

**COUNCIL OF THE DISTRICT OF COLUMBIA  
COMMITTEE ON HUMAN SERVICES**



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**COUNCIL OF THE DISTRICT OF COLUMBIA**

**PUBLIC HEARINGS**

**AGENCY PERFORMANCE OVERSIGHT HEARINGS  
FISCAL YEAR 2021-2022**

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**Testimony of Niquelle M. Allen, Esq.  
Director of Open Government**

**Tuesday, February 22, 2022  
12:00pm  
Virtual Platform  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004**

Good Afternoon, Chairperson Nadeau, members of the Committee on Human Services (the “Committee”), and staff. I am Niquelle Allen, Director of Open Government. It is a pleasure to be here today via this virtual platform to update the Committee and the public on the performance of the Office of Open Government (the “OOG”). OOG is an office within the Board of Ethics and Government Accountability (BEGA). We ensure that the District of Columbia Government’s (the “District”) operations are open, transparent, and accessible to the public.

## **I. Introduction**

As Director of Open Government, BEGA’s enabling legislation requires that I issue advisory opinions regarding compliance with the Open Meetings Act (the “OMA”); provide training for members of public bodies on the OMA; and issue rules to implement the OMA. I am the head of the OOG, which I may direct to bring a lawsuit in D.C. Superior Court to enforce the OMA and issue advisory opinions on the implementation of the Freedom of Information Act (FOIA). OOG is also responsible for training the District’s FOIA Officers on D.C. FOIA law and regulations. OOG also trains Advisory Neighborhood Commissioners (ANCs) on FOIA, twice a year, with the Office of ANCs and assists the public with their submission of FOIA requests. We continually strive to provide fair, objective, and clear guidance on the application of the OMA and FOIA laws and regulations to District of Columbia government operations.

In FY21 and FY22, I am pleased to report that OOG operated with a full staff. That has made a huge difference in our ability to provide advice, execute our mission and serve the public. In my testimony today, I will detail OOG’s activities concerning the OMA and FOIA. I will also discuss my recommendations for changes to the OMA and FOIA that could enhance government transparency in the District. I will begin with a discussion of OOG’s activities concerning the OMA.

## **II. Open Meetings Act**

OOG is empowered by statute to enforce the OMA. During FY21 and FY22, to date, D.C. public bodies subject to the OMA are meeting virtually. OOG has been monitoring OMA compliance by attending remote meetings. We have also been investigating and resolving complaints. As we are progressing into calendar year 2022, OOG is examining how public bodies will transition into a hybrid meeting model where some members are meeting together in person, while others remain remote. We see this as our major challenge with public meetings in the future. Looking back on what we accomplished, my testimony will focus on OOG’s activities concerning issuing Advisory Opinions, rendering informal advice, and providing virtual training during FY21 and FY22, to date.

## **A. Open Meetings Act Advice**

OOG responded to 273 requests for informal OMA advice in FY21 and FY22, to date. These requests were requests for legal advice about the OMA that were rendered by OOG without a written Advisory Opinion. The advice was primarily given via email, but it was also delivered via telephone and other means. OOG received 9 requests for OMA Advisory Opinions during that time, which included OMA complaints and requests for formal legal advice.

Five OMA complaints were resolved by issuing Advisory Opinions in FY21 and FY22, to date. The OMA issues that the Advisory Opinions resolved included emergency meetings; closed meetings; record of meetings; special meetings; meeting notices; and statute of limitations. An OMA Advisory Opinion was also issued to provide legal guidance on an OMA issue. OOG provided advice regarding the retention and inspection of meeting records.

## **B. OMA Compliance Activity**

OOG has also carried out activities designed to ensure that public bodies comply with the OMA. In FY21 and FY22, to date, OOG has completed 20 OMA training webinars. OOG's training offerings are currently all remote due to the pandemic.

In June 2021, OOG completed the Open Meetings Act training video project with the DC Office of Film, Music and Entertainment. The 30-minute OMA training video is available on our website and is part of a larger effort to provide video content online to public bodies to receive OMA training, on-demand. OOG looks forward to working with the Mayor's Office of Talent and Appointments (MOTA) to incorporate that video and the Office of Government Ethics' "Ms. Ethics" government ethics training video into a virtual onboarding platform for new members of Boards and Commissions, in the future.

OOG has also deployed its legal staff to attend online public body meetings on a regular basis to assist with OMA compliance. Having the OOG attorneys present at the meetings enables OOG to identify OMA compliance issues before the public is impacted. It also gives public body members the opportunity to get to know and interact with our legal staff, so they feel comfortable contacting us with questions, get to know OOG, and see us as a resource for information and assistance with meetings.

OOG is also working collaboratively transparency advocates in the community on open government issues. We meet regularly with community advocates, such as the DC Open Government Coalition, to find out if there are any problems in the community with public meetings. We use those meetings with community advocates to guide us in tailoring our training and outreach to public bodies so their meetings can be more effective.

OOG commissioned a training portal for District personnel to learn about Robert's Rules of Order, which is the parliamentary authority recommended in OMA regulations. The platform was launched, and administrative points of contact for the public bodies were solicited and given access to the portal, throughout the early months of FY22. OOG's goal with the portal is that by having more orderly, professional meetings, public bodies will be more compliant with the OMA as a result.

OOG's legal staff have continued to monitor and respond to changes in the law and in circumstances surrounding the COVID-19 pandemic. OOG has proactively distributed, and posted on its website, anticipatory guidance to public bodies for continuing to conduct remote/electronic meetings, in compliance with the OMA, throughout the pandemic.

I will next discuss OOG's activities respecting the D.C. Freedom of Information Act.

### **III. Freedom of Information Act**

OOG is empowered to provide advice and training when it comes to FOIA matters. There is a public perception that OOG has the authority to provide remedies for or investigate FOIA issues that may arise in the District. BEGA's enabling legislation provides OOG with no such authority. However, given our relationships with D.C. agencies and District FOIA Officers, OOG assists with resolving FOIA matters when we can. OOG provides legal advice, guidance, and training to all parties – the public and the government – on D.C. FOIA.

#### **A. FOIA Advice and Advisory Opinions**

In FY21 and FY22, to date, OOG responded to 264 informal requests for informal FOIA Advice. This is advice rendered by the office that was not a formal advisory opinion. The informal advice is most frequently given via email. In the same time frame, OOG issued 3 FOIA Advisory Opinions.

The April 12, 2021 Advisory Opinion was issued in regard to the District of Columbia Public Schools' (DCPS) compliance with the Freedom of Information Act's requirement for agencies to publish Administrative and Policy Documents on its website. OOG found that DCPS was not in compliance and recommended that the agency request sufficient funding to enable it to digitize its records and become compliant.

The November 2, 2021 Advisory Opinion concerned the FOIA Personal Privacy Exemption and discussed whether the University of the District of Columbia could release faculty member's personnel records. We found that UDC could withhold the records under the FOIA exemption.

The February 17, 2022 Advisory Opinion concerned whether the operation of the Office of the Chief Technology Officer's (OCTO) Online FOIA processing system, "FOIAXpress," complies with D.C. FOIA and does not serve as a hinderance to D.C. FOIA processing. OOG

found that there are some aspects of OCTO's system that impede FOIA processing. The most significant was the remnants of federal FOIA law that remain embedded in the system that confuse public and government users. At the very least, OCTO should undertake an immediate, general legal review of the platform and ensure that it lists only D.C. FOIA citation options for D.C. FOIA Officers to use.

## **B. FOIA Training and Publications**

In FY21 and FY22, to date, OOG provided 21 FOIA training opportunities. Due to the pandemic OOG offered webinars only and we have not yet resumed in-person training. Some topics of our webinars include: "Biannual FOIA Training for ANCs", which we just held on February 17, 2022; "FOIA 101: The Path that Leads to Openness and Accountability," which we held during Ethics Week on October 20, 2021; and "Innovations in DC FOIA Law" at the American Society of Access Professionals Virtual National Training Conference, on May 27, 2021.

OOG also partnered with the D.C. Open Government Coalition and the D.C. Library Association to provide a series of webinars titled "Digging into DC," which were designed to educate the public on how request and receive records from DC government agencies. The first two webinars focused on education and law enforcement records.

We also published and distributed a memorandum regarding the temporary legislative changes to D.C. FOIA that were enacted as a result of the COVID-19 pandemic to D.C. FOIA Officers via email in early October 2021. We provided the information to ensure they had complete information concerning the pandemic-related changes to D.C. FOIA law and provided a form letter for them to use when communicating with FOIA requesters if the processing of their request would be delayed due to the pandemic.

## **IV. Recommendations for Changes to the OMA and FOIA**

The Committee on Human Services should consider the following changes to the Open Meetings Act and Freedom of Information Act to make the District's operations more transparent, accessible, and open to the public.

### **A. Advisory Neighborhood Commission Meetings Should Be Subject to the OMA.**

OOG receives requests from individual ANCs for OMA and parliamentary procedure training, and we receive complaints from members of the regarding ANC meeting compliance with the OMA. There seems to be a general thought in the District that ANCs are subject to the OMA. I believe that more people have been attending DC government meetings in general since they have become available online, so there is a general assumption that these meetings are

subject to the OMA like all other government meetings. I believe ANC meetings should be subject to the OMA. With the advances in technology, we have all learned to record meetings and hold virtual meetings using a telephone or other handheld device. What once may have seemed difficult for an ANC is something we now do every day – virtual meetings. Bringing them under the OMA would permit OOG to provide them with training, support, and other resources they need to be more effective leaders and hold open and transparent meetings. From my interactions with ANCs through my FOIA trainings with them, and as a DC resident, I find them to be some of the most dedicated public servants in government. OOG would appreciate the opportunity to contribute to ANC’s openness, transparency, and continued value to the community through their open meetings.

### **B. The D.C. Council Should Create an FOIA Reform Task Force**

The D.C. Council should move forward with reforming D.C. FOIA. The law needs to evolve to reflect a digital government. In order for the D.C. Council to reform D.C. FOIA in a meaningful way, it must bring all of the parties in the District government that are responsible for District government records and transparency together. Within the government that includes OOG, the Office of the Secretary (D.C. Archives), the Mayor’s Office of Legal Counsel (Appeals), the Office of the Chief Technology Officer), to name a few. It should also receive input from experts and stakeholders from outside of the government that frequently utilize D.C. FOIA and interact with D.C. government. That includes journalists, attorneys, academicians, and D.C. resident stakeholders. I strongly suggest that the D.C. Council assemble a Task Force to reform D.C. FOIA and to specifically recommend changes to D.C. FOIA law.

Task force usage affords the Council the opportunity to have the best-suited people at the table to tackle the issue at hand, resulting in higher quality output with the input of public and private stakeholders. Investing in this endeavor and ensuring that the task force members possess the skill sets and interests to the specific task of reforming the D.C. FOIA law will provide the Council with modernized FOIA legislation that will better serve the public good. It will also provide the opportunity for more meaningful public discourse around the issue, as such a task force should be empowered to receive comments from the public on D.C. FOIA. I hope the Committee would consider creating this task force.

### **C. The Board’s Best Practice Report Recommendations**

I would like to briefly reiterate the Best Practice Report (BPR) Recommendations recommended by BEGA’s Board (the “Board”) in the 2021 Report and respectfully request that the Committee consider implementing the recommendations concerning open government.

The Board supported making District agencies’ FOIA responses readily available on the Open Data Portal and also making it available on the Online FOIA Portal. I would like to reiterate that investing in the affirmative release of records is in line with D.C. FOIA law,

provides a good service to constituents, and enhances transparency. It is important to fund the digitization of the District's records and to make those records available online. D.C. FOIA has required that for over 20 years. It should be funded.

The Board also recommend that the District adopt a plan to manage its massive email portfolio. It is expensive and a drain on financial resources for the District to maintain every email ever drafted and received from every District employee 1998 to the present. From an energy conservation perspective, the District started using cloud-based servers in 2016, so we are maintaining physical servers and paying for cloud based email. The Capstone Approach utilized by the federal government is a sound approach to email retention that the District should consider. Under this approach, the emails that are retained perpetually are based upon an employee's or official's position. For example, the Mayor's and Chief of Police's emails, for example, would be retained in perpetuity. The District should examine a thoughtful policy.

The Board also recommends an adjustment to the time period for FOIA Officers to respond to FOIA requests. Federal agencies are required to respond to a federal FOIA request within twenty working days, excluding Saturdays, Sundays, and legal holidays. This period does not begin until the request is actually received by the component that maintains the records sought. The federal government has devoted much more of its resources to FOIA processing than the District, so District FOIA Officers should at least have the same amount of time as their federal counterparts. D.C. FOIA is patterned after federal FOIA in many ways, and this is one area where it would make sense to adjust the law to provide more time for FOIA processing.

## **V. Conclusion**

Thank you, Councilmember Nadeau, and members of the Committee, for this opportunity to highlight OOG's operations and to present suggestions for legislative enhancements to FOIA and the OMA. I am pleased to answer any questions you or members of the Committee may have.