BOARD OF ETHICS AND
GOVERNMENT ACCOUNTABLITY

BEST PRACTICES REPORT 2023

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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 to effectively promote a culture of high ethical conduct. The Ethics 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 continues to advance its mission of promoting an ethical, transparent, and open District of Columbia government. In FY2023 and FY2024 to date, OGE negotiated 11 dispositions resolving Code of Conduct violations; issued 5 show cause orders based on the finding of a Code of Conduct violation; issued 4 advisory opinions providing guidance on the ethics rules; provided informal

[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.*

ethics advice for over 470 inquires; conducted more than 56 trainings on various ethics topics; and trained over 8,400 employees and officials. OGE continued its oversight of the District's Lobbyist Reporting System by managing 795 registration reports, 144 registration terminations, and 2,203 lobbying activity reports. OGE also administered the District's Financial Disclosure Statement Program which resulted in 7,385 confidential and public financial statements from employees and public officials for calendar year 2022.

In FY2023 and FY2024 to date, OOG issued nine OMA and five FOIA advisory opinions and resolved 14 OMA and FOIA complaints, dismissing two 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 11 OMA trainings and 20 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. Almost 400 participants attended Ethics Week 2023 which was held in October 2023 with the theme "Everyday Ethics." 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. The weeklong conference included 20 courses, including a fireside chat on artificial intelligence and ethics and a discussion among local ethics officials from neighboring jurisdictions of Baltimore, Prince George's County, and the Commonwealth of Virginia along with a CLE-accredited legal ethics course jointly hosted with the DC Bar. All the Ethics Week sessions were well-attended, and the programs were positively received by participants.

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 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)

[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/.

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 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 2023 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 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. Review of Lobbyist Registration and Reporting Systems

With the passage of the Ethics Act, oversight over individuals and organizations who lobby the District of Columbia transferred from the Office of Campaign Finance ("OCF") to BEGA.[10] In the District, "lobbying" means "communicating directly with any official in the legislative or executive branch of the District government with the purpose of influencing any legislative action or an administrative decision" and excludes communications or appearances before the District courts.[11] An administrative decision means any activity directly related to action by an executive agency to issue a Mayor's order, to cause to be undertaken a rulemaking proceeding (which does not include a formal public hearing) under Chapter 5 of Title 2, or to propose legislation or make nominations to the Council, the President, or Congress.[12] Legislative action includes any activity conducted by an official in the legislative branch in the course of carrying out his or her duties as such an official, and relating to the introduction, passage, or defeat of any legislation in the Council.[13]

Lobbyist registration with BEGA is required for a person who receives or expends $250 or more in any consecutive three-month period for lobbying. The registration fee is $250 and must be

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

[10] *See* D.C. Law 19-214; D.C. Official Code § 1-1161.01 *et seq*. *See also* D.C. Official Code §§ 1-1162.27-1162.32; 3 D.C.M.R. § 3-5800 *et seq*.

[11] D.C. Official Code § 1-1161.01 (32)(A).

[12] *Id*. at. § 1-1161.01(1).

[13] *Id*. at § 1-1161.01(31).

renewed each year. There is a reduced registration fee of $50 for nonprofit organizations registered under section 501(c)(3) of the Internal Revenue Code.[14]

District lobbyists must comply with several filing deadlines. First-time or new lobbyists meeting the registration requirements must file a registration *within 15 days* of any lobbying activity. Repeat lobbyists must re-register each year thereafter no later than January 15th.[15] Registrations include collection of basic biographical data along with the names of individual clients and remittal of the registration fee. Registrations are completed using OGE's online filing system via a link from the "Lobbyist" tab on OGE's website.

In addition to registrations, lobbyists are required to file statements with BEGA detailing the names of officials with whom they met, along with a short summary of the activity. These statements are known as Lobbyist Activity Reports (LARs). At BEGA's inception, these reports were semi-annual requirements, due by January 10th and July 10th. However, after the passage of the BEGA Amendment Act of 2018, lobbying registrants must now file activity reports four times per year. Activity occurring between October 1 to December 31, is due on January 15. Activity occurring between January 1 and March 31, is due on April 15. Activity occurring between April 1 and June 30, is due on July 15. Activity occurring between July 1 and September 30, is due on October 15. Persons who file a report or registration form in an untimely manner are assessed a civil penalty of $10 per day up to 30 business days that the report or registration is late, effectively capping penalties at $300 a violation.[16] The maximum fine for willfully or knowingly violating lobbyist registration and reporting requirements is $5,000.00.[17]

A review of lobbying registration, reporting, and training requirements in other jurisdictions suggests that there are steps that the District should consider bringing its lobbying program in line with lobbying rules in other jurisdictions. While the District's lobbyist registration fees are within the range of fees assessed by some other jurisdictions, the fees and penalties associated with untimely reporting or registration are among the lowest.

Late Fees and Penalties

The District requires a fee of $250 for registration, with a reduced fee of $50 for organizations exempt from taxation under 501(c)(3) of the Internal Revenue Code. Lobbyist registration is yearly and activity reporting is quarterly. The District's penalties are $10 a day, up to $300, for late registration or reporting, which is among the lowest fine authority across jurisdictions with comparable lobbying activity. In 2022, the District had 619 registered lobbyists and 279 clients, and collected $3,400.00 in penalties. In 2023 to date, the District has 432 registered lobbyists with 300 clients and assessed $7,090 in penalties.

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[14] *Id.* at § 1-1162.27.

[15] *Id.* at § 1–1162.29(a).

[16] *Id.* at §1162.32 (c).

[17] *Id.* at § 1-1162.32(a).

In 2022, the City of Chicago reported 2,038 registered lobbyists and 2,224 principals or clients, collecting $17,000 in penalties.[18] As of November 2023, Chicago reports 840 registered lobbyists.[19] Chicago's lobbyist activity is very comparable to the District, except Chicago has much more administrative capability with significantly higher fine authority.

Chicago's Board of Ethics requires registration of any person who is paid or otherwise undertakes to influence any legislation or administration action as a part of his duties as an employee of another.[20] The registration must be filed no later than January 20th of each year, or within five business days of engaging in any lobbying activity.[21] The fee is $350.00 per lobbyist and an additional fee of $75.00 per client after the first client.[22] The City of Chicago includes a provision that allows for a waiver of the registration fee for a lobbyist that lobbies solely on behalf of a tax-exempt section 501(c)(3) entity.[23] As in the District, lobbyist reporting in Chicago is due quarterly on January 20, April 20, July 20, and October 20, of each year.[24]

A significant difference between the District and the city of Chicago lobbying program can be seen in the fines and penalties for late lobbyist registration and reporting. Failure to submit timely registration and activity reports is subject to a fine of $1,000 per day and suspension of the lobbyist's registration. [25] A person who employs a lobbyist who fails to register may be subject to a fine of up to $20,000.[26] The Chicago Board of Ethics is authorized to make public the names of lobbyists that fail to file timely registration and activity reports on time and the Board of Ethics regularly publicizes listings of lobbyists that fail to meet the reporting requirements.[27] Any lobbyist who fails to file a timely report for three or more reporting periods is subject to suspension of their registration for a one-year period.[28]

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[18] *See* Matthew Bobys & Theodore Grodek, Council on Governmental Ethics Laws *2022 Lobbying Update on Legislation and Litigation, United States and Canada* (COGEL 2022 Lobbying Update) at 93.

[19] *See* Matthew Bobys & Theodore Grodek, Council on Governmental Ethics Laws *2023 Lobbying Update on Legislation and Litigation, United States and Canada* (COGEL 2023 Lobbying Update) at 98.

[20] Chicago Municipal Code § 2-156-210.

[21] *Id.* at § 2-156-230.

[22] *Id.* § 2-156-230 (d).

[23] *Id.*

[24] *Id. at* § 2-156-250.

[25] *Id.* at § 2-156-465(b)(3). At least 10 days before a required report is due a lobbyist may request a 30-day extension of time to file the report. Failure to file the report within the extension period constitutes a violation of the regulations and subjects the lobbyist to the same penalties as filing a late registration and report. *See id* at 2-156-270.

[26] *See* COGEL 2023 Lobbying Update at 97; Chicago Municipal Code §§2-156-305, 2-156-465(b)(5).

[27] *See* Chicago Municipal Code § 2-156-465(b)(1); *see also* https://www.chicago.gov/city/en/depts/ethics/provdrs/lobby/news.html

[28] *See* Chicago Municipal Code at §§ 2-156-270; 2-256-465(b)(3).

The state of Maryland has fewer registered lobbyists but more clients than the District. In 2023, Maryland had 713 lobbyists registered and 1,600 clients, and collected $1,600 in penalties.[29]

Lobbyists in the state of Maryland are required to register within 5 days after performing a lobbying activity and annually on or before November 1 of each year if the lobbyist is engaged in lobbying.[30] Registered lobbyists pay a $100 fee and are required to submit separate registrations for each entity that has engaged the lobbyist.[31] Similar to the District, Maryland has certain activities that are specifically exempted from lobbyist registration; however, there are no specified entities that are exempted except for religious organizations seeking protection of rights to practice the doctrine of the organization.[32]

Once registered, a Maryland lobbyist must report bi-annually on May 31, of each year for activity between November 1, of the previous year through April 30, of the current year, and by November 30, of each year for activity between May 1, through October 31, of that year.[33] The Maryland statute includes a fee of $10 for each day a report is late, not to exceed $1,000, and the State Ethics Commission may enter into agreements with lobbyists for the payment of fees for late registration and reporting after a formal complaint, with the ability to impose a fine of up to $5,000 per violation.[34] Maryland may also suspend individual registrations for lobbyists who "knowingly and willfully" violate the lobbying statute or if the lobbyist has been convicted of "bribery, theft, or other crime involving moral turpitude."[35]

The state of Kentucky has a bifurcated system with lobbying of the state legislature and executive agencies are subject to different provisions of the code. In 2023, there were 747 executive branch lobbyists and 715 clients, and 678 legislative lobbyists and 848 clients, and collected $9,800 in penalties.[36] Kentucky has comparably higher registration fees than the District with significantly higher maximum penalties for late registration and reporting.

Legislative lobbyists and their employers must register with the Kentucky Ethics Commission within seven days of employment as a lobbyist and the employer pays a $250 registration fee which is valid through December 31st of every odd numbered year.[37] Updated registration statements, which are in line with the District's activity reports, must be filed on the 15th day of January, February, March, April, May and September of each year for the period of activity since the end

[29] *See* COGEL 2023 Lobbying Update at 145.

[30] Md. General Provisions Code Ann. § 5-704 (d).

[31] See *id* at §§5-704(a) and (e)(1).

[32] *Id*. at § 5-702(b)(1)(iii).

[33] *Id.* at § 5-705 (a).

[34] *Id.* at § 5-504(d) and (g).

[35] *Id.* at §5-504(e).

[36] *See* COGEL 2023 Lobbying Update at 119 and 123.

[37] KRS §§ 6.809 and 6.807(6).

of the previous report until the last day of the month preceding the filing date.[38] Executive agency lobbyists must file an initial registration within 10 days of employment as a lobbyist and employers are required to and pay a $500 registration fee and update their registration annually by the last day of July each year.[39] There is no reduction of fees or exemption for any types of organizations for lobbyist registration in Kentucky.

For legislative lobbyists in Kentucky, failure to register or renew registration in a timely manner, may result in a fine assessed at $100 per day up to $1,000, upon notice that the commission will impose a fine and provide an opportunity for the registrant to offer evidence to mitigate the fine.[40] An executive agency lobbyist who fails to timely file an updated registration with accurate compensation information may be fined $100 per day up to $1,000.[41] An intentional failure to register is a felony and the fine increases to $5,000.00 per violation for both types of lobbyists.[42]

The state of Georgia has even higher penalties for late reporting. There were 1,056 registered lobbyists in Georgia in 2023, Georgia's State Ethics Commission collected $96,090 in penalties for lobbyist reporting.[43]

In Georgia a person must register as lobbyist upon being hired or retained as an employee or agent with a substantial part of the duties involving lobbying activity, and they must register before commencing those activities.[44] The registration requires disclosure of only those clients that pay the lobbyist an amount exceeding $10,000 in a calendar year, and is active until December 31 of each year.[45] The cost of registration is $20, there is a $20 processing fee for a lobbyist ID, and supplemental groups added to the registration are $10 each.[46] Therefore, the registration costs may start lower, but increase with activity.

Georgia lobbyists who oppose legislation, oppose any ordinance or resolution, regarding legislation by the governor or a committee of the chamber must file either monthly and semimonthly disclosure reports, on the first and fifteenth day of each month, current through the end of the preceding report, beginning January 15 and continuing throughout the period that Georgia's General Assembly is in session.[47] The disclosure reports must be current through the

[38] *Id.* at §§ 6.821(5)(a) and 6.807.

[39] *Id.* at § 11A.211

[40] *Id.* at § 6.807(7)

[41] *Id.* at § 11A.990 (5)

[42] *Id.* at §§ 6.807(7) - (8) and 11A.990(5).

[43] *See* COGEL 2023 Lobbying Update at 82.

[44] O.C.G.A. § 21-5-71 (a)(2)

[45] *Id.* at § 21-5-71 (b) & (d)

[46] *Id.* at § 21-5-71 (f), *see also*, 2022-0526-Website-LOBBYIST-INFORMATION.pdf (ga.gov)

[47] O.C.G.A. § 21-5-73

end of the preceding month, on or before the fifth day of May, September, and January of each year.[48]

For late activity reports, the Georgia State Ethics Commission may assess a fee of $275 for each late report with an additional late fee of $1,000 on the either the seventh or fifteenth day the report is late and an additional fee of $10,000 on the 21st or 45th day after the due date if the report has not been filed depending on whether the Georgia General Assembly is in session.[49] The Georgia State Ethics Commission may deny, suspend, or revoke the registration of lobbyist for willful omissions, failures, or misleading information and may impose a civil penalty of up to $2,000 per violation.[50] Similar to the District, certain activity is specifically excluded from the requirement of lobbyist registration, but there is no exemption for any specific type of organization.[51]

While the maximum late fee of over $10,000 in Georgia is on the high end of the scale, multiple jurisdictions across the country have daily or maximum late registration and reporting fees that are significantly higher than the $10 per day/$300 maximum in the District. Maximum late registration and reporting fees include $500 for the city of Los Angeles[52]; $750 for the state of Nebraska[53]; $1,000 Minnesota[54]; $2,000 for the city of Philadelphia[55]; $2,500 for Montana[56]; $4,500 for Indiana[57]; and $5,000 for San Francisco, Florida, New Mexico, and South Carolina.[58] The $10,000 maximum late penalty is also in effect in Connecticut, Louisiana, and Texas[59] while New York City also has a civil penalty of up to $20,000.[60]

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[48] *Id.* at § 21-5-73

[49] *Id.* at § 21-5-72.

[50] *Id.* at § 21-5-72

[51] *Id.* at § 21-5-71 (i)

[52] Los Angeles Muni. Code § 48.09.C.

[53] R.R.S. Neb. § 49-1488.01(1) (late filing fee of $25 per day up to $750 per statement).

[54] Minn. Stat. § 10A.04 Subd.5 (effective Jan. 1, 2024, the late filing fee is $25 per day up to $1,000).

[55] Phila. Muni. Code § 20-1207(1)(b) (late fee of $250 per day up to $2,000).

[56] MCA § 5-7-306(1) ($50 for each working date the report is late up to $2,500 for each report).

[57] Ind. Code Ann. § 2-7-2-2 (late registration fee of $100 per day up to $4,500).

[58] *See* S.F. Camp. and Gov. Conduct Code §2.145 (late fee of $50 per day with knowing and negligent violations subject to civil action and penalty up to $5,000 per violation or three times the amount not properly reported); Fla. Stat. § 11.045(3)(D)(1) (legislative lobbyists) and § 112.3215(5)(d)(1) (for executive branch lobbyists); N.M. Stat. Ann. § 2-11-8.2.D ($50 per working day up to $5,000); S.C. Code Ann. § 2-17-50(A) (late fee of $100 if not filed within 10 days of due date with possibility of up to $5,000).

[59] Conn. Gen. Stat. § 1-99(b) (authorizing the Board of Ethics to impose a civil penalty of $10 per day to up $10,000 for late filing after conducting a hearing); La. R.S. § 24:58.D (late fee of $50 per day, if more than eleven days late the Board of Ethics may assess a civil penalty of up to $10,000 after a hearing); Tex. Gov. Code § 305.033 (late registrations and reports are subject to $500 civil penalty except reports more than 30 days late are assessed a penalty subject to Texas Ethics Commissions rules with a cap of $10,000).

[60] N.Y.C. Admin. Code § 3-223(c)(1) (civil penalty for late filing assessed by the city clerk).

Exemptions for Not-for-profit Organizations

Among the list of exemptions to the District's lobbying registration and reporting program is the exemption for registration and reporting for "[a]n entity specified in § 47-1802.01(4), whose activities do not consist of lobbying, the result of which shall insure to the financial gain or benefit of the entity."[61] The reference to § 47-1802.01(4) appears to be a drafting error; no such provision exists in the current code.

D.C. Law 13-305, the "Tax Clarity Act of 2000" rewrote the District tax code provisions on exempt organizations to mirror the federal code.[62] The language of the pre-2001 § 47-1802.01(4) is now housed in § 47-1802.01(a)(3):

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in section 501(h) of the Internal Revenue Code of 1986, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[63]

This language parallels the language at section 501(c)(3) of the Internal Revenue Code while current § 47-1802.01(a)(4) reflects the language at § 501(c)(4) of the Internal Revenue Code:

> (A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes;

[61] D.C. Official Code § 1-1162.28(a)(4).

[62] D.C. Law 13-305, effective June 9, 2001; *see* generally, Report of the Committee on Finance and Revenue on Bill 13-586, The Tax Clarity Act of 2000 (Council of the District of Columbia, Sept. 28, 2000) at 4.

[63] *See id.*; 26 U.S.C. § 501(c)(3).

(B) Subparagraph (A) of this paragraph shall not apply to an entity unless no part of the net earnings of the entity inures to the benefit of any private shareholder or individual.[64]

The legislative history of the Ethics Act is also not instructive regarding the reference to § 47-1802.01(4) as the Committee Report provides that there is an exception for "an entity specified in D.C. Official Code § 47-1802.01(4)," but does not include an explanation for the inclusion of the provision.[65]

A review of the predecessor provision to § 1-1162.28(a)(4), § 1-1105.03, indicates that the lobbying exemption to registration initially applied to "any entity specified in section (1)(d) of title II of the District of Columbia Income and Franchise Tax Act of 1947 . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."[66] The language in District of Columbia Income and Franchise Tax Act of 1947 suggests that the exemption for lobbying initially applied to section 501(c)(3) organizations.[67]

While the language of this exemption is ambiguous, the Ethics Act already includes a reduction of the lobbying registration fee for section 501(c)(3) organizations, from $250 to $50.[68] Although the Office of Government Ethics has interpreted the exemption to apply to the District equivalent of section 501(c)(4) organizations,[69] this preference for § 501(c)(4) organizations alone is an outlier among other jurisdictions.[70] Indeed, most jurisdictions, including the federal lobbying disclosure program, do not differentiate between nonprofit organizations and other organizations that meet the lobbying registration requirements.[71] While public policy and the nature of 501(c)(3) and 501(c)(4) entities can justify a fee reduction for these nonprofit organizations, BEGA has not

[64] D.C. Official Code § 47-1802.01(a)(4); 26 U.S.C. § 501(c)(4).

[65] *See* Ethics Act Committee Report at 35.

[66] District of Columbia Campaign Finance Reform and Conflict of Interest Act, 88 Stat. 462, Pub. L. 83-376, title V, §510 (Aug. 14, 1974).

[67] District of Columbia Revenue Act of 1947, 61 Stat. 328, 80 Pub. L. 195 (July 16, 1947).

[68] *See* D.C. Official Code § 1-1162.27(b)(2).

[69] BEGA Advisory Opinion, Lobbying Requirements for a Non-Profit Organization and its Executive Director at n.1, Nov. 8, 2019, https://bega.dc.gov/publication/lobbying-requirements-non-profit-organization-and-its-executive-director(citing the language at D.C. Official Code § 47-1802.01(a)(4) for organizations exempt from registration).

[70] *See, e.g.,* Ind. Code Ann. § 2-7-2-1(c) (reducing registration fee from $200 to $100 for section 501(c)(3) or 501(c)(4) organizations and the lobbyist performs services as part of their salaried responsibilities); Nev. Rev. Stat. Ann. §218H.500.2(c) (providing for maximum fee of $100 for lobbyist whose lobbying activities are on behalf of section 501(c)(3) organizations).

[71] *See, e.g.*, 2 U.S.C. § 1601, *et seq.* While the federal lobbying program does not exclude nonprofit organizations from registration and reporting if they meet the thresholds, there is a provision that section 501(c)(4) organizations are not eligible to receive federal funds in the form of an award, grant, or loan if they engage in lobbying activities. *See id* at §1611. *But see* Chicago Municipal Code § 2-156-220(e) (excluding individuals acting on behalf of non-profit entities that "(1) undertake nonpartisan analysis, study, and research; (2) provide technical advice or assistance; or (3) examine or discuss broad social, economic, and similar problems").

identified a practical or public policy purpose for completely exempting either 501(c)(3) or 501(c)(4) entities from registration.

Training Requirements

BEGA provides lobbyist reporting and registration training on a quarterly basis; however, District laws do not require lobbyists to attend training. The training provided by BEGA explains the District's lobbying law and the requirements for registration and reporting along with how to use the electronic filing system to file the required registration statements and activity reports. As District lobbyists are required to comply with regular deadlines for registration and reporting, providing access to clear and concise training on compliance with the lobbying laws supports the transparency goals of the lobbying program.

Many jurisdictions provide training for the lobbyist programs, with several jurisdictions now requiring the lobbyists and entities that retain or employ lobbyists complete training prior to registration and on an annual or ongoing basis. Earlier this year, the state of Hawaii established a mandatory training requirement for all lobbyists who are required to register with the state. Lobbyists are required to complete a lobbyist training course administrated by the Hawaii Ethics Commission prior to registration and at least once every two years.[72] Failure to complete the required lobbyist training is subject to an administrative fine of up to $1,000.[73]

Although the specific details differ, with some states requiring training upon registration and additional training on an annual or recurring basis, requirements for lobbying training are present in multiple states.[74] The states are not the only jurisdictions mandating ethics training. Chicago also requires lobbyists to complete an ethics training course developed by the Board of Ethics each year subject to a fine of $250 for each day that they fail to complete the required training.[75] The Chicago Board of Ethics is also authorized to make public the name of lobbyists that fail to

[72] H.R.S. §§ 97-2.2(a) and (b).

[73] *Id* at 97-7(a).

[74] *See, e.g.,* Md. General Provisions Code Ann. § 5-704.1 (requiring training within six months of registration and then within two years of the last training); Cal Gov. Code § 86103 (requiring lobbyist to certify completion of training course); La. R.S. § 42:1170.A(4) (lobbyists required to receive at least one hour of training each year they are registered); W.Va. Code § 6B-3-3c (lobbyists required to attend training before engaging in lobbying activities and complete a training course during each two-year registration cycle); ORS § 171.742 (registered lobbyists required to attend at least two hours of training annually); Utah Code Ann. §36-11-307 (complete required lobbying training within 30 days of registration or license renewal); Tenn. Code Ann. § 3-6-114 (lobbyist required to attend one ethics course annually); 25 ILCS 170/4.5 (lobbyists required to complete training before registration or renewal); Rev. Code Wash. (ARCW) § 72.17A.600 (requiring certification that the lobbyist completed required training as part of registration with registration required every odd-numbered year).

[75] Chicago Municipal Code §§ 2-156-146 and 2-156-465(b)(1).

complete the mandatory training requirements on time.[76] In addition to Chicago, Baltimore County, Los Angeles, Philadelphia, Miami-Dade County, and San Francisco are among other jurisdictions that have instituted required lobbyist training.[77]

The addition of a training requirement to the District's lobbying program will foster uniformity in the reporting process and serve as lobbyists' first line of education. By making the training mandatory, BEGA can ensure the consistency of the lobbying information we disseminate and ensure that all registered lobbyists are equipped with the same tools as they conduct business in the District. We also anticipate that training will reduce the amount of lobbyist enquiries. BEGA recently launched a new Learning Management System and can easily integrate self-directed lobbyist training into the platform.

B. Outside employment/outside activity

A key component of the Code of Conduct is the restriction on outside employment and other outside activity which 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.[78] 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. OGE has issued several recent advisory opinions which further clarify the restrictions on outside employment, including the restriction on representation of a third party before the District government and teaching, along with discussion of the recusal requirements that public officials and employees need to consider in connection with any outside activity.[79]

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[76] *See id.* at 2-156-4654(b)(1).

[77] *See* Baltimore County Muni. Code § 7-1-203(b) (training required within six months of registration and then annually); Los Angeles Muni. Code § 48.07(H) (registered lobbyists required to complete training every two years); Phila Code § 20-1209 (training "in such form and frequency" required by the Philadelphia Board of Ethics); Miami-Dade County Code § 2-11.1(s)(4) (training required within 60 days of registration and then every two years); La. R.S. § 42:1170.A(4) (lobbyists required to receive at least one hour of training each year they are registered);San Franciso Campaign and Governmental Conduct Code § 2.116 (training required within one year of registration and additional trainings as required by the Ethics Commission).

[78] *See* 6-B DCMR § 1807.

[79] *See* BEGA Advisory Opinion, Outside Employment and Private Representation, Sept. 8, 2022, https://bega.dc.gov/publication/outside-employment-and-private-representation; BEGA Advisory Opinion, Recusal,

BEGA has also continued to address conflicts of interest that arise from outside business and employment activities through its enforcement process. Since the 2022 Best Practices Report, the Board and Director of Government Ethics have resolved another eight public enforcement matters involving employees engaging in outside business and employment activities that conflict with their official duties. In **23-0075-P *In re* R. Broadnax**, the employee used his official title, position, District email account, and information he obtained in his official capacity to solicit clients for his outside business. In ***23-0003-F* In re Medgar Webster**, the Board dismissed a formal investigation against the respondent after his sentencing for felony fraud charges for working at his outside employment during his District tour of duty. **22-0087-P *In re* S. Huffman**, involved a ministerial fine by the Director of Government Ethics for an employee who provided services to another school district during his tour of duty for DCPS. The respondent in **23-0029-P *In re* L. Samuels** applied for employment with a vendor who did business with his agency and worked for that vendor while still employed by the agency. In **23-0007-P *In re* K. Barnes**, the respondent approved payments from her agency to a non-profit organization where she worked as an independent contractor. The respondent in **22-0100-P in re K. Boodlal** worked for a company owned by her husband that did business with her agency and attended meetings and took part in official duties involving her outside employer. Meanwhile, the respondent in **23-0012-P In re C. Troxler** recommended a company she owned for a contractor with her employing agency and the respondent in **22-0078-P *In re* J. Smith** used her official email, which identified her by her official title and position, to communicate with another agency in connection with her personal rental properties. The Board also has a pending hearing in **23-0006-F, *In re* David Deboer,** in connection with charges that the District employee, as part of his outside employment, provided services to a District contractor and made appearances on behalf of that contractor during his official tour of duty and failed to report the outside activity on his required Financial Disclosure Statement.

These matters involving outside employment and business activity account for the bulk of the public enforcement matters resolved by the Board and Director of Government Ethics over the last year. This caseload is consistent with the trends this office has seen in prior years and current rules do not necessarily provide 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,[80] 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 for executive branch employees. As outlined in prior Best

May 3, 2023, https://bega.dc.gov/publication/advisory-opinion-guidance-recusal; BEGA Advisory Opinion, Outside Activity and Teaching as an Adjunct Professor, Aug. 7, 2023, https://bega.dc.gov/publication/guidance-outside-activity-and-teaching-adjunct-professor.

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

Practices Reports, other jurisdictions are more explicit in requiring disclosure and pre-approval of outside activities by government officials and employees.[81]

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 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. Annual Ethics Training requirement

The Ethics Act requires that BEGA conduct mandatory training on the Code of Conduct.[82] The DPM, however, only requires that individuals who 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.[83] 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. In FY2023 and FY2024 to date, over 6,200 employees completed over 13,200 courses using BEGA's LMS system. BEGA's Learning Management System has been highlighted as a top training upgrade for ethics commissions by the Campaign Legal Center, a nonprofit organization that engages in research and advocacy in the area of governmental ethics.[84]

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[81] *See, e.g.,* Chicago, Ill, Personnel Rule XX, § 3(requiring city employees to obtain written permission for dual employment or outside business activities and prohibiting employes of the Mayor and city department heads from engaging in outside employment); Atlanta, Ga., Code of Ordinances § 114-437 (a)(requiring approval of outside employment by department heads); Denver, Co., Revised Municipal Code Chap. 2, Art. IV, § 2-63(a)(requiring prior written approval before engaging in paid outside job or other business activity and annual approval to continue activity).

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

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

[84] Campaign Legal Center, "Top Ten Training Upgrades for Ethics Commissions," *available at* https://campaignlegal.org/document/top-ten-training-upgrades-ethics-commissions.

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 addition of a regular training requirement in cities and states across the country.[85]

[85] *See, e.g.,* Atlanta, Ga., Code of Ordinances § 2-825(a) (requiring mandatory annual ethics training for part-time, full-time, and contract employees); Philadelphia, Pa., Code § 20-606(1)(b)(.3) (annual training requirement for all elected city officers, all cabinet members, city department heads, boards and commissioners members, and their staff with failure to attending training a violation of the ethics rules); La. R.S. §42:1170.A (elected officials and public employees required to complete at least one hour of training annually); Alaska Stat. § 24:60.155 (legislators and legislative staff required to complete training at the start of legislative session or within 30 days the start of employment); .J. Stat. § 52:13D-28 (annual ethics training required for legislators, legislative officers and staff with public verification requirement); 5 ILCS 430/5-10 (requiring annual training).

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, 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 D.C. FOIA by providing advisory guidance on the implementation of D.C. FOIA, as well as assisting members of the public in filing D.C. FOIA requests and providing training to D.C. FOIA Officers, Advisory Neighborhood Commissioners, and members of the public.

This section discusses several areas where the District may look to federal and state government 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 and its proper management should be a priority for the District. Second, we discuss open meetings enforcement. Upon examination of the civil enforcement mechanism in other states, it is clear that the District's enforcement falls below most jurisdictions in its civil enforcement of OMA violations. Third, we discuss FOIA Appeals. The time for responding to FOIA appeals has resulted in a significant backlog in resolving those matters for several years in the District, especially during the pandemic. Neighboring jurisdictions' best practices, as well as the federal government, provide guidance for improving this issue.

A. Electronic Communications

The District does not have a comprehensive, uniform record retention policy that addresses records of electronic communications, whether via email, text messages, social media posts, or encrypted apps. The District's use of these modes of communication to conduct government business is routine. What remains unclear is the extent to which individual agencies and employees must retain the electronic records they are creating. When District agencies use these methods of communication to conduct official government business, the government may have to produce these records produced under D.C. 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.[86] The Capstone approach relies on the concept

[86] 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.

that key records are held in senior officials' email records and that retention of those email records 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") to the Mayor of the District of Columbia (the "Mayor").[87] 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.[88]

As an initial matter, the AO confirmed that text messages are "public records" for purposes the D.C. FOIA.[89] 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.[90]

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

[88] *Id.*

[89] *Id.*, at 2.

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

The Council unanimously passed B25-0165, "Fidelity in Access to Government Communications Clarification Emergency Amendment Act of 2023," 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."[91]

The Council reinforced 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)."[92]

After the expiration of the emergency measure and the expiration of the companion temporary measure, D.C. Law 24-0135, on February 10, 2023, and the Council determined that the lack of a consistent government-wide policy regarding electronic communications required additional steps "to ensure that existing record retention guidelines continue to apply to a wide variety of electronic communications" in order to "ensure that public access to information is not diminished or comprised."[93] Accordingly, the Council passed additional emergency and temporary measures to address retention of electronic communications, which are set to expire on January 25, 2024.[94] District law and public policy are clear about transparency being the District's position on open government,[95] 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. Enforcement of Open Meeting Laws

To enforce the Open Meetings Act, OOG is authorized to bring a lawsuit in the Superior Court of the District of Columbia to petition the court to grant injunctive or declaratory relief either before or after the meeting.[96] The statute also provides that the court "may impose a civil fine of not more than $250 for each violation" upon a finding that "a member of a public body engages in a pattern or practice of willfully participating in one or more closed meetings" in violation of the

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

[92] Fidelity in Access to Government Communications Clarification Emergency Declaration Resolution of 2022, D.C. Council Res. 24-0404 (adopted Mar. 1, 2022).

[93] Fidelity in Access to Government Communications Clarification Emergency Declaration Resolution of 2023, D.C. Council Res. 25-0082 (adopted Mar. 7, 2023).

[94] Bill 25-0165; D.C. Law 25-0020.

[95] *Id.*, at 2.

[96] D.C. Official Code § 2-579(a).

OMA.[97] A review of the monetary penalties for violations of state open meetings laws indicates that the District's maximum $250 civil penalty for violations of the Open Meetings Act is on the lower end of civil penalties authorized in other jurisdictions for comparable violations.

In comparison to neighboring states, the District's $250 civil penalty, which is only available after a judicial finding of a "pattern and practice" of violations of the OMA, is significantly lower than the penalties available in Maryland, Virginia, and West Virginia. Violations of Maryland's Open Meetings Act for public bodies that "willfully meet" in violation of the act are subject to a civil penalty of up to $250 for the first violation and $1,000 for subsequent violations within 3 years of the initial violation.[98] In Virginia, a court could impose of civil penalty of not less than $500 an up to $2,000 for an officer, employee, or member of a public body for "willfully and knowingly" violation the state open meetings law, with the penalty for additional violations of at least $2,000 up to $5,000.[99] "Willfully and knowingly" violating the provisions of the West Virginia open meetings law can result in a civil penalty of up to $500 for the initial violation and an additional $100 to $1,000 for subsequent violations.[100]

Only a handful of states do not include a civil penalty for either the public body or individuals associated with the public body for violations of the open meetings law, although injunctive or other relief may be available – Alaska, Colorado, Delaware, New York, North Carolina, South Carolina, Tennessee [101] Seventeen states allow for penalties of up to $500 – Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Vermont, Wisconsin.[102] Wyoming has a $750

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[97] *Id* at § 2.579(e).

[98] Md. Gen. Provisions § 3-402(a).

[99] Va. Code § 2.2-3714.A. The court could also impose a civil penalty of up to $1,000 for the public body. *Id at* § 2.2-3714.B.

[100] W.Va. Code § 6-9A-7(a).

[101] *See* Alaska Stat. § 44.62.310(f); Colo. Rev. Stat. § 24-6-402(9); 29 Del. Code § 10005(d); N.Y. Pub. Off. Law § 107(1); N.C. Gen.Stat § 143-318.16(a); S.C. Code Ann. §30-4-100; Tenn.Code § 8-44-105

[102] *See* Ark. Code §§ 5-4-201(b), 25-19-104 (fine up to $500 upon conviction of a Class C misdemeanor "negligently" violating the open meeting law); Fla. Stat. §§ 286.011(3), 775.083(1); Ind. Code § 5-14-1.5-7.5(f) (up to $100 for the first violation and not more than $500 for each additional violation although the court may impose only one civil penalty in an action even in the event of multiple violations); Kan. Stat. Ann. § 75-4320(a) (up to $500 for each violation); Ky. Rev. Stat. §§ 61.848(6), .991(1) (up to $100 per violation); La. Rev. Stat. § 42:28 (not to exceed $500 per violation); Minn. Stat. § 13D.06.1 (civil penalty not to exceed $300); Mont. Code § 45-7-401(1)(e), (2) (fine not to exceed $500); Neb. Rev. Stat. §§ 28-106(1) and 84-1414(4) (violations of the open meetings law subject to fine up to $500 for initial offense while multiple offenses are punishable by up to a $500 fine or imprisonment, or both); N.J. Stat. § 10:4-17 (civil penalty of $100 for the first knowing offense and from $100 to $500 for subsequent knowing offenses); N.M. Stat. § 10-15-4 (fine up to $500); Ohio Rev. Code § 121.22(I)(2)(a) (civil Forfeiture of $500 shall be awarded against public body if injunction is granted); Okla. Stat. tit. 25, § 314.A; S.D. LL. §§ 1-25-1, 22-6-2(2) (class 2 misdemeanor and $500); Tex. Gov. Code §§ 551.143(b)(1), 551.144(b)(1) (fine of $100 to $500 for "knowingly" violating the statute); Vt. Stat. tit.1 § 314(a) (misdemeanor fine up to $500 for member of public body who "knowingly and intentionally" violates the statute); Wis. Stat. § 19.96 (forfeiture of $25 to $300 for knowing attendance at meeting the violates the open meetings law).

civil penalty for "knowingly or intentionally" violating the state's open meetings law.[103] The remaining 23 states – Alabama, Arizona, allow for penalties $1,000 or more for either the initial or subsequent violations of their respective open meetings laws.[104]

C. FOIA Appeals

If a FOIA request is 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[105] require recordkeeping and reporting to enable oversight of the appeals mechanism. The reporting requirements follow: "On or before February 1 of each year, the Mayor [or her designated agent[106]] 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

[103] Wyo. Stat. § 16-4-408(a).

[104] *See* Ala. Code § 36-25A-9(g) (civil penalty of up to $1,000 or half of the defendant's monthly salary, whichever is less); Ariz. Rev. Stat. § 38-431.07.A (civil penalty up to $500 for second offence and up to $2,500 for third and subsequent offenses); Cal. Educ. Code § 89927, Gov't Code §§ 9030, 11130.7, 54959, Penal Code § 19 (violations of the open meetings laws are misdemeanors subject to fine up to $1,000); Conn. Gen. Stat. § 1-206(b)(2) (civil penalty up to $1,000); Ga. Code § 50-14-6 ("knowingly and willfully" violating the open meetings law results to civil penalty up to $1,000 for initial violation and up to $2,500 for each additional violation); Haw. Rev. Stat. §§ 92-13, 706-640(1) ("willfully" violating the open meetings law is a misdemeanor subject to up to a $2,000 fine); Idaho Code § 74-208(2) to (4) (civil penalty of up to $250 which increases to $1,500 for "knowingly" violating the open meetings law with subsequent violations within 12 months subject to civil penalty of up to $2,500); ll. Comp. Stat. ch. 5 §§ 120/4, ch. 730 and 5/V-4.5-65(e) (fine not to exceed $1,500 for each offense); Iowa Code § 21.6.3 ($500 civil penalty increasing to $2,500 for individuals who "knowingly participated" in the violation); 1 Me. Rev. Stat. § 410 (fine up to $500 for initial violation increasing to $1,000 for second violation within four years and $2,000 for third and subsequent violations within the four-year period); Mass. Gen. LL. ch. 30A, § 23(c) ($1,000 civil penalty for each intentional violation); Mich. Compiled LL. §§ 15.272, .273(1) (intentional violations of the open meetings act are considered misdemeanors and subject to up to $1,000 fine for the initial violation and up to $2,000 for second violation along with personal liability of up to $500); Miss. Code § 25-41-15 (civil penalty of up to $500 "willfully and knowingly" violating the open meetings laws the first time and up to $1,000 for subsequent violations); Mo. Rev. Stat. §§ 610.027.3 and .4 (civil penalty of up to $1,000 for initial violation and $5,000 for subsequent violations); Nev. Rev. Stat. §§ 241.040.1, .2, .4 (providing for administrative finds of $500 for first violation, $1,000 for second violation, and $2,500 for third and subsequent violations); R.S.A. 91-A:8.IV (civil penalty of not less than $250 and not more than $2,000); N.D. Cent. Code § 44-04-21.2(1) ($1000 for "intentional or knowing violation" or actual damages whichever greater); Ore. Rev. Stat. § 244.350(2) (up to $1,000 penalty unless public body acted on advice of counsel); PA. Stat. tit. 65, § 714(a) (fine of $100 to $1,000 plus costs of prosecution for participating in a meeting "with the intent and purpose" of violating the law with subsequent offense subject to fine of $500 to $2,000; R.I. Gen.Laws § 42-46-8(d) (fine of up to $5,000 for willful and knowing violations); Utah Code §§ 52-4-305, 76-3-301(1)(d) (knowingly or intentionally violating the statute results in misdemeanor and up to $1,000 penalty); Wash. Rev. Code § 42.30.120(1), (2) ($500 for the first violation and $1,000 for subsequent violations).

[105] 1 DCMR § 415.1.

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

section 207(a), [[107]] the result of the appeals, and the reason for the action upon each appeal that results in a denial of information . . . ."[108]

As of the date of this report, the Mayor has not yet submitted the FY2023 FOIA Report to the D.C. Council. The Mayor submitted the FY2022 report[109] to the D.C. Council on March 16, 2023. This report included FOIA Appeal Summaries and a FOIA Appeal Log reflecting the 210 appeals resolved by the MOLC in FY2022.[110] As of the MOLC's performance oversight hearing in February 2023, there were 108 administrative appeals of agency decisions pending adjudication.[111]

Since the 2023 Best Practices Report was issued, the MOLC has published additional FOIA-appeals opinions to the *D.C. Register*. The MOLC published opinions in the April 7, 2023, April 14, 2023, April 21, 2023, and October 27, 2023 issues.[112] The latest opinion in this October 27, 2023 batch was dated January 28, 2020, still leaving a significant backlog of unpublished opinions. On its FOIA Appeals page,[113] the MOLC directs 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.[114]

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

[107] *Id.* § 2-537(a).

[108] *Id.* § 2-538(a).

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

[110] *See* "FY2022 Final FOIA Report" at 206-236.

[111] *See* Mayor's Office of Legal Counsel FY 2023 Performance Oversight Questions at 19, *available at* https://dccouncil.gov/wp-content/uploads/2023/02/MOLC-POH-Pre-Hearing-Questions-and-Responses-FY23.pdf.

[112] *See* 70 DCR 004239-004301 (Apr. 7, 2023) ("FOIA Appeals" numbers 2019-165 to 2019-202); 70 DCR 004477-004488 (Apr. 14, 2023) ("FOIA Appeals" numbers 2019-202 to 2019-209); 70 DCR 006044-006094 (Apr. 21, 2023) ("FOIA Appeals" numbers 2019-210 to 2019-240); 70 DCR 014305-014325 (Oct. 27, 2023) ("FOIA Appeals" numbers 2020-001 to 2020-10).

[113] https://dc.gov/page/freedom-information-act-foia-appeals (last visited Nov. 29, 2023).

[114] 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,[115] there is a two-layer administrative-review procedure.[116] 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).[117] 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.[118] 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.[119]

The Virginia Freedom of Information Advisory Council issues advisory opinions on request.[120] 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."[121] "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*."[122]

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*[123] to decide appeals, plus the *authority to extend* the period under "unusual circumstances."[124]

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 would also be reasonable.

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

[116] *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.

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

[118] *Id.*

[119] *See id.* at 5–10.

[120] 21 Va. Code § 30-179.1.

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

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

[123] 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.

[124] 5 U.S.C. § 552(a)(6)(A)(i)(III), (ii), (B)(i)–(iii).

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 to improve the District government's ethics and open government and transparency laws.[125]

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."[126] 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.

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

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

[126] *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.

As part of the new proposed CCC, BEGA recommends 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.[127] Confidential financial disclosure filers would be designated by agencies based on their responsibilities if their rate of pay is below the threshold for public filers.

BEGA also recommends 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,[128] and would still be comparable to or lower than the limits in other jurisdictions.[129] 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 more detail in BEGA's 2021 and 2022 Best Practices Report, 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 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 recommends that the CCC 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 heads 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 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.

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[127] *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.

[128] 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).

[129] *See, e.g.,* Philadelphia, PA, Code § 20-604(1) ($99 aggregate limit per calendar year); Chicago, Ill, Municipal Code §2-156-142(a)(2) ($50 limit from a single source per year); New York, NY, City Charter, Ch. 68, § 2604(b)(5); Title 53, §1-01 ($50 annual limit for gifts from a single source).

To ensure that any potential conflict of interest between an employee's District employment and their outside business activity or outside employment is apparent, BEGA also recommends that employees required to file a public or confidential financial disclosure statement notify their employing agency prior to engaging in any outside employment, private business activity, or other outside activity. 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.

BEGA's 2022 Best Practices Report also addressed the need for revisions to the nepotism statute. 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 as part of the CCC.

The proposed CCC would also extend the requirement for annual ethics training from financial disclosure filers to all covered individuals. The addition of a training requirement 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. BEGA's online Learning Management System provides the ability to conduct the large-scale training required to implement such a program.

In addition to annual training for financial disclosure filers, BEGA also recommends requiring training for the District's lobbyists, along with additional changes to the lobbying registration and reporting program. The addition of a training requirement to the District's lobbying program will foster uniformity in the reporting process and serve as lobbyists' first line of education. By making the training mandatory, BEGA can ensure the consistency of the lobbying information we disseminate and ensure that all registered lobbyists are equipped with the same tools as they conduct business in the District. We also anticipate that training will reduce the amount of lobbyist enquiries. BEGA recently launched a new Learning Management System and can easily integrate a self-directed lobbyist training program into the platform.

With respect to more substantive changes to the lobbying program, BEGA recommends that increasing the fines for late registration and reporting for lobbyists from $10 per day and maximum of $300 to $100 per day up to $5,000 as well as removing the exemption from registration and reporting for certain nonprofit entities and increasing registrations for nonprofit entities, both 501(c)(3) and 501(c)(4) equivalents, to $100. BEGA also recommends increasing the registration fee of for-profit entities from $250 to $350. These changes, when accompanied by a robust training program, will promote increased transparency, and align the District's lobbying programs with the best practices in other jurisdictions.

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 the Open Meetings Act and the Freedom of Information Act.

As BEGA outlined in the 2022 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.[130] To address the identification requirements at issue in a first party request for records under FOIA, BEGA reiterates our recommendation from the 2022 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.

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."[131] 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;
(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;

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

[131] *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.

(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 25-0020 prior to its expiration on January 25, 2024, 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.

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.[132] D.C. FOIA, however, provides District agencies with 15 days to respond to FOIA requests.[133] 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.[134] 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. D.C. FOIA provides for administrative appeals from FOIA denials from agencies that are subordinate to the Mayor. D.C. FOIA requesters may file these administrative appeals at no cost, and without an attorney's assistance. D.C. FOIA requesters should be able to obtain adjudication relatively quickly, as opposed to FOIA litigation in D.C. Superior Court. But while the current timeframe appears to call for a quick resolution, it is not reasonable to achieve the desired outcome. Making changes to the law to make this process work more effectively and efficiently will benefit both the executive and D.C. FOIA requesters. The 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.

[132] 5 U.S.C. § 552(a)(6)(A)(i). The 20 days excludes Saturdays, Sundays, and legal public holidays.

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

[134] 5 U.S.C. § 552(a)(6)(B)(i); D.C. Official Code § 2-532(d)(1).

As noted in prior Best Practices Reports, the Open Meetings Act exempts Advisory Neighborhood Commission meetings from compliance with the OMA,[135] even though their members are elected by the public to consider and take positions of "great weight" as to District business.[136] Instead, ANC meetings are currently governed by a separate statute, the Advisory Neighborhood Councils Act of 1975 ("ANC Act").[137]

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,[138] 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.[139]

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.[140]

While 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 reasonably practicable";[141] (2) in the requirement for public bodies to "establish an annual schedule of its meetings, if feasible";[142] (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

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

[136] 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.

[137] D.C. Official Code §1-309.11.

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

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

[140] 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.

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

[142] *Id.* at §2-576(1).

of the reasons for closure and the matters to be discussed;[143] (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 practicable";[144] and (5) in the requirement to provide a recording or the meetings, or "if a recording is not feasible, detailed minutes of the meeting."[145] 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.[146] 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.

With respect to open meetings, BEGA finds that 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.

During BEGA's FY23 Performance Hearing, the D.C. Open Government Coalition requested that the Committee support legislation to create an "Information Technology and Transparency Commission comprised of executive and legislative branch representatives and outside experts in records management and security, public engagement technology, and transparency." The Council should create and fund this Commission to collaborate with the government and its citizens to create new laws and regulations that better reflect the ways that the District conducts business and collects its records. Creating such a Commission will demonstrate that the District recognizes the importance of government transparency and collaboration with its citizens for the betterment of its processes and procedures.

Next, we recommend that the Council amend the Open Meetings Act to provide for enhanced enforcement of the Open Meetings Act. Specifically, the Council should amend subsections (e) and (f) of section 409 of the Open Meetings Act, which currently reads:

> (e) If the court finds that a member of a public body engages in a pattern or practice of willfully participating in one or more closed meetings in violation of the provisions of this title,[147] the court may impose a civil fine of not more than $250 for each violation.

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[143] *Id.* at §2-576(5).

[144] *Id.* at §2-577(a)(1).

[145] *Id.* at §2-578(a).

[146] 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).

[147] *I.e.*, Title IV of the District of Columbia Administrative Procedure Act, Public Law 90-614.

(f) The court may grant such additional relief as it finds necessary to serve the purposes of this title.

Finally, we recommend that the Council amend the OMA and adopt the standard from Maryland, Virginia, and West Virginia, namely "willful and knowing." The Council should remove the current language "pattern or practice" to permit a fine for violating the OMA even after just one violation. The "pattern or practice" language in the current statute suggests that OOG cannot pursue a fine until *after* allowing *multiple* (if not several) violative meetings to take place, in order to establish "a pattern or practice."[148] Moreover, the legal phrase, "pattern or practice," is most often associated with the civil-rights context and has little or no precedent in the area of open-meetings enforcement.[5] We therefore recommend it be stricken from the OMA. We also recommend that the Council increase the base-maximum fine amount to $1000 per (willful and knowing) violation (without increasing the amount for any subsequent violations), which (1) roughly splits the difference between Maryland's ($250) and Virginia's ($2000) maximum for a first offense; (2) takes into account that this fine only applies to a "willful and knowing violation" and the training and pre-vetting that most appointed members of public bodies incur; and (3) matches the civil-fine amount proposed by the original drafters of the OMA 17 years ago.[149]

[148] An October 30 search of Words & Phrases for < *wp("pattern or practice")* > yielded no useful hits related to open-meetings laws, though the U.S. District Court for the District of Columbia did hold, in the *FOIA* context, "that an allegation of a single . . . violation is insufficient . . . to state a claim . . . based on a policy, pattern, or practice of violating [5 U.S.C. § 552]," *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 231 (D.D.C. 2011) (emphasis added).

[149] District of Columbia Open Government Meetings Act of 2006 § 2 at 11 *l*.3 (Bill 16-0747 (as introduced)).