

Statement for the Record of

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Chairperson Spagnoletti, Members of the Board of Ethics and Government Accountability, Executive Director and staff, my name is Brian K. Flowers, and I am the General Counsel for the Executive Office of Mayor Vincent C. Gray. Thank you for this opportunity to present ideas on best practices in government ethics and transparency and to submit these comments for the record. The Board has come a long way since its formation in 2012, and has served an important function in bringing together the public and government officials to find ways to improve our city. I applaud the Board on bringing order and predictability to our previously fragmented ethics regime. The training and published guidance you have provided has been invaluable in providing direction to the District's employees. I could consume the entire time praising the Board and its accomplishments, but that is not why we are here.

I am here to speak primarily on the progress that the Gray Administration has made in improving open government in the District of Columbia. We believe that we have been good stewards of the government and that our efforts have laid a solid foundation that will leave this government in better shape than we found it. We remain committed to making this the most open and transparent government anywhere.

This will mark the third BEGA symposium that I have attended, and I want you to know that I have listened and continue to listen to the residents and other interested persons and the recommendations that they have made.

Approximately one year ago (October 25, 2014), the Executive Office of the Mayor issued a Request for Comments on the District of Columbia's Transparency and Open Government Initiative.<sup>1</sup> The Request was published in the D.C. Register, on the District's website, sent to each of the District's 295 Advisory Neighborhood Commissioners, presented to cabinet members and their deputies, and widely publicized in the local media. In response to the request, we received approximately a dozen comments, including detailed comments from the Sunlight Foundation, D.C. Open Government Coalition, Socrata, Code for DC, as well as comments from education advocates and advocates concerned with transparency in government real property dispositions. We also published those comments on the [open.dc.gov](http://open.dc.gov) website. Additionally, we consulted with the Director of the Office of Open Government, reviewed BEGA's Best Practices Reports from April and December of 2013, and consulted the legislative record from the Council hearing on open government legislation. At around the same time that we solicited comments on the Initiative, we procured FOIAXpress, a government-wide FOIA processing system that for the first time ever provides a government-wide web-based public facing portal to track and submit FOIA requests online, and house documents for proactive release.

The resulting Transparency, Open Government and Open Data Directive that Mayor Gray issued on July 21, 2014, incorporated a number of the recommendations we received and was based on federal and local best practices, including the White House's Open Government Initiative, that was the best practices model at that time, ordinances and

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<sup>1</sup> The Directive was issued pursuant to Mayor's Memorandum 2011-1, the Transparency and Open Government Policy.

executive orders from other jurisdictions, including Philadelphia, Chicago, Boston, San Francisco, Sacramento, San Diego, and New York. We originally considered issuing two separate orders, one dealing with the proactive publication requirements, FOIA and Open Meetings, and the other establishing an Open Data Policy. However, it made more sense to combine them to convey our Open Government Initiative in its totality and to make it clear that the proactive open format publication requirements would apply to all electronic public records, including raw data, and other documentary materials.<sup>2</sup> Further, understanding that data drives virtually every government decision, and based on the overwhelming groundswell of comments we received on that issue, we knew that the order had to contain an open data component.

Our selected software application, FOIAXpress, went live at the same time the Transparency Directive was issued. After working through several initial setbacks, the rollout of FOIAXpress followed several weeks of in-house testing and began with 50 participating agencies. This includes all subordinate agencies that received 10 or more FOIA requests, and most major independent agencies that receive a significant number of FOIA requests, including DC Water, UDC, the Board of Elections, and BEGA. OCTO was required to change the structure and content on the website of approximately 80 different agencies, and this was done at the same time they were redesigning the complete dc.gov domain. Our intent was to integrate the Open Government Initiative into the FOIAXpress application and use it as a platform for the proactive publication of public records. We are now working to overcome some of the limitations we have identified with the application,

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<sup>2</sup> See, D.C. Official Code § 2-502 (18). (The term "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format).

including its inability to house audio and video files, and the application's settings that convert all uploaded files to a pdf format. We have asked the vendor to address these issues.

FOIAXpress is one tool, and will never be the sole manner in which FOIA requests are submitted, because as you know, the law requires the government to accept hard copy, electronic, and in some cases oral requests. Until the federal Department of Corrections permits the use of computers, and there is universal connectivity, that will not change.

We have always viewed the Open Government Initiative as a starting point, rather than the finish line. We recently appointed members to an Open Government Advisory Group of which the Director of BEGA's Office of Open Government is a member. The Advisory Group will examine additional issues to improve transparency and accountability and make recommendations to the Mayor, Council and this Board. For example, we know that the 15 categories of information that the Directive requires to be proactively published is a minimum requirement, because many agencies have other express statutory internet publication requirements, such as procurement notices, employment contracts, rules, and reports.<sup>3</sup> Moreover, we knew the number of datasets required by the order was conservative. Working with OCTO, in collaboration with the open data community, we are finalizing the revised [terms and conditions](#) that will apply to the online publication and use of the District's open data and anticipate an announcement concerning the release of new high-value datasets shortly. We also learned that OCTO staff, working directly with the Office of the City Administrator's data managers rather than the agencies was a better resource for identifying the initial set of new high-value datasets. As you know, we recently

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<sup>3</sup> See, D.C. Official Code § 2-354.01-2-354.05(specific contract information), D.C. Official Code § 1-610.64 (Employment contracts with subordinate agency heads), D.C. Official Code § 2-555 (DCMR), and D.C. Official Code § 8-103.09b (Anacostia River Clean Up Fund report).

announced the re-launch of the [data.dc.gov](http://data.dc.gov) website which now includes 237 new datasets; and a redesigned [track.dc.gov](http://track.dc.gov), where residents can track agency performance.

The new open data projects complement the other online applications the Mayor previously launched, directing city agencies to provide increased information to the public and significantly widen opportunities for public feedback, including: implementation of FOIAXpress, required agency posting of Open Government Reports, revision of the Terms and Conditions on the dc.gov website to loosen restrictions on the use of government data posted online, and continued promotion of grade.dc.gov where residents can grade their government to facilitate improved service delivery.

The order also requires boards and commissions to submit plans for webcasting and archiving their meetings online. We believe this is the next phase in ensuring that District board and commission meetings are open to the public, and in time, the public will expect this type of access, just as they now have access to all Council meetings, an enhancement that the Mayor, who as Council Chair, accomplished during his tenure. Moving government information and government meetings online is one way to ensure that government operations are transparent and accessible to anyone (with an internet connection), anywhere, and at any time.

In the area of FOIA, the Mayor is responsible for deciding appeals from all agency FOIA decisions, whether decided by subordinate or independent agencies. We have taken significant steps to increase the availability of the appeals decisions, including publishing each decision in the DC Register (with full text searches available at [dcregs.org](http://dcregs.org)), publishing them in both a chart and searchable database on our website, and we intend to release 3 or 4 years of the decisions for bulk downloading in Word format.

We sought to set the tone early with the release of Mayor's Memorandum 2011-1 and our decisions reflecting that every effort should be made to exercise discretion and release records unless a statutory harm was identified. Early in the administration, we rejected the "pending litigation" exemption that agencies were using to withhold records, and we similarly overruled an agency that was relying on its past practice of designating disciplinary actions as "non-public" to justify withholding. Our office heard 115 appeals last fiscal year, an increase of approximately 20% from last year. This number includes 20 appeals from the same party contesting the same issue that were consolidated into one decision. Nonetheless, the percentage of appeals remains very small, constituting slightly more than one percent of all requests.

We are in the process of reviewing the initial agency Open Government Reports, which are due by close of business tomorrow. Because of the short timeline of this first year combined with the significant progress we've already made this year on ensuring that each agency's Open Government page contains 15 categories of open government and FOIA information required by the Directive, this year's plans will be fairly modest. We anticipate that the Open Government Advisory Group will be in a position to review the reports, and as they offer input on next year's report template, will determine the right balance between requiring agencies to put more information in these reports and not creating an overly burdensome exercise. In addition, next year, the Advisory Group will be able to offer recommendations for the second year report templates and EOM will issue them with much more notice than this year because of the truncated timeline. I think with more advance notice we can reasonably expect more of agencies. In the spirit of "you have to start somewhere," within certain basic standards we'll let agencies submit a baseline report this year. Since the reports will be posted online, we believe the public and Open Government

groups will play an important role by reviewing the reports and publicly praising or offering constructive criticism to each agency.

Mike Flowers (no relation), former CDO in NYC, made a powerful point when he shared with us: sometimes you just have to put information out there and let the media and the public weigh in on it. That has its own corrective power.

We do not have a monopoly on advancing government transparency, but we are responsible for implementing the policy and we believe that we have done good work and are doing our part to further this important goal. Let us not allow the perfect to be the enemy of the good, but acknowledge there is more to do if the District government is to be the most transparent government we can make it.