

**COMMITTEE ON JUDICIARY & PUBLIC SAFETY**



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**COUNCIL OF THE DISTRICT OF COLUMBIA**

**PUBLIC HEARING**

**BILL 25-0555, ADDRESSING CRIME TRENDS (ACT)  
NOW AMENDMENT OF 2023**

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**Comments for the Record**

**Niquelle M. Allen, Esq.  
Director of Open Government  
Board of Ethics and Government Accountability**

**Wednesday, November 29, 2023  
9:00 a.m.  
Virtual Meeting Platform  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004**

Good afternoon, Chairperson Pinto and members of the Committee on Judiciary and Public Safety (“Committee”). I am Niquelle M. Allen, Director of Open Government, Board of Ethics and Government Accountability (“BEGA”), and I lead the Office of Open Government (“OOG”). OOG is an office within BEGA that enforces the Open Meetings Act (“OMA”) and provides guidance on the implementation of the District of Columbia Freedom of Information Act (“D.C. FOIA”). I am respectfully providing comments on Bill 25-555, the “Addressing Crime Trends (ACT) Now Amendment Act of 2023” (the “bill”) in the interest of maintaining transparency in the Metropolitan Police Department’s (MPD) operations. With my comments, I request that the Committee consider the implications the bill will have on the public’s trust in government, the rules that govern access to its records, and MPD’s requirements for producing and releasing their records to the public.

I commend the Committee for attempting to address the increase in crime in the District of Columbia (the “District”) with the bill. With efforts toward greater effectiveness of law enforcement, the Committee must however maintain the checks and balances that the Council, in its wisdom, put in place with the Comprehensive Policing and Justice Reform Amendment Act of 2022 to increase the public’s trust in government, generally, and MPD, particularly. I am addressing the areas of the bill that I recommend the Committee reject or revise to maintain government transparency.

### **Why Do We Need Excessive Body Worn Camera (“BWC”) Redaction?**

OOG has consistently rejected the notion that MPD officers have a right to an expectation of privacy when executing their duties as state actors.<sup>1</sup> I request that the Committee be guided by that principle as it works to address crime in the city. Most people in the District have cell phones, ring cameras, dashboard cameras - any other type of camera you can think of - that can record anything in public, including police officers. MPD officers are trained to display their badges as they perform their duties in public. Redaction of their faces and badges should not be permitted under the FOIA personal privacy exemption. No other D.C. government employees are permitted to shield their identities in the performance of their duties under this exemption. The law enforcement exemptions may apply, but personal privacy is a misapplication here, and certainly should not be codified.

Moreover, the Committee should consider that the D.C. Court of Appeals has rejected the notion of MPD officers having a privacy interest in their likeness appearing on BWC footage while performing their duties in public. In *Fraternal Order of Police Metro. Police Dep't Labor Comm. v. Dist. of Columbia*, 290 A.3d 29 (March 2, 2023). The D.C. Court of Appeals expressly held

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<sup>1</sup> [Metropolitan Police Department — Body-Worn Camera Footage Under the Freedom of Information Act of 1976, # OOG-2023-002 AO, Sept. 15, 2023; MPD District of Columbia Freedom of Information Act Compliance, OOG-002-10.1.19-AO.](#)

that the release of BWC footage did not implicate MPD police officer's privacy rights. In that case, the Mayor and D.C. Police Union challenged the reforms of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, which required the release of the names of officers who were "committed [an] officer-involved death since the BWC Program was launched on October 1, 2014."<sup>2</sup> While the Mayor complied, the resultant lawsuit sought to end the practice on the ground that it violated the individual officers' privacy rights and releasing their identities could result in harm to them and their reputations.<sup>3</sup> The D.C. Court of Appeals rejected this notion of officer privacy. First, the court noted the public's rights under the First Amendment to record police officers performing their official duties (if they are not interfering with the execution of those duties). Second, the court disagreed with the notion of a state actor having a privacy interest: "no court has ever held that police officers have a fundamental right to the privacy of information about their involvement – while on duty and while in contact with the public they serve in a shooting or other serious use of force."<sup>4</sup> The Committee should consider the D.C. Court of Appeals' decision regarding police officers' expectation of privacy when performing their duties.

As the Committee addresses the important issue of increased crime in the city, I respectfully request that these state actors not be permitted to act anonymously when working on behalf of the government, in public, under the reasoning that state actors have a privacy right.

### **Categorical Exclusion for Disciplinary Records Still Requires Consideration of the Public Interest**

My comments here regard the public policy of the District and the purpose of D.C. FOIA. D.C. Official Code § 2-531 states "[t]he public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. To that end, provisions of this subchapter shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." This bill, as currently drafted, requires MPD's FOIA Officers to start with a categorical exclusion from disclosure in the case of a request for disciplinary and related records. This is antithetical to the role of a D.C. FOIA Officer. Analysis is required when a record request is received. Up to now, well-settled case law requires D.C. FOIA Officers to consider whether the public interest in the request outweighs any privacy interest.<sup>5</sup> This legislation effectively does nothing other than prejudice, in the classical meaning of the word, the MPD FOIA Officer that there is always a privacy interest. The MPD Officer will still have to determine if the public's interest in a record outweighs the privacy interest and then decide whether to release a record or not. D.C. FOIA exemptions are

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<sup>2</sup> *FOP Metro. Police Dep't Labor Comm. v. District of Columbia*, 290 A.3d 29, 35.

<sup>3</sup> *Id.* at 36.

<sup>4</sup> *Id.* at 44.

<sup>5</sup> [https://www.open-dc.gov/sites/default/files/OOG-2023-002\\_AO\\_MPD\\_BWC\\_Sept152023.pdf](https://www.open-dc.gov/sites/default/files/OOG-2023-002_AO_MPD_BWC_Sept152023.pdf)

never categorical exclusions; they always require analysis of the situation, especially in light of the public policy of the District at § 2-531.

If the Committee seeks to clarify this issue from the D.C. FOIA perspective, I recommend either rejecting this provision or considering a codification of the balancing test.

### **BWC Footage Must Remain Primarily a Safeguard Not an Evidentiary Tool**

Body Worn Cameras are a "check" of police officers' conduct and should not be used to write actual police reports. Police officers should watch BWC footage only after they have written down their actual memories of any incident. If officers are permitted to revise their incident report after watching BWC footage, as the bill permits, the resultant record should clearly identify where the revisions were made in the report. As a matter of record-keeping, MPD officers must be required to differentiate between their present sense impressions and any revisions made as a result of viewing BWC footage. If revisions are made, the source and date of those revisions must be noted in the police report to maintain the integrity of the record. This would address the concerns of critics regarding the possible impact of incident reports on case closure and prosecution rates while still preserving the necessary oversight element of the BWC footage.

### **OOG Endorses D.C. Open Government Coalition's Testimony**

OOG fully supports the testimony provided by the D.C. Open Government Coalition and we strongly suggest that the Committee consider all of their input and recommendations.

Thank you for the opportunity to comment on this important legislation.