

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



MEMORANDUM

TO: [REDACTED]

FROM: Niquelle Allen
Director of Open Government

DATE: March 1, 2023

RE: Compliance with the District of Columbia Freedom of Information Act
When Publishing Public Comment Submissions to the [REDACTED] Website

This memorandum is in response to your inquiry regarding how to comply with the District of Columbia Freedom of Information Act of 1976 ("D.C. FOIA"),¹ when publishing public comment submissions to the proposed [REDACTED] website. In your inquiry, you state [REDACTED] is creating a new website that is much more user friendly than the previous website. In addition to the current section that allows the public to submit public letters to [REDACTED], we are also creating a section that allows for more informal comments about [REDACTED]. Do the more informal comments need to be recorded and/or posted on [REDACTED] or can those remain internal information?"²

As discussed below, I opine that, for both its current and planned [REDACTED] websites, [REDACTED] must post relevant submissions under the D.C. FOIA proactively as public information,³ retain all other submissions under D.C. FOIA's Public policy⁴, and correct the [REDACTED] website language regarding submissions made to [REDACTED] to reflect D.C. FOIA.

Background

In the document "[REDACTED]," which is posted on [REDACTED] website, under the heading "[REDACTED]," the final objective of the District's [REDACTED] is that it "[REDACTED]."⁵

¹ D.C. Official Code § 2-531 *et seq.*

² [REDACTED], [REDACTED] email to OOG Attorney Advisor Anthony J. Scerbo, seeking clarification regarding public comment submissions to a revised [REDACTED] website.

³ D.C. Official Code § 2-536(a)(5).

⁴ D.C. Official Code § 2-531.

⁵ [REDACTED]. Last accessed February 24, 2023.

Following, under the heading “How [REDACTED] is doing its work,” it states “[REDACTED]” and further on,

“[REDACTED]”⁶

Thus, it is established that [REDACTED] is conducting the public’s business and is actively seeking information and opinion in order to fulfill its mandate.

Current [REDACTED] website solicitation and disclaimer language and public comment submissions

On the “Contact Us” tab of the [REDACTED] website, the following is posted:

“Public Letters to [REDACTED] Submission

[REDACTED] welcomes public input as it prepares its recommendations. Please submit by sending to [REDACTED] with the subject line: [REDACTED] **Public Input.**

[REDACTED].”⁷ (*formatting in original*).

By including the solicitation and disclaimer language, discussed below, the public policy of the District government regarding openness makes clear that D.C. FOIA applies to [REDACTED], as with all non-exempt public bodies.

There are currently four “public letters” posted to [REDACTED] website at [REDACTED]:

Public Letters Submitted to [REDACTED]

Correspondence such as these posted items are public information under D.C. FOIA and are properly available to the public on [REDACTED] website without the need of a FOIA request. Please note, however, that [REDACTED] should redact from this correspondence personally identifiable information (“PII”), such as personal email addresses, residential addresses, and personal telephone numbers to protect personal privacy pursuant to the provisions of D.C. FOIA.⁸

D.C. FOIA’s Public Policy and Proactive Disclosure Provisions

D.C. Official Code § 2-531 states D.C. FOIA’s public policy:

The 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

⁶ *Id.*

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⁸ D.C. Official Code § 2-534(a)(2).

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.

At issue is whether D.C. FOIA's Public policy statement that "all persons are entitled to full and complete information" requires ██████████ to post all correspondence that it receives. As your website currently and correctly states, "[w]ritten submissions to ██████████ are public documents."⁹ As such, written submissions that ██████████ receives are subject to the D.C. FOIA.

In terms of the distinction between what gets posted to your website and what does not, the introductory language to the proactive disclosure provisions of D.C. FOIA¹⁰ states: "Without limiting the meaning of other sections of this subchapter, *the following categories of information are specifically made public information, and do not require a written request for information:*" followed by ten categories of information.¹¹ (*emphasis added*)

Written Submissions to ██████████ that is public information must be publicly available by posting to its website under D.C. FOIA's Proactive Disclosure provisions

The currently posted comments, under "Public Letters Submitted to ██████████,"¹² which qualify as "formal comments," seem to be correspondence that is public information that must be made publicly available, so it is appropriate for them to be posted proactively and without the need of a FOIA request to adhere to D.C. Official Code Section 2-536(a)(5):

Correspondence and materials referred to therein, by and with a public body, relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the public body determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party;¹³

Where ambiguity remains is in whether ██████████ must post all correspondence it receives as what you deem to be "informal comments"¹⁴ to the website. As stated, all received correspondence once received by ██████████ are public documents, and thus subject to D.C. FOIA. On the current website, ██████████ states:

"[w]e generally will post materials to our website in the interests of transparency, but we reserve the right to exclude any submissions for any reason. For example, we will not disseminate submissions that in our

⁹ ██████████.

¹⁰ D.C. Official Code § 2-536(a).

¹¹ D.C. Official Code § 2-536(a).

¹² ██████████.

¹³ D.C. Official Code § 2-536(a)(5).

¹⁴ ██████████ email to OOG Attorney Advisor Anthony J. Scerbo, seeking clarification regarding public comment submissions to a revised ██████████ website.

judgment violate standard norms of civil discourse or that are entirely unrelated to the work of [REDACTED].”¹⁵

As [REDACTED] website properly states, “[w]ritten submissions to [REDACTED] are public documents.” As such, they are subject to D.C. FOIA provisions and cannot be “excluded...for any reason.”¹⁶ This is incorrect. [REDACTED] lacks the authority to exclude public submissions “for any reason.” [REDACTED] may only exclude submissions for the reason that they fall outside of the requirements of D.C. Official Code § 2-536(a)(5): “Correspondence and materials referred to therein...relating to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby...determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party.” Therefore, I recommend changing the website verbiage to something like: “[w]e will post materials to our website in the interests of transparency, but we reserve the right to exclude any submissions for a legitimate reason under D.C. FOIA. For example, we will not post submissions entirely unrelated to the work of [REDACTED] as provided by the statute (D.C. Official Code § 2-536(a)(5)); however, all submissions are subject to the provisions of the D.C. FOIA and will be available.”

The plain meaning of D.C. Code § 2-536(a)(5) is that all submissions to [REDACTED] that relate “to any of its regulatory, supervisory, or enforcement responsibilities, whereby...determines, or states an opinion upon, or is asked to determine or state an opinion upon, the rights of the District, the public, or any private party to its work must be posted proactively for public access without having to file a D.C. FOIA request.

As regards submissions that “violate standard norms,” if they are related to the work of [REDACTED], then they must be proactively posted. If there are parts of a submission that “violate standard norms,” then those contents which are unrelated and violate said norms may be redacted before posting, so long as the original submission is retained and remains available subject to a D.C. FOIA request.¹⁷ For submissions that “are entirely unrelated to the work” of [REDACTED], while any submissions that are related to the work of [REDACTED] are public information and must be proactively made available on the website, in an on-demand format, submissions that are “entirely unrelated” must be retained and available subject to submission of D.C. FOIA request, but do not need to be posted proactively.¹⁸

I recommend that [REDACTED] establish a distinct tab or page on the website that includes all submissions, formal and informal, so that the public can access them upon demand. If [REDACTED] lacks the capacity to make all submissions digitally available, we further recommend reaching out to the Office of the Chief Technology Officer (OCTO) for assistance. As both the federal and District governments are going “paperless” as regards records, it is advisable to have a procedure in place and convert any non-digital communications to digital. The District is

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ D.C. Official Code § 2-531 *et seq.*

¹⁸ D.C. Official Code § 2-536(a)(5).

following the federal government's lead because they are setting the national standard for records, and because the NARA stores some District records.¹⁹

Additionally, per the requirements of the Open Meetings Acts (OMA), when comments are solicited as part of some proceeding, they would be part of the record of that proceeding and that meeting record may also need to be online.²⁰ Although this is beyond the scenario to which you referred, we distinguish it here for clarity.

Conclusion

For both the current and planned [REDACTED] websites, [REDACTED] must post relevant submissions pursuant D.C. FOIA's proactive disclosure provisions, which includes redacting from some submissions information that does not comply with D.C. Official Code §2-536(a)(5) or contains PII. [REDACTED] must retain, but does not have to publish proactively, correspondence that does not meet the requirements of D.C. Official Code §2-536(a)(5). The public may obtain this correspondence by submission of a D.C. FOIA request. [REDACTED] must correct its website language to comport with D.C. FOIA as discussed in this memorandum.

As you know, the OOG provides training on the Open Meetings Act (OMA) upon request. Additionally, OOG provides formal and informal advice to agencies seeking guidance on FOIA and provides FOIA training courses for DC government FOIA officers, DC agencies and for the public.²¹

Please feel free to reach out with any questions, concerns, or training requests.

Thank you for contacting the Office of Open Government for assistance and for your attention and diligence in identifying and addressing these issues.

¹⁹ See Memorandum M-23-07, *Transition to Electronic Records*, issued jointly by the Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA), which "established several requirements to move Federal agencies to a fully electronic environment..." The memorandum included goals that: (1) "[b]y June 30, 2024, Federal agencies must manage all permanent records in an electronic format," (2) "[a]fter June 30, 2024, Federal agencies must transfer all permanent records in an electronic format and with appropriate metadata," (3) "[b]y June 30, 2024, Federal agencies must manage all temporary records in an electronic format or store them in commercial records storage facilities," (4) "[a]fter June 30, 2024, NARA will no longer accept transfers of permanent or temporary records in analog formats and will accept records only in an electronic format with appropriate metadata," (5) "NARA will issue records management regulations and guidance to support Federal agencies' transition to fully electronic recordkeeping," (6) "NARA will issue records management regulations and guidance to support Federal agencies' transition to fully electronic recordkeeping," and (7) "NARA will establish Electronic Records Management (ERM) standards and requirements for Federal agencies procuring ERM solutions and services." [OMB M-23-07 Released – Records Express \(archives.gov\)](#).

²⁰ See this Office's Advisory Opinion providing guidance on what constitutes detailed records of public meetings under the Open Meetings Act, D.C. Official Code §§2-571-2-580. "If there are documents provided...and discussed during the public portion of a meeting, those documents must be posted along with the meeting agenda and a detailed written record of the meeting; and if feasible, the electronic recording," and the agency "may not rely upon any of the enumerated exemptions of the Open Meetings Act to withhold the posting of such documents if the documents were provided to the Board during the public portion of the meeting." https://www.open-dc.gov/sites/default/files/12.12.13%20OOG%20Opinion_HPTF_Meeting%20Record_Minutes%20Audio%20Video%20Transcripts.pdf.

²¹ [Office of Open Government | Open DC \(open-dc.gov\)](#).

