BOARD OF ETHICS AND
GOVERNMENT ACCOUNTABLITY

BEST PRACTICES REPORT 2024

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I. Introduction

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, 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").[3] 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.[4] OOG also provides training and advice on compliance with the District's Freedom of Information Act of 1976 ("FOIA").[5] 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 FY2024 and FY2025 to date, OGE negotiated 16 dispositions resolving Code of Conduct violations; conducted one adversarial hearing; issued 6 advisory opinions providing guidance on the ethics rules; provided informal ethics advice for over 472 inquires; conducted more than 80 trainings on various ethics topics; and trained over 4390 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 continued its oversight of the District's Lobbyist Reporting System by managing 530 registration reports, 100 registration terminations, and 1594 lobbying activity reports. OGE also administered the District's Financial Disclosure Statement Program which resulted in 8350 confidential and public financial statements from employees and public officials for calendar year 2023.

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

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

[3] 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)).

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

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

In FY2024 and FY2025 to date, OOG issued two OMA and two FOIA advisory opinions and dismissed 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 18 OMA trainings and 12 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 the District's central meeting calendar, as well as providing training in parliamentary procedure through its operation of the District's Robert's 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 training, on-demand training programs, and its annual Ethics Week. Almost 500 participants attended Ethics Week 2024 which was held in October 2024 with the theme "Empowered by 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 17 courses, including a fireside chat on journalism and ethics 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.[6] 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) Amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976.[7]

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 2024 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.

[6] 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/.

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

II. Assessment of Ethical Guidelines and Requirements for Public Employees and 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.[8]

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.

A. Outside Employment/Outside Activity

While the Council's Code of Official Conduct requires that an employee obtain approval from the employee's supervisor before engaging in outside employment,[9] 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 Practices Reports, other jurisdictions are more explicit in requiring disclosure and pre-approval of outside activities by government officials and employees.[10]

With the increase in telework by both District agencies and the private sector after the advent of the coronavirus epidemic in 2020, the Board has seen a commensurate increase in cases involving outside activity by District employees. These matters involve violations of the Code of Conduct by District employees engaging in their outside employment or other activities during their District tour of duty or where their outside employment creates conflicts with other provisions of the Code of Conduct, such as the prohibition on taking official action that impacts their personal financial

[8] *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).

[9] *See* Code of Official Conduct, Rule II(a)(2) (Res. 25-1, § 3; 70 DCR 000238).

[10] *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).

interests or the prohibition on representing a third party before the District. In 2024 these matters resulted in over $200,000 in civil penalties assessed by BEGA.

In Case No. 24-0006-F In re David Deboer, the Board held a public adversarial hearing and found that Respondent Deboer violated the Code of Conduct by engaging in outside employment incompatible with the full and proper discharge of his official duties and responsibilities when he held overlapping positions as an employee of the Department of Employment Services (DOES) and as an employee of Enlightened, LLC working under a contract with the Criminal Justice Coordinating Council (CJCC). The Board assessed a civil penalty of $5,000 for each of the thirty-three months that Respondent worked for both DOES and CJCC, for a total civil penalty of $165,000.

In Case No. 24-0056-P In re C. Lian, the Board approved a negotiated disposition and $25,000 civil penalty with Respondent, then Deputy Director of the Department of Buildings, for engaging in outside employment incompatible with her District duties, using government time and resources for other than official business, and failure to file a full and complete public financial disclosure statement. Respondent held a second full-time position with Freddie Mac during her District tour of duty, served as a member of the Falls Church City Council, failed to report her outside employment, and misreported her income from the city council position. The Respondent in Case No. 23-010-P In re L. Graves, then the Human Resources Director at the DC Public Library, agreed to pay a $17,500 civil penalty for violations of the District's outside employment restrictions. Respondent worked two outside jobs, as a doula and as a human resources manager with a consulting company, which conflicted with her position at DCPL.

The Board also approved negotiated dispositions in three other matters that involved District employees acting on behalf of affiliated organizations before the District, in violation of the conflict-of-interest provisions of the Code of Conduct. In Case No. 24-0057-P In re N. Tourinho, the Board approved a negotiated disposition and $3,000 civil penalty with Respondent, a Supervisory Social Worker at the Department of Human Services for using government time and resources for other than official business and serving in a representative capacity as an agent for an outside entity in a matter before the District. Respondent Tourinho signed and submitted grant applications for the company she owned and operated to the Department of Behavioral Health and communicated with the agency about the grant to provided behavioral health services to DCPS in 2023 and 2024, including sending emails about the grant during her District tour of duty. The Board approved a $700 civil penalty in Case No. 24-0019-P In re M. Briggs for violations of the prohibition on representing an outside entity in a matter before the District and for failure to protect and conserve government property. Respondent Briggs acted as an agent for his nonprofit organization before the District and used his official email for communications. In Case No. 23-0091-P In re C. Garris, the Board approved a $15,000 civil penalty for a Respondent who violated the financial conflict of interest statute and the outside employment restrictions by entering into a contract for services with his agency, overseeing the implementation of the contract and approving payments to his company, and performing work for his company during his tour of duty and using his District email account.

OGE has started the process of increasing awareness of the outside employment restrictions by implementing a new training initiative that focuses on the outside employment rules. During Ethics

Week 2024, we conducted a course titled, Outside Employment Overview. The training initiative includes creating and publishing a training course on our Learning Management System. Once the course is finalized, OGE will alert employees by sending an email campaign from the system. OGE will also offer quarterly outside employment webinars, which employees can register for using the BEGA website.

B. Financial Disclosure

Public officials and District employees who act in areas of responsibility that may create a conflict of interest or the appearance of a conflict are required to file financial disclosure reports with BEGA, or in the case of confidential filers, with their District agency. These financial disclosure reports serve to prevent potential conflicts of interest by providing information to allow District agencies and, in the case of public officials, the public to conduct a review of financial interests of District officials. During the 2024 financial disclosure period, 8350 public officials and confidential filers were part of the financial disclosure process.

BEGA continually assesses whether the financial disclosure system meets its goals of providing information on the potential conflicts of interests of District public officials and employees. In 2024, BEGA identified 47 District boards and commissions whose members were not required to file financial disclosure reports despite engaging in conduct as part of their duties for the District that creates a conflict of interest or the appearance of a conflict of interest. BEGA initiated a rulemaking to designate these board and commission members as public financial disclosure statement filers and the final rules were published on September 27, 2024.[11]

As part of its review of the financial disclosure process, BEGA has also published another notice of proposed rulemaking that addresses additional changes to the financial disclosure program. This rulemaking will provide clarity for regulations that are ambiguous and corrects language that aligns with the Ethics Act and Chapter 18 of the District Personnel Regulations. The rulemaking would clarify the Board's authority to designate filers, require confidential filers to file with BEGA using its online filing system, address the time for filing waiver requests, and align the designation appeal process with the District Personnel Regulations.[12]

While BEGA has made changes to the financial disclosure process through regulatory rulemakings, additional changes will require legislative changes to streamline the financial disclosure filing process.

C. Review of Lobbyist Registration and Reporting Systems

In BEGA's 2023 Best Practices Report we surveyed the fees and penalties in other lobbyist registration and reporting systems and recommended increasing the fine for late registration and reporting for lobbyists from $10 per day and a maximum of $300 to $100 per day up to $5,000, as well removing the exemption from registration and reporting for certain nonprofit organizations and increasing registration fees and requiring lobbyist training. We appreciate the Council enacting

[11] *See* 71 DCR 11602 (Sept. 27, 2024).

[12] *See* 71 DCR 13069 (Nov. 1, 2024).

several of the recommended changes to the lobbyist registration and reporting system by amending the Ethics Act to increase the lobbyist registration and reporting fees from $250 to $350 for for-profit entities and from $50 to $100 for Internal Revenue Code section 501(c)(3) non-profit entities and increasing the late filing fee from $10 a day or a maximum of $300 to $100 per day up to a maximum of $6,000.[13] The increases became effective on October 1, 2024.

The Lobbying Fees and Penalties Reform Amendment of 2024 did not change the lists of entities that are not required to register or report their lobbying activities. As detailed in the 2023 Best Practices Report, 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."[14] 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.[15] The language of the pre-2001 § 47-1802.01(4) is now housed in § 47-1802.01(a)(3).[16] 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.[17]

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.[18]

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."[19] 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.[20]

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[13] The Lobbying Fees and Penalties Reform Amendment Act of 2024 was passed as a subtitle of the Fiscal Year 2025 Budget Support Act of 2024 (D.C. Law 22-217; D.C. Act 22-550, effective Sept. 18, 2024).

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

[15] 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.

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

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

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

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

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

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 $350 to $100.[21] Although the Office of Government Ethics has interpreted the exemption to apply to the District equivalent of section 501(c)(4) organizations,[22] this preference for section 501(c)(4) organizations alone is an outlier among other jurisdictions.[23] Indeed, most jurisdictions, including the federal lobbying disclosure program, do not differentiate between nonprofit organizations and other organizations that meet the lobbying registration requirements.[24] 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 identified a practical or public policy purpose for completely exempting 501(c)(4) entities from registration and reporting requirements

D. Training Requirements

The Ethics Act requires that BEGA conduct mandatory training on the Code of Conduct.[25] 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.[26] District employees who are not required to file disclosures under the Ethics Act are not required under the DPM to undergo regular ethics training. Council members and employees of the Council are required to undergo ethics training within two months of beginning employment and once every council period.[27] The importance of regular mandatory ethics training is reflected in the addition of a regular training requirement in cities and states across the country.[28]

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

[22] 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).

[23] *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).

[24] *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").

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

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

[27] *See* Council Period 25 Recess Rules Amendment Resolution of 2023 (Res. 25-0218, § 2; 70 DCR 0010480).

[28] *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

Similarly, several jurisdictions now require lobbyists and entities that retain or employ lobbyists complete training prior to registration and on an annual or ongoing basis.[29] The city of Chicago, for example, 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.[30] The Chicago Board of Ethics is also authorized to make public the name of lobbyists that fail to complete the mandatory training requirements on time.[31] Baltimore County, Los Angeles, Philadelphia, Miami-Dade County, and San Francisco are among other jurisdictions that have instituted required lobbyist training.[32]

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.

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).

[29] *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); H.R.S. §§ 97-2.2(a) and (b) (establishing a mandatory training requirement for all lobbyists required to register with the State upon registration and at least once every two years) .

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

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

[32] *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).

III. 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 will discuss open meetings enforcement. While the District made improvements by increasing the civil penalty for OMA violations, the District's enforcement mechanism is still not in line with and/or falls below state-level enforcement. Second, 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. Third, we discuss alternative dispute resolution in federal and state government concerning open government issues. The remedy available in most jurisdictions is a lawsuit when meetings are improperly closed, or open records requests are not honored by the government. The federal government and some states have a mediation process in place to avoid litigation in open government disputes. We will explore best practices concerning alternative dispute resolution.

A. 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.[33] The statute also provides that the court "may impose a civil fine of not more than $500 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 OMA.[34] A review of the monetary penalties for violations of state open meetings laws indicates that the District's maximum $500 civil penalty for violations of the Open Meetings Act, while an increase from the $250 civil penalty in place prior to this year, is still on the lower end of civil penalties authorized in other jurisdictions for comparable violations.

In comparison to neighboring states, the District's $500 civil penalty, which is only available after a judicial finding of a "pattern and practice" of violations of the OMA, is significantly lower than

[33] D.C. Official Code § 2-579(a).

[34] *Id* at § 2.579(e).

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.[35] In Virginia, a court could impose a civil penalty of not less than $500 and up to $2,000 for an officer, employee, or member of a public body for "willfully and knowingly" violating the state open meetings law, with the penalty for additional violations of at least $2,000 and up to $5,000.[36] "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.[37]

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.[38] 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.[39] Wyoming has a civil penalty of up to $750 for "knowingly or intentionally" violating the state's open meetings law.[40] The remaining 23 states allow for penalties $1,000 or more for either the initial or subsequent violations of their respective open meetings laws.[41]

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[35] Md. Gen. Provisions § 3-402(a).

[36] 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.C.

[37] W.Va. Code § 6-9A-7(a).

[38] *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

[39] *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 knowingly attending a meeting that violates the open meetings law).

[40] Wyo. Stat. § 16-4-408(a).

[41] *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

B. 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[42] 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[43]] shall request from each public body and submit to the Council [] a report covering the public-record-disclosure activities of each public body during the preceding fiscal year. The report shall include: . . . (4) The number of appeals made pursuant to section 207(a), [[44]] the result of the appeals, and the reason for the action upon each appeal that results in a denial of information . . . ."[45]

As of the date of this report, the Mayor has not yet submitted the FY2024 FOIA Report to the D.C. Council. The Mayor submitted the Annual Freedom of Information Act Report for Fiscal Year 2023 to the Council on February 27, 2024.[46] This report included FOIA Appeal Summaries and a

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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. L. 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 fines of up to $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).

[42] 1 DCMR § 415.1.

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

[44] *Id.* § 2-537(a).

[45] *Id.* § 2-538(a).

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

FOIA Appeal Log reflecting the 464 appeal decisions issued by the MOLC in FY2023.[47] As of the MOLC's performance oversight hearing in January 2024, there were no appeals of agency FOIA decisions pending adjudication by the MOLC.[48]

Since the 2023 Best Practices Report was issued, the MOLC has published 73 additional FOIA appeals opinions to the *D.C. Register*.[49] The latest published opinions were dated November 5, 2020, still leaving a significant backlog of unpublished opinions. On its FOIA Appeals page,[50] 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.[51]

As discussed in BEGA's 2023 Best Practices Report, the delay in disposing of appeals is in part due to the statutory deadline being too short. As a remedy, BEGA continues to suggest an amendment to the FOIA statute to enlarge the MOLC's administrative review period. The District's surrounding jurisdictions—Maryland, Virginia, and the federal 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,[52] there is a two-layer administrative-review procedure.[53] 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).[54] 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.[55] The Compliance Board's outermost deadline is *120 calendar*

[47] *See* "Annual Freedom of Information Act Report for Fiscal Year 2023*"* at 206-274.

[48] *See* Mayor's Office of Legal Counsel FY 2024 Performance Oversight Questions at 19, *available at* https://dccouncil.gov/wp-content/uploads/2024/08/MOLC-Responses-to-FY24-POH-MOLC-Pre-Hearing-Questions.pdf.

[49] *See* 71 DCR 012664-012706 (Oct. 18, 2024) ("FOIA Appeals" numbers 2020-011 to 2020-023 and 2020-036); 71 DCR 014285-014370 (Nov. 22, 2024) ("FOIA Appeals" numbers 2020-024 to 2020-046, 2020-048 to 2020-056); and 71 DCR 014648-014728 (Nov. 29, 2024) ("FOIA Appeals" numbers 2020-047, 2020-057 to 2020-088, and 2020-125).

[50] https://dc.gov/page/freedom-information-act-foia-appeals (last visited Dec. 18, 2024).

[51] 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").

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

[53] *See generally* Office of the (Md.) Attorney General, MARYLAND PUBLIC INFORMATION ACT MANUAL at 5-4 to 5-11 (18th ed. 2023), *available at* https://www.marylandattorneygeneral.gov/opengov documents/pia_manual_printable.pdf.

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

[55] *Id.* at 5-5.

days from the date of the complaint, which is of course in addition to the Ombudsman's review period.[56]

The Virginia Freedom of Information Advisory Council issues advisory opinions on request.[57] 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."[58] "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*."[59]

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*[60] to decide appeals, plus the *authority to extend* the period under "unusual circumstances."[61]

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 a longer period of review, so extending the review period to 20 days would be reasonable.

C. Alternative Dispute Resolution for Open Government Conflicts

In this section we discuss mediation as an alternative to litigation concerning open meetings and open records and provide an overview of the federal and state government laws and practices. Confidential, impartial, and independent conflict management processes provide an alternative to litigation in resolving open government disputes. The federal government and some states offer alternative dispute resolution that provide services designed to help resolve problems and reduce the costs of conflicts over open records and open meetings.

1. Federal government

The Office of Government Information Services (OGIS) was established by the Open Government Act of 2007 [62] (the "Act"). The Act sets forth the role of OGIS and elevated the use of Alternative Dispute Resolution (ADR) in the federal FOIA process by directing federal agency FOIA Public Liaisons to assist in resolving disputes between requesters and agencies. OGIS' position was

[56] *See id.* at 5–9.

[57] 21 Va. Code § 30-179.1.

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

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

[60] 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.

[61] 5 U.S.C. § 552(a)(6)(A)(i)(III), (ii), (B)(i)–(iii).

[62] 5 U.S.C. §§ 552 and 552a; 31 U.S.C. § 1304. https://www.congress.gov/bill/110th-congress/senate-bill/2488

bolstered by the FOIA Improvement Act of 2016 [63], which strengthened the commitment of the Act, directing agencies to inform requesters of OGIS's mediation services throughout the federal FOIA process, not just at the conclusion of the administrative process. OGIS offers dispute resolution services, including mediation and other informal processes such as facilitation to resolve federal FOIA disputes without the need of litigation. This process is voluntary and involves a neutral third party helping both sides reach a mutually agreeable resolution.

2. State Governments

In most states, the only meaningful option for residents to resolve complaints about agencies wrongfully withholding public records is to file costly lawsuits. However, several states offer mediation programs through their state attorney general's office or by other means to resolve open government-related disputes as an alternative to litigation.

Georgia offers an "Open Government Mediation Program" where complainants may bring issues to the attorney general concerning local government's closure of meetings or responses to open records requests.[64] The Georgia Department of Law attorneys investigate these complaints and, if a violation is discovered, the Attorney General can commence the legal action to force the local government to obey the sunshine laws. In Florida, the State's Attorney General's Office may mediate public records disputes, if a member of the public requests for them to do so.

To resolve open records disputes, Florida offers mediation between the complainant and the agency overseen by the Florida Attorney General's Office. The mediation is voluntary. The Florida Attorney General's office provides an impartial individual who encourages and facilitates resolution of the dispute.[65] No similar program is available for open meeting disputes.

In Massachusetts, public bodies may enter a closed meeting to confer with a mediator regarding litigation or decisions concerning government business, including records requests.[66] The enforcement of the Open Meetings Law in Massachusetts is primarily the responsibility of the Attorney General. The public body's decision to enter mediation must be in an open meeting where the public body must disclose the parties, particular issues, and purposes of the mediation.

In Mississippi, the Mississippi Ethics Commission enforces the Open Meetings Act and the Public Records Act through a complaint process. The Mississippi Ethics Commission may mediate disputes and enter orders agreed to by the parties.[67] They may also request the assistance of the Attorney General and others in investigating alleged violations, to administer oaths and serve subpoenas.

[63] 5 U.S.C. § 552, as amended. https://www.congress.gov/114/plaws/publ185/PLAW-114publ185.pdf

[64] https://law.georgia.gov/open-government-mediation-program

[65] https://www.myfloridalegal.com/sunshine-law/open-government-mediation-program

[66] Mass.Gen. Laws ch. 30A, §21(a)(9).

[67] Miss.Code §§ 25-4-1 *et seq.*, 25-41-15.

The New Jersey Open Public Records Act requires the Government Records Council to establish an informal mediation program to facilitate the resolution of disputes regarding access to government records.[68] The mediation process is the first step after a formal complaint of denial of access is filed with the Council.[69]

Pennsylvania also provides for mediation of open records disputes through Pennsylvania's Office of Open Records (OOR).[70] Mediations are voluntary and either party or the OOR Mediator may terminate the mediation process at any time.[71]

Mediation helps resolve public records and public meeting disputes more efficiently by expediting the resolution process and avoiding the time and expense associated with litigation. The federal and state mediation practices outlined above illustrate the value of instituting such programs.

[68] N.J. Stat. §47:1A-7.

[69] https://www.nj.gov/grc/mediation/brochure/

[70] Pa. Stat. tit. 65, § 67.1310.

[71] https://www.openrecords.pa.gov/Appeals/Mediation.cfm#:~:text=The%20Right%2DTo%2DKnow%20Law,records%20disputes%20before%20the%20OOR.

IV. 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.[72]

Ethics Recommendations

BEGA continues to recommend that the Council adopt a Comprehensive Code of Conduct ("CCC") that 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 interest, outside activity, post-employment restrictions and financial disclosures. We also recommend that individuals who perform services for the District government as contractors 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 explicitly confirm that Advisory Neighborhood are subject to the CCC, thus eliminating any potential ambiguity on this point.

BEGA recommends that the CCC include steps to streamline 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.[73] 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. We also recommend that the revised financial disclosure filing process include a statutory requirement to address filing obligations upon termination of District employment in a filing position.

With respect to the District's Gifts Rule, BEGA recommends that the CCC adopt changes to the Gifts Rule, including allowing up to $20 per gift with an annual aggregate limit of $50 per source. This would represent an increase from the $10 per gift and annual aggregate limit of $20 in the DPM and a reduction in the permissible limit of $50 per source per occasion and annual aggregate limit of $100 in the Council rules.[74] This change would harmonize the rules between the Council and the executive, is consistent with federal executive branch limits for gifts,[75] and would still be

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

[73] *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.

[74] *See* DPM § 1803.5(a); Council Rule III(c)(7).

[75] 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).

comparable to or lower than the limits in other jurisdictions.[76] BEGA's recommended revisions to the Gifts Rule would also 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 prior 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.

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.

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. We hope that these changes, along with increased training efforts, will reduce violations of the Code of Conduct stemming from outside employment or other activities that BEGA has seen over the past few years.

We recommend that a revised CCC 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

[76] *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).

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. 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.

BEGA also recommends requiring training for the District's lobbyists. 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. With respect to more substantive changes to the lobbying program, BEGA recommends the exemption from registration and reporting for certain nonprofit entities. 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 should invest in an overhaul of its transparency laws and continue 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 previously outlined in past Best Practices Reports, 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 requesters about themselves without redacting the information subject to D.C. FOIA's exemptions, primarily the personal privacy exemption.[77] To address the identification requirements at issue in a first party request for records under FOIA, BEGA reiterates our recommendation from the previous Best Practices Reports that the Mayor promulgate D.C. FOIA regulations that would allow District agencies to seek verification of identity. In addition, the Council should consider whether the District would benefit from privacy legislation that is in line with the federal Privacy Act and would amend D.C. FOIA to provide a right of access to an individual's records that are maintained by District agencies.

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

BEGA also renews its previous recommendation that the Mayor 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;
(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.

With respect to the processing of D.C. FOIA requests, BEGA recommends amending D.C. FOIA to extend the response time for D.C. FOIA requests to mirror the timelines in the federal FOIA. Federal FOIA provides agencies with 20 days to respond to requests.[78] D.C. FOIA, however, provides District agencies with 15 days to respond to FOIA requests.[79] 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.[80] 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 D.C. FOIA appeals. D.C. FOIA provides for administrative appeals from D.C. 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 litigation in D.C. Superior Court to resolve D.C. FOIA matters. 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 the District agencies 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 District agency responses, the legal complexity of some appeals, and adopt the practices of the federal government, Maryland, and Virginia.

[78] 5 U.S.C. § 552(a)(6)(A)(i). The 20 days excludes Saturdays, Sundays, and legal public holidays.

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

[80] 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,[81] even though their members are elected by the public to consider and take positions of "great weight" as to District business.[82] Instead, ANC meetings are currently governed by a separate statute, the Advisory Neighborhood Councils Act of 1975 ("ANC Act").[83]

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,[84] 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.[85]

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.[86]

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 meeting is taking place, or, if doing so is not technologically feasible, as soon thereafter as reasonably practicable";[87] (2) in the requirement for public bodies to "establish an annual schedule of its meetings, if feasible";[88] (3) in the requirement that the meeting notice "shall include, if feasible, a statement of intent to close the meeting or any portion of the meeting" along with an explanation of the reasons for closure and the matters to be discussed;[89] (4) in language on meeting procedures which discusses the requirement that a meeting may be held remotely provided reasonable

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

[82] 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.

[83] D.C. Official Code §1-309.11.

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

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

[86] 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.

[87] D.C. Official Code §2-575(a)(4).

[88] *Id.* at §2-576(1).

[89] *Id.* at §2-576(5).

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";[90] and (5) in the requirement to provide a recording of the meetings, or "if a recording is not feasible, detailed minutes of the meeting."[91] The use of the term "feasible" in multiple provisions of the OMA creates confusion 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.[92] To eliminate this confusion and ensure public bodies' meetings are 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 and FY24 Performance Hearings, 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."[93] 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,[94][147] the court may impose a civil fine of not more than $250 for each violation.

[90] *Id.* at §2-577(a)(1).

[91] *Id.* at §2-578(a).

[92] 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).

[93] https://www.open-dc.gov/node/9297.

[94] *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.[95]

The Council should amend the OMA and adopt the standard from Maryland, Virginia, and West Virginia, namely "willful and knowing" violations of the OMA, in addition to the current language "pattern or practice" of violating the OMA by closing meetings in violation of the law. Such an addition would permit a judge to fine an offender for violating the OMA even after just one violation. The "pattern or practice" language in the current statute suggests that OOG cannot request that the court issue a fine until after allowing multiple (if not several) violative closed meetings to take place, in order to establish "a pattern or practice."[96] The Council should therefore supplement the recent increase of the base-maximum fine amount of $500 for a "pattern or practice" of entering into closed meetings by also permitting lawsuits for "willful and knowing" violations of the OMA. We propose that the Council add a provision permitting lawsuits for willful and knowing violations of the OMA with a fine of $1,000 per (willful and knowing) violation (without increasing the amount for any subsequent violations). This new enforcement mechanism would serve as a deterrent and (1) approximately splits the difference between Maryland's ($250) and Virginia's ($2,000) 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.[97]

[95] D.C. Official Code § 2-579.

[96] An October 30, 2024 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).

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