GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

December 31, 2013

The Honorable Vincent C. Gray
Mayor, District of Columbia
John A. Wilson Building, Ste. 316
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Chairman Phil Mendelson
Council of the District of Columbia
John A. Wilson Building, Ste. 504
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: BEGA Annual Best Practices Report

Dear Mayor Gray and Chairman Mendelson:

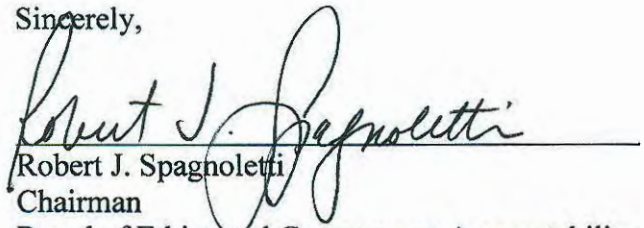
I am pleased to present you with the enclosed copy of the 2013 Best Practices Report of the Board of Ethics and Government Accountability (BEGA). The report caps BEGA's busy first full year of operations, and the experiences gained along the way have combined to inform the discussion in it of the specific questions the Ethics Act requires be addressed in an annual assessment to the Mayor and the Council, as well as the recommendations for legislative and programmatic action.

The report also reflects the lessons learned by the Office of Open Government (OOG) during the beginning of its operations this year. In it, you will find a discussion of the OOG Director's recommendations regarding the establishment of a comprehensive citywide open data and transparency policy, mediating FOIA disputes between requestors and District government agencies, and making changes to the Open Meetings Act.

A number of the recommendations in BEGA's first report are reflected in Bill 20-412, the "Universal Code of Conduct and BEGA Amendment Act of 2013", which is now pending before the Committee on Government Operations. Together with my fellow Board members, I urge that the measure be passed along to the full Council. Enacting this important piece of legislation will enable BEGA to better perform its statutorily mandated functions. In the same vein, we hope you find that the current report will also serve as a helpful guide in taking even further steps to

amend the Ethics Act and, in the process, continue to promote a culture of high ethical standards in District government.

Sincerely,



Robert J. Spagnoletti
Chairman
Board of Ethics and Government Accountability

Enclosure

Copies to:

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Nyasha Smith, Secretary to the Council
Brian K. Flowers, General Counsel to the Mayor
V. David Zvenyach, General Counsel to the Council

ANNUAL BEST PRACTICES REPORT

December 31, 2013

BEGA

BEGA Board

Robert Spagnoletti, Chairman ■ Deborah Lathen ■ Laura Richards

Directors

Darrin P. Sobin, Government Ethics ■ Traci L. Hughes, Office of Open Government

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

BEGA enforces ethics laws and the District of Columbia Code of Conduct. The Open Government Office is an independent office within BEGA that enforces the Open Meetings Act and monitors compliance with the Freedom of Information Act.

The Board of Ethics and Government Accountability (BEGA or Board) was established in 2012 to perform several important functions, including administering and enforcing the Code of Conduct.[1] The Board also is responsible for appointing the Director of the Office of Open Government (OOG).[2] The OOG, which began operations in April 2013, ensures greater government transparency through enforcement of the Open Meetings Act (OMA) and the Freedom of Information Act (FOIA).[3]

Now in its second full year of operations, BEGA has accomplished its core mission by investigating and enforcing Code of Conduct violations, conducting training sessions and producing training materials for District government employees and public officials, and giving advice, both informally and in formal written advisory opinions. The experience gained from those efforts has prepared BEGA well to meet another of its principal responsibilities – conducting an annual assessment of ethical standards for public employees and officials, including a review of national best practices of government ethics, and presenting recommendations for amending the Code of Conduct.[4]

The Board is required by the Ethics Act to address seven specific questions in the annual assessment. Those questions are 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. The Board may also make recommendations on any other matters it deems appropriate.

In anticipation of this report, the Board again directed its staff to conduct research and to reach out to government ethics experts and organizations, relevant District government officials, and the general public for advice and input. On October 3, 2013, the Board held a symposium on government ethics and transparency best practices. Members of the public participated, including several who formally presented their views orally or in writing.[5]

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[1] *See* section 202(a)(1) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (Ethics Act), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1162.02(a)(1) (2013 Supp.). The Code of Conduct is defined in section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.01(7)).

[2] *See* section 202(a)(2) of the Ethics Act (D.C. Official Code § 1-1162.02(a)(2)).

[3] OMA is codified at D.C. Official Code § 2-571 *et seq.*, and FOIA is codified at D.C. Official Code § 2-531 *et seq.* Visit http://www.bega.dc.gov/node/649852 for more information about OOG's mission and responsibilities.

[4] *See* section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

[5] Visit http://www.bega.dc.gov/node/700482 for minutes of the symposium and copies of the written statements that were submitted.

What follows is the Board's assessment of the seven specific questions, along with its recommendations and those of the OOG, for action to be taken by the Council and/or the Mayor.[6]

[6] The Board wishes to note with appreciation that a number of the recommendations made in its first report are reflected in Bill 20-412, the "Universal Code of Conduct and BEGA Amendment Act of 2013", which is now pending before the Committee on Government Operations. Indeed, one of those recommendations is captured in a key provision in the bill to require the Board to submit proposed legislation codifying a Universal Code of Conduct, which would be "applicable to all employees and elected officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions, but excluding the Courts." Further discussion of the bill is contained in the text below.

1. Should the District Adopt Local Laws Similar in Nature to Federal Ethics Laws?

In its first report, BEGA recommended that the standards in the federal ethics laws that are applicable to District government employees[7] be incorporated into the Code of Conduct, so that BEGA could civilly enforce those standards on a local basis. One of the main reasons for the recommendation was that, by incorporating the standards, it would be clear that federal case law and interpretive opinions would apply to District employees, thereby allowing for clearer precedent and more consistent and predictable enforcement.

Further research[8] and BEGA's experience since the first report have underscored the need to act on the recommendation. For example, an advisory opinion to a member of the Council on legislative recusal included an analysis of section 223 of the Ethics Act (D.C. Official Code § 1162.23) and 18 U.S.C. § 208(a), both of which deal with financial conflicts of interest. The analysis was somewhat involved, largely because the statutes are drafted with different language. The result, although supported by Justice Department interpretive guidance on section 208(a), could have been reached more directly if section 223 read in terms substantially similar to its federal counterpart.

To be clear, as was noted in the first report, there would be a significant downside to accepting the recommendation. Incorporating the federal standards would require continual monitoring of federal ethics laws and regulations to ensure that any future changes to them would be reflected locally through affirmative Council legislation and/or BEGA rulemaking. Even so, the approach would be less problematic than adopting the federal laws themselves by reference. Courts in most states have held that legislation that purports to adopt by reference not only laws in existence at the time the reference is made, but also subsequent changes to those laws, constitutes an unlawful delegation of legislative power.[9] Further, judicial concerns aside, a recent BEGA experience illustrates

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[7] Those federal laws are: 5 U.S.C. § 3110 (nepotism); 5 U.S.C. § 4111 (acceptance of training, travel reimbursement from non-profits); 5 U.S.C. § 5531-38 (dual pay (federal and District governments)); 5 U.S.C. § 7342 (foreign gifts); 18 U.S.C.§ 200 (aiding and abetting); 18 U.S.C. § 201 (bribes, illegal gratuities); 18 U.S.C. § 202 (definitions); 18 U.S.C. § 203 (compensation for representation in claims against the government); 18 U.S.C. § 205 (serving as agent/attorney in claims against the government); 18 U.S.C. § 207 (post-employment restrictions on former officers, employees and elected officials of the executive and legislative branches); 18 U.S.C. § 208 (financial conflicts of interest); 18 U.S.C. § 209 (compensation for performance of official duties); 18 U.S.C. § 216 (civil & criminal penalties); 18 U.S.C. §219 (foreign agents); 18 U.S.C. § 601 (deprivation of employment); 18 U.S.C. § 602 (solicitation of political contributions); 18 U.S.C. § 610 (coerced political activity); and 18 U.S.C. § 1913 (lobbying).

[8] *See, e.g., McReady v. Department of Consumer & Regulatory Affairs*, 618 A.2d 609, 615 (D.C. 1992) ("When the provisions of a federal statute are substantially adopted by the Council, it is presumed that the Council intends to adopt the known and settled judicial interpretations of that statute as well.").

[9] *See* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 La. L. Rev. 1201, 1255 n.228 (2008) (collecting cases). The rationale reflected in the decisions is that the legislating body has "allowed

the limited potential usefulness of adopting the federal ethics laws by reference. In preparing an advisory opinion to several Councilmembers on blind trusts, the Director of Government Ethics found that, currently, there is no provision in the federal regulations pursuant to which a District government employee can even establish such a trust as some measure of protection against the conflict of interest prohibitions in 18 U.S.C. § 208. In other words, there is a "disconnect" between the statute, which covers District employees, and the relevant implementing regulations, which do not.

Unless and until Congress acts to remove District government employees from the scope of the federal ethics laws – action which BEGA considers to be well worth pursuing given the passage of the Ethics Act – this recommendation should be adopted, although in revised fashion, by having BEGA incorporate the federal standards into the provisions of the Universal Code of Conduct. The Council's intent to adopt the standards, together with existing interpretive opinions, easily could be reflected in the committee report accompanying the legislation codifying the Universal Code. This at least will achieve the long sought goal of subjecting District officials and employees to one set of ethics standards rather than multiple and perhaps conflicting standards.

2. Should the District Adopt Post-Employment Restrictions?

In its first report, BEGA recommended substituting appropriately applicable post-employment restrictions contained in 18 U.S.C. § 207 (amended to provide for only civil penalties) for the standards currently in 6B DCMR § 1814, both of which provisions cover almost all District government employees.

For the reasons discussed in the previous section, BEGA believes that the recommendation should still be adopted, but by incorporating the federal standards into the provisions of the Universal Code of Conduct.

On a related note, BEGA also recommends that 6B DCMR § 1814.2 be amended. It currently provides that "[section] 1814 is intended to be in conformity with the provisions of 18 U.S.C. § 207 and implementing regulations" and that, if there is any conflict between the provisions of section 1814 and the provisions of 18 U.S.C. § 207 and implementing regulations, "the latter provisions control." Unfortunately, the citation to the implementing regulations is out-of-date; they are now contained in 5 C.F.R. parts 2637 and 2641. Section 1814.2 should, then, be amended accordingly.

3. Should the District Adopt Ethics Laws Pertaining to Contracting and Procurement?

In its first report, BEGA recommended that it be authorized to investigate allegations of, and enforce penalties for, violations of ethical standards related to contracting and procurement and that such standards be made part of the Code of Conduct. BEGA requested the opportunity to continue its

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future amendment of the governing law to occur without the exercise of its discretion and so has abdicated its assigned role." *Id.* at 1257.

research regarding best practices in this area, so as to be able to propose specific provisions for inclusion in the Code.

Research conducted to date strongly suggests the need for a coordinated programmatic and legislative approach in this area. On a program level, BEGA should partner with the Office of Procurement Integrity and Compliance (OPIC) in the Office of Contracting and Procurement (OCP), to further ensure that ethics laws are enforced as part of policing the District's contracting and procurement practices. OPIC was established in 2007 to perform procurement-related audits, contract reviews, and contract compliance monitoring, as part of its responsibility to detect internal and external fraud, waste, and abuse in procurement operations. To that extent, OPIC serves as the principal liaison between OCP and the District's Office of the Inspector General (OIG). OPIC's internal auditors must follow the Code of Ethics of the Institute of Internal Auditors. OCP also requires all of its employees to adhere to an agency-wide Code of Ethics.

BEGA recommends that OPIC's mission be expressly modified to the extent that it be required to report matters involving government ethics-related violations to BEGA for enforcement. Matters involving fraud, waste, and abuse should continue to be reported to OIG.

BEGA also recommends that it incorporate all relevant provisions of OCP's Code of Ethics into the Universal Code of Conduct and that it and OCP work together to provide comprehensive and on-going ethics training for all OCP employees.

To augment those programmatic efforts, BEGA recommends that the Council amend Chapter 2 (Contracts) of Title 2 of the D.C. Official Code to require that all contracts with the District, as well as all government-assisted projects that the District administers, contain an acknowledgement by contractors/vendors and project beneficiaries that they are subject to BEGA's authority under the Ethics Act. The requirement would be similar to, for example, those existing provisions requiring First Source employment agreements (*see* D.C. Official Code § 2-219.03) or contract terms related to the living wage (*see* D.C. Official Code § 2-220.04). Moreover, the new provision would send the message that requiring the highest ethical standards in contracting and procurement is as important to the District as purchasing quality goods and services in a timely manner and at a reasonable cost.

4. Should the District Adopt Nepotism and Cronyism Prohibitions?

In its first report, BEGA made several recommendations related to nepotism. The first was that the standards in section 1804 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA) (D.C. Official Code §1-618.04) be included in the Code of Conduct, so that BEGA could investigate and enforce violations of the nepotism prohibitions (concurrently with the District's Department of Human Resources) as potential government ethics infractions. Second, BEGA recommended that the Council consider expanding nepotism prohibitions, as has been done in other jurisdictions, to include indirect action that creates the appearance of a nepotism-based conflict of interest. Third, it recommended that the Council consider adopting a broader definition of the term "relative" in D.C. Official Code §1-618.04(d)(2) to include individuals in romantic and cohabitant

relationships, domestic partners, and foster children. Last, BEGA recommended against allowing nepotism waivers.

BEGA stands by these recommendations, the only refinement being that the nepotism-related standards and the expanded definition of "relative" be incorporated into the Universal Code of Conduct.

BEGA made no specific recommendations related to cronyism, noting a dearth of statutory authority on the issue elsewhere. Subsequent research has not changed this view.

5. SHOULD THE DISTRICT CRIMINALIZE VIOLATIONS OF ETHICS LAWS?

In its first report, BEGA recommended that the Council criminalize the conflict of interest provisions in section 223 of the Ethics Act (D.C. Official Code § 1-1162.23) and the contingent fees provision in section 416 of the Procurement Practices Reform Act of 2010 (D.C. Official Code § 2-354.16).[10] In short, because violations of those two statutes substantially threaten the public trust, and for the other reasons discussed in the first report, BEGA continues to see the need for the Council to act on this recommendation.

BEGA also recommended that section 215 of the Ethics Act (D.C. Official Code § 1-1162.15) be changed so that the Ethics Board, after presentation of evidence in an open and adversarial hearing, may both levy a penalty in accordance with section 221 of the Act and refer the matter to the Office of the Attorney General for the District of Columbia (OAG) or to the United States Attorney for the District of Columbia (USAO) for enforcement or prosecution. BEGA is very pleased that this recommendation is reflected in Bill 20-412, now pending before the Committee on Government Operations, and urges that the measure be passed along to the full Council for approval.

BEGA also recommended that it be within the Board's discretion to include its agreement not to refer a matter for criminal prosecution as a term of the negotiated resolution of any matter before it. BEGA makes this recommendation again, but notes that, if OAG or USAO should decide on its own to prosecute a matter, BEGA will cooperate in the effort.

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[10] Section 416(a) provides that "[a] contractor shall not offer to pay any fee or other consideration that is contingent on the making of a contract."

6. Should a Member of the Council be Expelled for Certain Violations of the Code of Conduct?

In its first report, BEGA recognized the importance of being able to investigate alleged ethical violations by the District's public officials and to publicly censure them for proven violations, but left to the Council itself the ability to exercise its Home Rule Act authority to expel one of its members.[11]

BEGA stands by that position, but, with this report, recommends that Rules 651(a) and 652(a) of the Council's Rules of Organization and Procedure for Council Period 20 (and any substantively similar rules adopted in future Periods) be amended to provide that the establishment of an ad hoc committee following a Board censure be discretionary, rather than mandatory, as is the case now.[12]

7. Should the District Regulate Campaign Contributions from Affiliated or Subsidiary Corporations?

In its first report, BEGA noted the close connection between government ethics and campaign finance regulation and recommended that the Council consider the campaign finance bills then pending before it with certain ethical principles in mind. One of those principles is that campaign finance activities be open and transparent.

At this writing, BEGA is pleased and encouraged that the Council's efforts in this area have continued. Several pending bills have been the subject of public hearings.[13] Another, Bill 20-76, the "Campaign Finance Reform and Transparency Amendment Act of 2013", passed on first reading on November 5, 2013. Significantly, Bill 20-76 would define the term "business contributor" to mean "a business entity making a contribution and all of that entity's affiliated entities."[14] Among other things, the bill also would require the reporting of bundled contributions, authorize the Director of Campaign Finance to require that all reports filed with the Board of Elections (BOE) be filed online, require political action committees and independent expenditure committees to file reports, and prohibit making any contribution in the form of cash or money order which, in the aggregate, exceeds $100 in any one election to any one political committee or political action committee.

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[11] *See* section 401(e) of the Home Rule Act (D.C. Official Code § 1-204.01(e)) (authorizing the Council, by a 5/6 vote of its members, to expel a member for the "most serious" violations of law, "including those violations that substantially threaten the public trust").

[12] Rule 652(a), for example, currently provides that "[a]n ad hoc committee *shall be established* by the Council within 72 hours of a censure of one of its members by the Ethics Board, or as soon as practicable." (Emphasis added.)

[13] *See, e.g.,* Bill 20-03, the "Comprehensive Campaign Finance Reform Amendment Act of 2013", Bill 2-25, the "Campaign Finance Reform Amendment Act of 2013", and Bill 20-37, the "Campaign Finance Reform, Transparency and Accountability Amendment Act of 2013".

[14] The bill would also define the term "affiliated entity" to mean "each business entity that is related to an entity by virtue of one of the following relationships: (A) One of the entities owns or controls the other; or (B) The entities share an owner or controller, whether that owner or controller is another entity or an individual."

BEGA will continue to monitor the Council's continuing efforts in the area of campaign finance reform, standing ready to provide input and make recommendations when requested.

ADDITIONAL RECOMMENDATIONS OF THE OFFICE OF GOVERNMENT ETHICS

1. ***Clarification of term "Candidate" for purposes of Financial Disclosure Statement Filings.*** The Council should amend section 101(6) of the Ethics Act (D.C. Official Code § 1-1161.01(6)) to refine the definition of "candidate" to include only successful candidates or, alternatively, only candidates who appear on the ballot. The current definition is so broad that it includes, for example, individuals who obtain a nominating petition from the Office of Campaign Finance (OCF), but do not thereafter obtain any signatures, announce their candidacy, or file anything with OCF at all. Also, BEGA already has learned from experience that, once a candidate loses, it is nearly impossible to track him or her down a year or more after the election. The enforcement difficulties stemming from that reality are only compounded by the fact that many candidates do not know that they must file a personal financial disclosure statement, even if they lose the election, and records are consequently lost or destroyed. With the kind cooperation of the BOE, BEGA is taking steps to apprise candidates of their financial disclosure responsibilities by including information in the BOE's nominating petition package. However, an amendment narrowing the definition, preferably to one encompassing only successful candidates, would greatly facilitate enforcement efforts.

2. ***Tightening Requirement to File Financial Disclosure Statement When Circumstances Change.*** The Council should amend section 224 of the Ethics Act (D.C. Official Code § 1-1162.24) by adding a new subsection to require that Financial Disclosure filers file an amended Financial Disclosure form when an actual conflict of interest arises. Currently, the filer is not be required to report the actual conflict of interest until he/she files his/her Financial Disclosure form for the following year. Creating an affirmative duty to report an actual conflict of interest when the actual conflict of interest arises would greatly aid BEGA's ability to audit Financial Disclosure reports, as required by D.C. Official Code § 1-1162.24(g). Additionally, an affirmative duty to report an actual conflict of interest when it arises also would aid superiors in the executive and legislative branches, who would then be aware of the conflicts of interest of their subordinates, and could manage their subordinate's responsibilities accordingly.

3. ***Authority to Impose Fines.*** BEGA should have the authority to fine all non-government candidates up to $2,000 for failing to file a financial disclosure statement, as opposed to having to pursue the matter by means of an evidentiary hearing.

4. ***Expanding Definition of "Conflict of Interest."*** The Council should amend section 223(a) of the Ethics Act (D.C. Official Code § 1-1162.23(a)) to include financial, as well as non-financial, conflicts of interest. As one commentator has observed, "many if not most local government ethics codes limit the definition of 'conflict of interest' to situations where an official's interest involves money. But there are many personal interests that create a conflict, even though no

money is involved."[15] To illustrate the point with a local example, currently, an ANC Commissioner who serves on a neighborhood Civic Association can represent the association before his or her own ANC, while simultaneously voting on an association-related matter as an ANC Commissioner with no prohibition, as long as there is no financial conflict of interest. Section 223(a), therefore, could be amended to read as follows:

> No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's personal or financial interests or the financial interests of a person closely affiliated with the employee.[16]

5. ***Barring Non-Compliant Lobbyists from Registering.*** The Council should amend section 229 of the Ethics Act (D.C. Official Code § 1-1162.29) by adding a new subsection to provide that a registrant cannot file an annual registration form without clean hands. The provision would operate in similar fashion to D.C. Official Code § 47-2862, which prohibits the District from issuing licenses or permits to any applicant who owes more than $100 to the District for certain fines, penalties, assessed interest, past due taxes, or service fees. In the case of lobbyists, the prohibition would apply if the registrant had failed to file any required registration forms or activity reports for prior periods, or if the registrant owed BEGA more than $100 because of unpaid fines or registration fees. It should be noted that in years past, OCF permitted non-compliant lobbyists to register and file forms and reports. It is unclear, however, whether this was a policy decision or whether this was done because OCF felt, as does BEGA, that it does not currently have statutory authority to prevent a noncompliant lobbyist from registering.

6. ***Electronic Filing for Lobbyists.*** The Council should amend section 230 of the Ethics Act (D.C. Official Code § 1-1162.30) to authorize BEGA to charge a $100 administrative fee for lobbyists who file paper activity reports. Currently, BEGA's administrative staff is overwhelmed when lobbyists file paper activity reports and accompanying attachments. The information must be entered manually into a database, thereby increasing the risk of making errors. An

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[15] Robert Wechsler, *Personal, Non-Financial Interests* (Feb. 7, 2009, 3:56 PM) http://www.cityethics.org/node/635 (last visited Nov. 20, 2013).

[16] *Cf.* section 1802 of the CMPA (D.C. Official Code § 1-618.02) ("No employee, member of a board or commission, or a public official of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities."); Canon 2(B) of the Code of Conduct for United States Judges ("A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.").

administrative fee would encourage electronic filing, thereby cutting down on the amount of documents that have to be stored, and reduce administrative strain.

7. ***Clarifying Reporting Requirements for Lobbyists who do not Engage in Lobbying Activities During a Particular Reporting Period.*** The Council should amend section 230(c) of the Ethics Act (D.C. Official Code § 1-1162.30(c)) to clarify that a registered lobbyist must file an activity report even if he or she engaged in no lobbying activity during the reporting period. The provision currently states that "[e]ach registrant who does not file a report required by [section 230] for a given period is presumed not to be receiving or expending funds that are required to be reported under this part." Although we do not interpret this as relief from the filing requirement for temporarily dormant lobbyists, the amendment would resolve the arguable ambiguity in the statute, which one late filer raised as "good cause" in his request that the Board waive the penalty for a late-filed activity report. Moreover, the alternative interpretation – that activity reports need only be filed when activity during the reporting period has occurred -- has the potential to be a problem for our auditors because it is impossible to distinguish between a non-compliant lobbyist and one who did no lobbying for the reporting period without contacting each one individually and receiving only verbal confirmation. If no lobbying activity occurred during a particular reporting period, it should not be too much of a burden for the lobbyist to simply file a form stating so.

8. ***Clarifying that Lobbyists Should be Prohibited from Serving on Certain Boards and Commissions.*** The Council should amend section 231(f) of the Ethics Act (D.C. Official Code § 1-1162.31(f))[17] to clarify that lobbyists who are required to register pursuant to the Act are prohibited from serving on certain boards and commissions. The Board considered the need for legislation on this issue during several public meetings this year.[18] Based on staff input, it determined that lobbyists should be prohibited from serving on those boards and commissions that perform quasi-judicial or rulemaking functions, or that exercise certain other types of authority (*e.g.*, licensing, contracting, or grant-making). The Board nevertheless decided to solicit public opinion as well, and did so by inviting comments in conjunction with the symposium held in October. Informed by those comments and any further staff research, the Board anticipates presenting a proposed legislative package to the Council on this issue in the early part of next year.

9. ***Concurrent Criminal/Civil Jurisdiction over Lobbyists.*** The Council should amend section 232(a) of the Ethics Act (D.C. Official Code § 1-1162.32(a)) to authorize BEGA to exercise concurrent civil jurisdiction to enforce Part E (Lobbyists) of the Act.[19] In keeping with the

[17] Section 231(f) currently provides that, with certain exceptions, "[n]o public official shall be employed as a lobbyist while acting as a public official."

[18] Visit http://bega.dc.gov for the minutes of those meetings.

[19] Section 232(a) currently provides that violations of Part E are punishable by a fine of not more than $5,000, imprisonment for not more than 12 months, or both.

general principle that the District should be able to regulate and enforce its ethics laws, this recommendation is meant to extend BEGA authority over non-compliant lobbyists. Perhaps an oversight when the Ethics Act was adopted, but the only penalty available to punish lobbyists who violate the Ethics Act is a criminal penalty, which essentially means that only the USAO can act (the potential sanction of incarceration *and* a fine removes it from the purview of the District's Attorney General). In the past, there has been criticism that the USAO has declined to pursue District matters that it deems to be minor. By extending jurisdiction to include both civil and criminal penalties, less serious offenses could be pursued by BEGA while the more serious violations could be left to the USAO. The Council also should amend section 232(b) or add a new subsection permitting BEGA to bar registrants from engaging in any lobbying activity for a period of up to 2 years following a Board finding of a Code of Conduct violation.

10. ***Prohibiting Gifts from Lobbyists.*** The Council should amend Rule III(e)(1) of its Code of Official Conduct to prohibit soliciting or accepting *any* gifts from lobbyists. The Rule currently prohibits "[s]olicit[ing] or accept[ing] anything of value from a registered lobbyist that is given *for the purpose of influencing the actions of the employee in making or influencing the making of an administrative decision or legislative action.*" (Emphasis added.) Gifts from lobbyists should be avoided, no matter the value (lobbyists are in the business of attempting to influence legislative activity in order to obtain results for their clients). Soliciting or accepting gifts from lobbyists – for whatever purported purpose – creates, at a minimum, the appearance of impropriety and, therefore, should be prohibited.

11. ***Providing Consistency in Definition of the term "Employee" for Purposes of Code of Conduct Coverage.*** The Council should amend section 301(7) of the CMPA (D.C. Official Code § 1-603.01(7)) to include in the definition of "employee" both paid and unpaid individuals who perform functions for the District government. The term currently is defined as meaning, "except when specifically modified by [the CMPA], an individual who performs a function of the District government and who receives compensation for the performance of such services." Amending the definition would serve to clarify that ANC Commissioners and some boards and commissions members are covered by the Code of Conduct. As noted in BEGA's first report, a substantial number of employees are subject to the Code of Conduct pursuant to the District Personnel Manual (DPM), which, in turn, incorporates the CMPA by reference. However, ANC Commissioners and some boards and commissions members are not covered by the DPM because they serve without compensation.[20] Amending the definition would, then, close the gap in coverage as between compensated District government employees and uncompensated public officials.[21]

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[20] It should be noted that, while the DPM does not cover unpaid boards and commissions members for the most part, it does cover them for purposes of post-employment restrictions, *see* 6B DCMR § 1814.1

[21] Amending the CMPA definition of "employee" also would conform with a section of Bill 20-412, which would amend the Ethics Act by adding a new section to provide that the Code of Conduct "shall apply to all employees and elected officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions, but excluding the Courts."

12. ***Mandatory Annual Ethics Training for all District Government Officials and Employees.*** BEGA's duty to conduct mandatory training on the Code of Conduct[22] should be reflected in an official policy in both the executive and legislative branches that ethics training be required annually for all District government employees. Ethics is a fluid subject area, and yearly training to keep pace with developments is a best practice followed in other jurisdictions. The training could be done in person or via a webinar, so as to make it as convenient and accessible as possible. Either way, BEGA would need more funds for staff and the development of the webinar and other training materials.

13. ***BEGA Office Location.*** BEGA should be headquartered in the John A. Wilson Building. When the Council passed the Ethics Act, its ultimate goal was "to restore the public's trust in its government." 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, at 2 (Council of the District of Columbia, December 5, 2011). BEGA was seen as the centerpiece of the legislation. "Most importantly, the bill will establish a new entity charged exclusively with administering and enforcing the new and enhanced [ethics] laws and the code of conduct." *Id.* Cost and other practical considerations notwithstanding, relocation to the Wilson Building would accord with the Council's vision for BEGA by establishing for it a real "presence" in the seat of local government.

[22] *See* section 202(a)(5) of the Ethics Act (D.C. Official Code § 1-1162.02(a)(5)).

Unlike BEGA, the OOG is not statutorily required to conduct and present a yearly assessment of the District's compliance with government transparency. Nevertheless, so as to make this report as comprehensive as possible, the OOG Director was required by the Board to make recommendations regarding the feasibility of 1) establishing a comprehensive citywide open data and transparency policy; 2) modifying the OOG's mission so as to better align its FOIA and OMA enforcement functions; and 3) enforcing OMA under the Code of Conduct.

Below are the OOG's recommendations on best practices, as the District looks toward implementing a sustainable open government and transparency policy. Any such policy must contemplate cross-connections with FOIA and a more robust OMA to ensure the public's ability to gain greater access to its government in a more efficient and streamlined manner.

COMPREHENSIVE CITYWIDE OPEN DATA AND TRANSPARENCY POLICY

The District of Columbia is in a prime position to establish a transparency and open data policy which contemplates not only proactive disclosure of agency operations, but disclosure of data in a manner that will improve city services, lead to greater government accountability, and promote innovative uses of technology that will make government more efficient and responsive to the needs of District residents.

Long before President Barack Obama issued the *Memorandum on Transparency and Open Government*,[23] the District was among the earliest jurisdictions to establish criteria for the online publication of high-value data sets,[24] creating an online data portal of not all, but some, District agency data. The posting of the data has since evolved into a catalog of 459 data sets from multiple District agencies.[25] The data, however, is not published real-time, but posted in formats that are largely static and far from adaptable. Operational data is provided through the Office of the City Administrator agency data reports of select agencies (Department of Transportation, Metropolitan Police Department, Office of Tax and Revenue and the Citywide Call Center).[26] Agency-specific budget and performance

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[23] The memorandum was published at 74 Fed. Reg. 4685 (January 26, 2009) and is also available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

[24] *See* 2006 Memorandum from then-City Administrator, Robert Bobb, requiring certain agencies to stream certain bulk data sets through DCStat (available at http://www.scribd.com/fullscreen/26442622?access_key=key-20rfsh26eu0ob66xlbmu). Instituted in 2004, DCStat was managed by the Office of the Chief Technology Officer (OCTO) "to provide key information about city conditions from multiple agencies/sources in a real time basis to facilitate accountable, cost-effective, data-driven, customer focused management."

[25] *See* http://data.dc.gov.

[26] *See* http://oca.dc.gov/page/agency-data-reports.

data is supplied through the District's Track DC portal.[27] The data appearing on the Track DC site is a prime example of how data can be aligned with strategic goals. Residents may submit feedback on agency responsiveness through Grade DC.[28]

It is obvious from the outset that the District is well-intentioned about making data publicly available and providing online tools to encourage public input. However, it has fallen short by failing to establish an open data and transparency policy which mandates open formats for government data, ongoing data publication updates, code sharing or publication in open source, and establishing independent oversight authority to ensure compliance with new open data measures. The District government's many disparate sites must be contained in such a way to offer the public access to malleable data that is both current and useful.

Any open government and transparency policy adopted by District leaders must be memorialized in the form of legislation directing implementation, compliance processes, and enforcement. Transparency of government operations and open data need not be mutually exclusive. Technology and its common uses by the public to gain access to information about the government goes far beyond FOIA requests and the proactive disclosure of certain records.[29] The release of data must be dictated as much by service delivery as by accountability.[30]

Machine Readable Data

On May 9, 2013 President Obama issued Executive Order 13642, *Making Open and Machine Readable the New Default for Government Information.*[31] The memorandum requires federal agencies to establish protocols for collecting, managing, and creating structured data in a format which will allow for ease of down-streaming, searching, and sorting. Open data formats include JavaScript Object Notation (JSON), Extensible Markup Language (XML), Comma-Separated Values (CSV), Tab-Separated Values (TSV), RDF Site Summary (RSS feeds), HTML, and plain text.[32]

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[27] *See* http://track.dc.gov.

[28] *See* http://grade.dc.gov.

[29] D.C. Official Code § 2-531 mandates the proactive disclosure of administrative staff manuals, final orders and opinions, statements of policy, contracts, budgets, etc. *See also* Mayor's Memorandum 2011-1 *Transparency and Open Government Policy*, which expands public access to documents and errs on the side of releasing exempted information under DC FOIA if is not harmful to public interest (http://www.dcfpi.org/wp-content/uploads/2011/01/2011-1-mayors-memorandum-re-transparency-and-open-government-policy.pdf) .

[30] Harlan Yu and David G. Robinson, *The New Ambiguity of Open Government*, 59 UCLA L. Rev. Disc. 178, 182 (2012).

[31] The Executive Order was published at 78 Fed. Reg. 16129 (May 14, 2013) and is also available at http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government-.

[32] Both the House and Senate have passed Digital Accountability and Transparency Acts (H.R. 2061 and S.994) to amend the Federal Funding Accountability and Transparency Act 2006 to expand the release of

Supplying bulk data in these formats proactively distributes data and will encourage public engagement.[33] The format provisions defining the scope of the data must be determined by OCTO.[34]

The use of the term "data" also encompasses the body of electronic documents that are currently proactively disclosed pursuant to D.C. Official Code § 2-536 and are maintained by each agency according to its respective document retention schedules.[35] Policy direction implementing standard data formats should be in alignment with FOIA and the public policy of the District that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

Mandate Ongoing Data Updates

Once standards have been established for maintaining bulk data and disseminating the data in structured formats, there must be a process in place for the continual update of the data. For example, the New York City Information Technology and Telecommunications Open Data Policy and Technical Standards Manual specifically addresses the maintenance of data and identification of *open data coordinators* in each city agency to identify the delivery of data sets to a single web portal.[36]

Creating an Open Data Policy

A specific authority should be identified to ensure agency compliance with open data policy. Compliance monitoring practices should be established in coordination with OCTO, and consideration should be given to identifying key positions within OCTO to be solely focused on data. It is not

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federal spending data in structured data formats. *See* Sunlight Foundation, *House keeps DATA Act Momentum Moving* (*http://sunlightfoundation.com/blog/2013/11/19/house-keeps-data-act-momentum-moving/*) .

[33] The City of New York is the gold standard in implementing policy and standards governing the publication of open data. Its open data policy (Local Law 11) was signed into law on February 29, 2012 (http://www.nyc.gov/html/doitt/html/open/local_law_11_2012.shtml) and has since spurred public private partnerships with the local tech and digital communities that have tapped into the city's Application Programming Interfaces (APIs) in innovative ways that are benefiting city operations and residents. *See*, for example, https://data.cityofnewyork.us.

[34] Although bulk data provides the most basic access to searching and retrieving government data, government bodies can also develop APIs that allow third parties to automatically search, retrieve, or submit information directly from databases online. *See* Open States Project at https://code.google.com/p/openstates/wiki/StateBestPractices.

[35] *See* 1 DCMR § 1508. However, it should be noted that many agencies have failed to update document retention schedules for many years and, in some instances, for decades. In coordination with the OOG, OCTO, and the Office of Public Records, document retention schedules must address documents maintained in hard, electronic, and data formats and should be reviewed every two years to ensure that maintenance schedules are harmonized with technological advances in document access.

[36] The manual is available at http://www.nyc.gov/html/doitt/downloads/pdf/nyc_open_data_tsm.pdf.

uncommon for jurisdictions to assign policy adoption and oversight responsibility to an independent body with specific open government mandates.[37]

Any open data policy must be forward thinking and include the input of not only each city agency, but also the community to (1) identify the data that will be made available; (2) create a process for scrubbing confidential information or personal identifiers; (3) create a process for ensuring data quality; (4) set out the goals of the policy; (5) clearly define means by which the policy will be regulated; (6) establish criteria for public collaboration with developers; (7) consider channels to share data among neighboring jurisdictions; and (8) publish a comprehensive list of all data sets.

It is encouraging that much of the work has been done to identify bulk data sets and to create dashboards for some agencies, but it is not enough that these dashboards exist for agency use only. They also must be available for public access. An agreed upon policy must encourage agency directors to overcome a culture of non-disclosure outside the confines and strictures of the city's FOIA. An effective open government, open data, and transparency plan can benefit government in numerous ways by improving agency productivity, enhancing city services, and encouraging entrepreneurship.

Office of Open Government Process for Mediating Freedom of Information Act Disputes Among Requesters and Agencies

Currently, there is no formal process by which the OOG may mediate FOIA disputes. D.C. Official Code § 2-593(c) allows the OOG to issue advisory opinions, but there is no language in the statute that either gives binding effect to the opinions or directs parties to follow an established process to seek formal opinions.

In the federal government, the Office of Government Information Services (OGIS)[38] has the authority to arrange mediation to resolve FOIA disputes,[39] but is only in the process of drafting procedures for

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[37] There are several open data policies that are instructive and approach policy establishment and compliance in different ways. For example, the federal government's Recovery Accountability and Transparency Board is a non-partisan, non-political agency tasked with managing FederalTransparency.gov in accordance with its mission: "To promote accountability by coordinating and conducting oversight of Recovery funds to prevent fraud, waste, and abuse and to foster transparency on Recovery spending by providing the public with accurate, user-friendly information."

The City of Chicago established an advisory group to bring organizational structure to the city's existing open data program. *See* http://www.cityofchicago.org/city/en/narr/foia/open_data_executiveorder.html).

New York State has a Committee on Open Government that oversees its FOIA statute, Open Meetings Act, and the Personal Privacy Protection Law. In 2012, the committee issued a report to the governor and legislature recommending the publication of open data sets as a natural extension of proactive disclosure requirements under FOIA. *See* http://www.dos.ny.gov/coog/pdfs/AnnualReport.pdf).

[38] OGIS is responsible for reviewing policies and procedures of administrative agencies under FOIA and for recommending policy changes to Congress and the President to improve the administration of FOIA.

[39] *See* https://ogis.archives.gov/about-ogis/ogis-procedures.htm#Mediation.

issuing advisory opinions.[40] Mediation proceedings are conducted in accordance with Administrative Dispute Resolution Act guidelines, but OGIS affirmatively acknowledges that reduction in FOIA litigation must first begin with changing the internal processes among federal agencies by encouraging open lines of communication among FOIA officers and staff, agency counsel, and ADR-trained professionals when responding to FOIA requests and by proactively interacting with requesters.[41]

In some states, dispute resolution and the issuance of advisory opinions are regulated by statute. For example, in Connecticut, the Freedom of Information Commission has authority to resolve FOIA disputes in formal contested hearings.[42] In Illinois, Public Access Counselors in the Office of the Attorney General resolve disputes.[43]

In fiscal year 2012, 6,008 FOIA requests were made of District government agencies. Of that number, there were 86 administrative appeals and 49 reported lawsuits – 33 of which were from the same plaintiff.[44] Such a small percentage of lawsuits does not warrant a formal mediation process, but does call for the option of having requesters lodge an administrative appeal with the OOG and for that process to be clearly defined as part of the OOG's enforcement authority. The issuance of any opinions should be binding and offer safe harbor to an agency, as is the case for opinions provided by BEGA. Considering that the volume of administrative FOIA appeals is relatively large compared to the number of contested ethics hearings conducted to date by the Board, it is not the OOG's recommendation that procedures for contesting hearings be undertaken at this time.

Open Meetings Act Enforcement Under the Code of Conduct

The OOG recommends that OMA be made part of the Code of Conduct. Pursuant to D.C. Official Code § 2-579, the OOG currently has the authority to bring a lawsuit in the Superior Court of the District of Columbia for injunctive or declaratory relief for OMA violations. If the court finds that 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 OMA, it may impose a civil fine of not more than $250 for each violation. That sum is *de minimis* at best and does not serve as a deterrent, as would a civil penalty of up to $5,000 imposed by the Board pursuant to section 221 of the Ethics Act (D.C. Official Code §

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[40] *See* https://ogis.archives.gov/about-ogis/ogis-procedures.htm#Advisory+Opinions.

[41] *See OGIS Policy Recommendations for Improving Freedom of Information Act Procedures March 13, 2013* at https://ogis.archives.gov/Assets/OGIS+2013+Recommendations.PDF.

[42] *See* C.G.S.A. § 1-205(d).

[43] Public Access Counselors may choose to resolve a request for review by mediation, or by means other than issuance of a binding opinion. Should an agency be found to violate the Act, it may seek administrative review by the Court. *See* 5 ILCS 140/9.5(f) and 11.5.

[44] *See Office of the Attorney General Fiscal Year 2012 FOIA Litigation Report* at http://os.dc.gov/sites/default/files/dc/sites/os/publication/attachments/FY2012FOIALitigationReport.pdf. The litigation cost to the District was $196,658.30.

1-1162.21) for a Code of Conduct violation. Therefore, the Council should amend the Code of Conduct to include OMA.

ADDITIONAL RECOMMENDATION OF THE OFFICE OF OPEN GOVERNMENT

1. ***Advisory Neighborhood Commissions (ANCs) should be included under the Open Meetings Act.*** The policy of the District leans strongly in favor of full transparency. The operative intent of OMA is that the public is entitled to know what decisions are being made in the interest of residents by District government employees and elected officials – whether it be by passing laws or making city government more responsive to the needs of the citizenry.[45] However, OMA specifically exempts ANCs from its requirements,[46] even though they are elected by the public to consider and offer advice on District business.[47] ANCs are not considered "public bodies" under OMA and, therefore, are not bound to properly and timely notice meetings, post agendas, and supply meeting minutes to the public. While ANCs are required under a separate statute to conduct open and transparent meetings,[48] compliance is mixed. Both ANCs and the public are confused as to what statutory provisions mandate transparency and mistakenly (although understandably) assume the applicability of the OMA.

   It is also common for members of the public, and even fellow ANCs, to submit multiple FOIA requests for meeting minutes and agendas, when by law, the documents should be made available upon request.[49] Bringing the ANCs under the umbrella of the OMA will eliminate

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[45] *See* D.C. Official Code § 2-572 ("The public policy of the District is that all persons are entitled to full and complete information regarding the affairs of government and the actions of those who represent them."). The same statement of policy is reiterated in FOIA (*see* D.C. Official Code § 2-531) and in Mayor's Memorandum 2011-1.

The District has long-recognized the important role ANCs play in the operation of city government. *See, e.g.*, 10-A DCMR § 2507.1 (noting that ANCs "provide a unique forum for seeking local input and expressing priorities on a range of land use issues").

[46] *See* D.C. Official Code § 2-574(3)(F).

[47] The ANC website describes the ANCs' role, in part, as follows: "The ANCs are the *body of government* [emphasis added] with the closest official ties to the people in a neighborhood. The ANCs present their positions and recommendations on issues to various District government agencies, the Executive Branch, and the Council." *See* http://dccouncil.us/offices/office-of-the-advisory-neighborhood-commissions.

[48] *See* D.C. Official Code § 1-309.11(c) (providing that "[e]ach Commission shall give notice of all meetings or convocations to each Commissioner, individuals with official business before the Commission, and residents of the Commission area no less than 7 days prior to the date of such meeting. Shorter notice may be given in the case of an emergency or for other good cause. Notice of regular and emergency meetings must include, but is not limited to, at least 2 of" certain means of posting or publishing notice.

[49] D.C. Official Code § 1-207.42 provides as follows:

> (a) All meetings (including hearings) of any department, agency, board, or commission of the District government, including meetings of the Council of the District of Columbia, at which

confusion over what meetings are public and which discussions may be had in closed session. It would also lead to better enforcement and ensure that *all* ANCs are complying with open government mandates and policies. Further, until such time that the ANCs are required to comply with OMA, the OOG should be required to train ANCs annually on compliance with D.C. Official Code §§ 1-207.42 and -309.11, inasmuch as those statutes fall squarely within the OOG's mission.

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official action of any kind is taken shall be open to the public. No resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at such meeting.

(b) A written transcript or a transcription shall be kept for all such meetings and shall be made available to the public during normal business hours of the District government. Copies of such written transcripts or copies of such transcriptions shall be available, upon request, to the public at reasonable cost.

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