.

[92] 21 Va. Code § 30-179.1.

[93] *Id.* § 30-181; foiacouncil.dls.virginia.gov/Services/opinions.htm.

[94] foiacouncil.dls.virginia.gov/Services/opinions.htm (emphasis added).

[95] Federal FOIA was amended, effective 1975, before D.C. FOIA's enactment, to provide for administrative review that includes the base 20 business days for deciding an appeal.

[96] 5 U.S.C. § 552(a)(6)(A)(i)(III), (ii), (B)(i)–(iii).

D. Pandemic-Related Changes to Open-Government Laws

In keeping with the District's policy of encouraging open government and transparency,[97] OOG is charged with construing the OMA "broadly to maximize public access to meetings."[98] The OMA obligates entities within the Act's jurisdiction to ensure the rights of citizens to be informed about public business, which is essential in a democracy.[99] Open government and transparency laws build public confidence and trust in the government, and, thus, they are integral to maintaining an ethical government.

The public emergency first declared by Mayor Bowser on March 11, 2020, elapsed with the sunset of Mayor's Order 2022-043 on April 16, 2022.[100] However, the District has extended its legislative response to COVID-19 by continuing to relax physical-posting and physical-admittance requirements for public bodies' meetings. The Post–Public Health Emergency Protections Extension Temporary Amendment Act of 2022[101] and its emergency[102] companion measure extended the option for public bodies to stream live/contemporaneous[103] meetings virtually rather than physically admitting observers.[104] Public bodies are no longer required to post physical notices of their meetings.

Although there have been some changes to open government laws in nearby states, the changes are not as significant as many of the measures that were put in place at the start of the pandemic in 2020. In Maryland, the Maryland State Agency Transparency Act of 2022, effective October 1, 2022, excludes a project site visit or educational field tour from the definition of "meeting" for the purposes of Maryland's Open Meetings Act for certain public bodies and also subjects several public corporations to that same act.[105]

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[97] D.C. Official Code §§ 2-531, 572

[98] D.C. Official Code § 2-573.

[99] The OMA requires that public bodies: (1) maintain detailed records of all public meetings; (2) provide to the public advance notice of meetings to reflect the date, time, location, planned agenda, and statement of intent to close the meeting or portion of the meeting, including the statutory citation for closure and description of the matters to be discussed; and (3) strictly adhere to the OMA when conducting a public meeting by electronic means. (D.C. Official Code § 2-571, *et seq.*)

[100] 69 DCR 002503 (Mar. 25, 2022).

[101] Effective Dec. 21, 2022 (D.C. Act 24-615; D.C. Law 24-0212).

[102] Post–Public Health Emergency Protections Extension Emergency Amendment Act of 2022, effective Oct. 17, 2022 (D.C. Act 24-564).

[103] Specifically, section 5 of each act permits public bodies to satisfy the openness requirement through steps that are "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." The OMA had always allowed "televis[ing]" meetings as an alternative to allowing physical attendance, *see* D.C. Official Code § 2-575(a)(3) & nts. (section 405(a)(3) of the OMA), but this amendment broadens that option into streaming via, *e.g.*, YouTube or Facebook Live, which require less technical knowhow and equipment.

[104] Of course, individual public bodies might impose stricter requirements on themselves through by-laws or standing orders, but any *enforcement* of such internal parliamentary law would be beyond OOG's scope.

[105] 2022 Laws of Md., ch. 346, *available at* mgaleg.maryland.gov/2022RS/Chapters_noln/CH_346_sb0269e.pdf.

Virginia's General Assembly amended the Virginia Freedom of Information Act, which includes open-meetings provisions, to allow "certain public bodies to conduct all-virtual public meetings."[106] The Virginia law, however, states that "local governing bodies, local school boards, planning commissions, architectural review boards, zoning appeals boards, and any board with the authority to deny, revoke, or suspend a professional or occupational license" may not "conduct all-virtual public meetings" except during a declared state of emergency.[107]

New York State has amended its Open Meetings Law to authorize public bodies to conduct meetings using videoconference technology through June 30, 2024.[108] Except in extraordinary circumstances, a public body must permit the public to "attend, listen, and observe the meeting in at least one physical location at which a member participates and" ensure that "a quorum of the members are present in either the same physical location or in multiple locations where the public is permitted to attend."[109]

None of the principal federal access-to-information statutes[110] has been amended recently, let alone since the COVID-19 pandemic. A 2022 Congressional Research Service report cautions that, while "[s]ome federal advisory committees have embraced the use of virtual meetings, especially in response to coronavirus exposure concerns," they must still comply with the Advisory Committee Meeting and Recordkeeping Procedures.[111] For example, barring "exceptional circumstances,"[112] federal advisory committees and subcommittees must publish notice in the Federal Register "at least 15 calendar days" before any meeting.[113] This notice must include the "place . . . of the meeting,"[114] which presumably means the weblink or dial-in number just as OOG has applied the "location" requirement under the OMA to include the internet or phone instructions.[115]

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[106] Virginia's Legislative Information System, Summary as Passed, Va. Acts of Assembly—2022 Sess., ch. 597, *available at* lis.virginia.gov/cgi-bin/legp604.exe?221+sum+HB444.

[107] *See id.*

[108] lilanduseandzoning.com/2022/05/16/new-york-state-adopts-new-law-governing-public-meetings-by-videoconference (citing Public Officers Law § 100 *et seq.*)).

[109] *Id.*

[110] "Freedom of Information Act," recodified Sept. 6, 1966 (80 Stat. 383; 5 U.S.C. § 552); Privacy Act of 1974, approved Dec. 31, 1974 (88 Stat. 1896; 5 U.S.C. § 552a & nts.); Government in the Sunshine Act, approved Sept. 13, 1976 (90 Stat. 1241; 5 U.S.C. § 552b *et al.*); Federal Advisory Committee Act, approved Oct. 6, 1972 (86 Stat. 770; 5 U.S.C. app.).

[111] Meghan M. Stuessy, Access to Government Information, C.R.S. Report No. R47058 (Mar. 31, 2022); 41 C.F.R. pt. 102-3, subpt. D.

[112] 41 C.F.R. § 102-3.150(a).

[113] *Id.* subdiv. (b).

[114] *Id.* subdiv. (a)(2).

[115] D.C. Official Code § 2-576(5) (section 406(5) of the OMA) ("Each meeting notice shall include the date, time, location, and planned agenda . . . .").

With respect to D.C. FOIA, a string of extensions had suspended or eased time-limits for responses during the pandemic, but the last of those acts expired October 27, 2021.[116] Since then, there have been no D.C. FOIA amendments directly responsive to COVID-19, and BEGA agrees that none has been necessary in 2022, although we recommend other changes to D.C. FOIA unrelated to the pandemic.

[116] *See generally* Guidance for D.C. FOIA Compliance (Oct. 14, 2021), *at* open-dc.gov/documents/post-public-health-emergency-guidance-foia-officers.

III. Recommendations for Amendments to the District's Ethics and Open Government Laws

The Board is also tasked with recommending amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act in order to improve the District government's ethics and open government and transparency laws.[117]

Ethics Recommendations

BEGA was established in significant part to address the lack of a "uniform, comprehensive code of conduct for all employees, including public officials."[118] As in prior Best Practices Reports, BEGA continues to recommend that the District adopt a Comprehensive Code of Conduct ("CCC") that would consolidate government ethics laws in one place and standardize the practices between the legislative and executive branches. This comprehensive approach would strengthen the District's ethics framework and would be in line with best practices in other jurisdictions.

Over the course of several council periods, BEGA has submitted several iterations of the proposed Comprehensive Code of Conduct for consideration by the Council. On June 12, 2015, BEGA initially submitted Bill 21-250, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2015". After a hearing on the proposed legislation, Bill 21-250 lapsed, without prejudice, at the end of Council Period 21. In 2017, BEGA introduced a substantially similar bill, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2017" (Bill 22-136). Bill 22-136 was also the subject of a public hearing on November 2, 2017; however, the Council again took no action on the bill and it lapsed, without prejudice, at the conclusion of Council Period 22. The next iteration of the proposed legislation, Bill 23-0103, the "Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2019" was introduced in 2019. As with the prior versions, the Council did not act on Bill 23-0103 and the bill lapsed, without prejudice, at the conclusion of Council Period 23.

In the upcoming Council Period 25, after a comprehensive review of the provisions of the statutes and regulations that form the current Code of Conduct, BEGA expects to introduce a revised Comprehensive Code of Conduct for the Council's consideration. A proposed Comprehensive Code of Conduct would be informed by BEGA's decade of work administering the ethics rules applicable to District employees and would include several key elements detailed below.

The proposed CCC would establish a single ethical standard for all District employees, whether employed by the executive branch and independent agencies or the Council; setting the same limits for gifts and the same rules for conflicts of interests, outside activity, post-employment restrictions and financial disclosures. Individuals who perform services for the District government as contractors would also be subject to many of the provisions of the new CCC in the same manner as the District employees they work with. Similarly, a Comprehensive Code of Conduct would

[117] D.C. Official Code § 1-1162.02(b)(3).

[118] *See* Ethics Act Committee Report at 12.

explicitly state that Advisory Neighborhood Commissioners (ANC Commissioners) are subject to the CCC, which would eliminate any ambiguity as to whether ANC Commissioners are subject to the Code of Conduct.

Under the new proposed CCC, BEGA intends to recommend streamlining the financial disclosure reporting system to use a bright line salary threshold that would require all District employees, including employees of the Council paid at a rate equivalent to the midpoint of Excepted Service 9 or above, to file public financial disclosure reports. This mirrors the current requirements for Council employees under the Ethics Act, which requires public financial disclosure filing for Council employees based solely on rate of pay without regard to responsibilities.[119] Confidential financial disclosure filers would be designated by agencies based on their responsibilities as long as their rate of pay is below the threshold for public filers.

BEGA also plans to recommend changes to the District's Gifts Rule, including increasing the limits for gifts under the Gifts Rule from $10 to $20 per gift and the aggregate annual limit from $20 to $50. This would harmonize the rules between the Council and the executive, is consistent with federal executive branch limits for gifts[120] and would still be comparable to or lower than the limits in other jurisdictions. Philadelphia, for example, permits city officers and employees to accept gifts worth up to ninety-nine dollars ($99) in the aggregate per calendar year, while Chicago and New York City have a $50 limit from a single source per year.[121] Recommended revisions to the Gifts Rule would incorporate more detailed guidelines for attendance at widely attended gatherings, including when employees can accept an invitation for an accompanying guest and what free attendance at a widely attended gathering encompasses, again drawing on the federal guidance in this area.

As discussed in BEGA's 2021 Best Practices Report, a Comprehensive Code of Conduct that includes restrictions on providing professional services for compensation or affiliating with an entity that provides professional services for compensation, as well as limitations on the types of clients a District official could represent would strengthen the District's ethics rules and reduce the potential for a conflict of interest or the appearance of a conflict that could undermine the public's confidence in the District government. BEGA expects that its recommendations for the CCC will include restrictions on the provision of professional services for compensation by elected officials and agency heads, including prohibitions on receiving compensation for affiliating with or being employed by an entity that provides professional services for compensation, permitting their name to be used by such an entity or receiving compensation for practicing a profession that involves a fiduciary relationship. Public officials and agency head owe a duty to act in the interests of the District and its residents. Where an official or agency head acts as a fiduciary, that creates

[119] *See* D.C. Official Code § 1-1161.01(47)(J) defining public official to include Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9 and § 1-1162.24 outlining the requirements for public financial disclosure filers.

[120] The federal rules allow employees to accept unsolicited gifts having an aggregate market value of $20 or less per source per occasion with an annual aggregate limit of $50. *See* 5 C.F.R. § 2635.204(a).

[121] *See* Philadelphia, PA, Code § 20-604(1); Chicago, Ill, Municipal Code §2-156-142(a)(2); New York, NY, City Charter, Ch. 68, § 2604(b)(5); Title 53, §1-01.

an obligation to act in the interests of a third party that is not the District, creating the type of conflict of interest that the ethics rules are intended to prevent.

To ensure that any potential conflict of interest between an employee's District employment and their outside business activity or outside employment is apparent, the proposed CCC would add a notification requirement for all employees required to file a public or confidential financial disclosure statement. Under this provision, prior to any outside employment, private business activity, or other outside activity, these District employees would need to file a disclosure with their supervisor and agency personnel authority or ethics counselor and receive prior written authorization before engaging in the activity or employment. BEGA will work with District agencies to assess whether the agencies should designate any additional categories of employees for inclusion in the preapproval process based on their work for the agency.

The proposed CCC would also extend the requirement for annual ethics training from financial disclosure filers to all covered individuals. This is particularly important given the changes that the CCC would make to significant portions of the current Code of Conduct. Initial training of all District employees upon passage of the act with regular annual refresher training would not only assist employees with understanding the rules but would underscore the importance that the District places on a culture of ethics in the operations of the District government. An annual training educates and reminds employees of the ethics rules which promotes awareness and reduces the number of ethics violations.

Finally, the proposed CCC would include language to clarify the provisions of the nepotism statute at issue in the Gerren Price matter. BEGA intends to recommend language that would reinforce for District employees the importance of the anti-nepotism provisions in creating a culture of competence that instills confidence in the District government and its employees.

Open Government Recommendations

The District continues to take steps to make government transparent and accessible to the public, including its efforts to pivot as District government transitions from pandemic-related restrictions on its operations to traditional in-person operations. The District should use the experience gained from the temporary fully remote operations to incorporate into its permanent operational scheme. BEGA reiterates the recommendations made in prior Best Practices Reports regarding changes to D.C. FOIA that would allow the District to operate in a more transparent manner and allow for greater protection of the sensitive information and data it maintains. BEGA has also set forth recommendations to permit OOG to better carry out its mission to implement to Open Meetings Act and the Freedom of Information Act.

As BEGA outlined in the 2021 Best Practices Report, although D.C. FOIA is modeled on the federal FOIA, current District law does not have a statutory equivalent to the federal Privacy Act which would allow District agencies to release information to requestors about themselves without redacting the information subject to D.C. FOIA's exemptions, primarily the personal privacy exemption.[122] To address the identification requirements at issue in a first party request for records under FOIA, BEGA reiterates our recommendation from the 2021 Best Practices Report that the Mayor promulgate FOIA regulations that would allow agencies to seek verification of identity. In addition, the Council may also want to consider whether the District would benefit from privacy legislation in line with the federal Privacy Act, that would work with FOIA to provide a right of access to an individual's records that are maintained by District agencies.

Any privacy legislation should consider adopting data protection safeguards in line with the Virginia Consumer Data Protection Act. As discussed in more detail above, the Virginia law provides a balance between an individual's privacy rights and a corporation's ability to reasonably conduct business. The addition of standards for the collection and processing of personal data of District residents would be an additional tool in the District's data protection framework that would supplement the District's Data Breach Law.

BEGA continues to recommend that the District government implement recommendations of the Chief Data Officer, which called for the adoption of a "reasonable and uniform retention policy for email."[123] The District of Columbia does not have a retention schedule for email and stores all email for all agencies indefinitely. In the context of FOIA, the Chief Data Officer noted in a 2019 report that "the growing quantity of emails continues to slow FOIA responses, many of which include email searches." BEGA recommends that the Mayor adopt a reasonable email retention policy that requires email be stored for a fixed period of time.

To address the retention of text messages and records produced using "ephemeral" applications, BEGA recommends that the Mayor Issue a Mayor's Order that incorporates the follow provisions:

(1) recognizes that text messages concerning government business are "public records," even if stored on a private device;

[122] *See* D.C. Official Code § 2-534(a)(2).

[123] *See* https://opendata.dc.gov/documents/DCGIS::chief-data-officer-annual-report-2018/explore; https://opendata.dc.gov/documents/DCGIS::chief-data-officer-annual-report-2019/explore; https://opendata.dc.gov/documents/chief-data-officer-annual-report-2020/explore.

(2) directs retention of all such texts for purposes of D.C. FOIA;
(3) strongly discourages employees from texting using personal devices to transact public business, doing so only in rare instances where access to their District provided device is, for practical reasons, not available;
(4) requires employees in instances where personal devices are used to transact public business, to separate and retain such records;
(5) requires employees to execute an affidavit attesting to search efforts conducted for responsive records on personal devices; and
(6) prohibits the use of ephemeral text messaging applications by government employees, to expressly foreclose even the appearance of a violation for any communications related to public business.

BEGA further recommends that the Council pass a permanent version of D.C. Law 24-0135 prior to its expiration on February 10, 2023, amending the draft of the legislation to incorporate all six of the points listed above. The District should also consider including language directing substantial public bodies to contract with commercial electronic-archiving services to provide for continuity, and to insure legally valid authenticity and context for records.[124]

With respect to the processing of FOIA requests, BEGA recommends amending D.C. FOIA to extend the response time for FOIA requests to mirror the timelines in the federal FOIA. Federal FOIA provides agencies with 20 days to respond to requests.[125] D.C. FOIA, however, provides District agencies with 15 days to respond to FOIA requests.[126] Both statutes allow agencies to invoke a 10-day extension (excluding Saturdays, Sundays, and legal public holidays) for unusual circumstances, as defined in the respective statutes.[127] Amending section 202(c)(1) of D.C. FOIA to adopt the 20 days available to federal agencies would allow District agencies additional time to process FOIA requests. Changing the response time via statute would not require an amendment of the implementing regulations for D.C. FOIA as the provision at 1 DCMR § 405.1 refers to "the time prescribed by applicable law following the receipt of a request" in reference to the initial response time for a FOIA request.

BEGA also recommends extending the time for the MOLC to respond to FOIA appeals. The D.C. Council should consider amending D.C. FOIA to reflect the reality of the MOLC's resources, its dependence on agency response, the legal complexity of some appeals, and the practices of the federal government, Maryland, and Virginia.

As noted in prior Best Practices Reports, the Open Meetings Act exempts Advisory Neighborhood Commission meetings from compliance with the OMA,[128] even though their members are elected

[124] *Id*., at 14-16.

[125] 5 U.S.C. § 552(a)(6)(A)(i). The 20 days excludes Saturdays, Sundays, and legal public holidays.

[126] D.C. Official Code § 2-532(c)(1). D.C. FOIA also excludes Saturdays, Sundays, and legal public holidays.

[127] 5 U.S.C. § 552(a)(6)(B)(i); D.C. Official Code § 2-532(d)(1).

[128] D.C. Official Code § 2-574(3)(F).

by the public to consider and take positions of "great weight" as to District business.[129] Instead, ANC meetings are currently governed by a separate statute, the Advisory Neighborhood Councils Act of 1975 ("ANC Act").[130]

While the ANC Act requires that ANCs conduct open and transparent meetings, in practice compliance with this requirement is mixed. Because ANCs are not required to participate in regular training by OOG and current law does not provide a mechanism to enforce the open meeting requirements of the ANC Act apart from a private right of action under the Sunshine Act,[131] OOG is in the position of fielding constituent complaints at ANC meetings without any ability to enforce the open meeting requirements. Adding to the confusion is that ANCs are bound by D.C. FOIA, and OOG provides training, monitoring, and advice, as to the ANCs' public record practices.[132]

Accordingly, BEGA recommends that the Council make corresponding amendments to bring ANC meetings under the requirements of the Open Meetings Act and to allow OOG to enforce the ANC Act's open meetings provisions.[133] BEGA intends to forward draft legislation for your consideration in Council Period 25.

In the course of amending the OMA to address ANC meetings, BEGA recommends that the Council also address requirements that public bodies comply with the OMA requirements when "feasible." This provision appears five times in the OMA: (1) in the temporary amendment in response to remote meetings requirements during the COVID pandemic requiring public bodies to take steps "reasonably calculated to allow the public to view or hear the meeting while the meetings is taking place, or, if doing so is not technologically feasible, as soon thereafter as practicable";[134] (2) in the requirement for public bodies to "establish an annual schedule of meetings, if feasible";[135] (3) in the requirement that the meeting notice "shall include, if feasible, a statement of intent to close the meeting or any portion of the meeting" along with an explanation of the reasons for closure and the matters to be discussed;[136] (4) in language on meeting procedures which discusses the requirement that a meeting may be held remotely provided reasonable arrangements are made to accommodate the public's right to attend and steps are taken to view or hear the meeting taking place or "if doing so is not technologically feasible, as soon thereafter as reasonably

[129] The ANC website describes the ANCs' "main job" as being "their neighborhood[s'] official voice[s] in advising the District government (and Federal agencies) on things that affect their neighborhoods. Although they are not required to follow the ANCs' advice, District agencies are required to give the ANCs' recommendations 'great weight.' Moreover, . . . agencies cannot take any action that will significantly affect a neighborhood unless they give the affected ANCs 30 days advance notice." https://anc.dc.gov/page/about-ancs.

[130] D.C. Official Code §1-309.11.

[131] *See* D.C. Official Code §§ 1-207.42, 2-579(a)(2).

[132] *See id.* §§ 1-309.12(d)(6), .15(c)(4), (5).

[133] In several respects the ANC Act is stricter than the OMA in terms of the reasons for closure, location of meetings, advance notice requirement, and requirement to adopt and publish by-laws, and take and distribute minutes.

[134] D.C. Official Code §2-575(a)(4).

[135] *Id.* at §2-576(1).

[136] *Id.* at §2-576(5).

practicable";[137] and (5) in the requirement to provide a recording or the meetings, or "if a recording is not feasible, detailed minutes of the meeting."[138] The use of the term "feasible" in multiple provisions of the OMA creates confusion both among the public and public bodies on the OMA requirements given the lack of a clear standard for what is "feasible" in terms of compliance with the act.[139] To eliminate this confusion and ensure public bodies are meetings and open and accessible to the public, BEGA plans to include language striking the word "feasible" from the OMA when it submits draft amendments to the Council.

Finally, BEGA finds that, since their initial enactment on March 17, 2020,[140] the temporary changes to the OMA to allow public bodies to stream live/contemporaneous meetings virtually rather than physically admitting observers have operated as intended, balancing equity and openness against the health and accessibility concerns of expecting the public to travel to a physical meeting room. Accordingly, BEGA recommends permanent enactment.

[137] *Id.* at §2-577(a)(1).

[138] *Id.* at §2-578(a).

[139] The court in *Office of Open Government v. Michael Yates* noted that the Open Meetings Act "if feasible" language "arguably does not describe a standard that is precise enough to support regulatory intervention." Off. of Open Govt. v. Yates, No. 2016-CA-007337 3-4 (D.C. Super. Ct. Sep. 27, 2017).

[140] COVID-19 Response Emergency Amendment Act of 2020, § 504, effective Mar. 17, 2020 (D.C. Act 23-247; D.C. Official Code §§ 2-575(a)(4), 2-576(6), 2-577(a)(1)).