Board of Ethics and
Government Accountability

2014 Best Practices Report

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Introduction

The Board of Ethics and Government Accountability (BEGA or Ethics Board) was established in 2012 to perform several core functions, including administering and enforcing the Code of Conduct.[1] The Ethics Board also is responsible for appointing the Director of the Office of Open Government (OOG). [2] The mission of the OOG, an independent office within BEGA, is to ensure that government operations at every level are transparent, open to the public, and promote civic engagement. Operationally, the OOG ensures greater government transparency through enforcement of the Open Meetings Act (OMA) and the Freedom of Information Act (FOIA).[3]

Over the past year, BEGA has continued to accomplish its mission by investigating and enforcing Code of Conduct violations and by conducting general and specialized training sessions for District government employees and public officials; it has also produced training materials, including, in particular, an updated Ethics Manual,[4] and has given advice, both informally and in formal written advisory opinions.[5] The

[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). 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/office-open-government for more information about OOG's mission and responsibilities.

[4] The Ethics Manual can be accessed at http://www.bega-dc.gov/sites/default/files/documents/Ethics Manual-11.1.14.pdf.

[5] Section 219 of the Ethics Act (D.C. Official Code § 1-1162.19) authorizes the Director of Government Ethics to issue an advisory opinion to a District government employee or public official who requests advice, as well as to issue an advisory opinion, on his or her own initiative, "on any general question of law he or she considers of sufficient public importance concerning a

experience gained from those efforts, coupled with insights gained from attending outside trainings, 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.[6]

The Ethics Board is required by the Ethics Act to include recommendations regarding 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 Ethics Board may also make recommendations on any other matters it deems appropriate.

With this report, the Ethics Board will again address the seven specific questions. However, as explained in certain sections below, lessons learned from another year of operations compel the Board to repeat a number of the recommendations made in its last Best Practices Report, in addition to making new recommendations. One of the new recommendations, in fact, is for the Council to relieve the Board from having to address the same seven questions in each of its annual reports and, instead, to authorize a more general commentary on best practices in government ethics.

The OOG will also provide in this report its recommendations on best practices to make District government operations more transparent and accessible.

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provision of the Code of Conduct over which the Ethics Board has primary jurisdiction." All of these opinions can be accessed http://www.bega-dc.gov/documents/advisory-opinions.

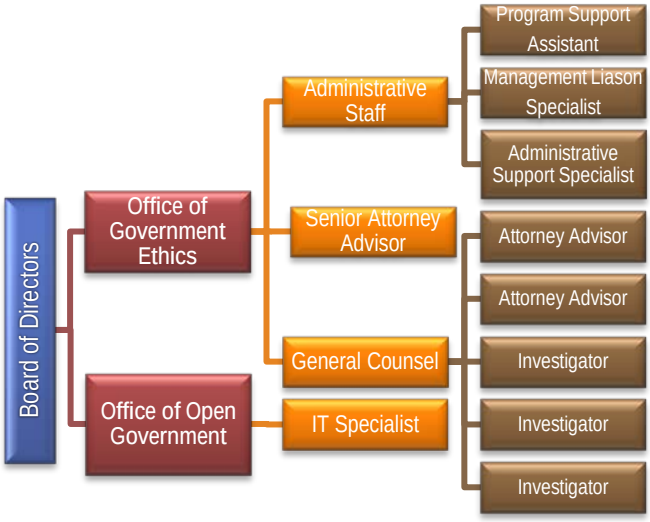
[6] *See* section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

In preparation for this report, BEGA staff conducted research and reached out to government ethics experts and organizations, relevant District government officials, and the general public for advice and input. On October 22, 2014, the Ethics Board held a symposium, "Keeping Government Accountable: Ethics and Open Government Considerations for Leaders and Citizens," which featured a panel discussion moderated by Dean Katherine Broderick of the David A. Clarke School of Law.[7] In addition to Darrin Sobin, the Director of Government Ethics, and Traci Hughes, the Director of the Office of Open Government, the panelists included Mark Davies, Executive Director of New York City's Conflicts of Interest Board, and Waldo Jaquith, Director of U.S. Open Data Institute. Members of the public also participated, including several who presented their views orally or in writing.[8]

[7] The Board wishes to thank Dean Broderick and her staff for hosting the event.

[8] Visit http://www.bega-dc.gov/meetings-and-events/bega-meeting/bega-best-practices-symposium for a video of the symposium and copies of the written statements that were submitted.

What follows is the Ethics Board's assessment of the seven specific questions, along with its recommendations and those of the OOG, for legislative or programmatic action.[9]



The **Office of Government Ethics** is an office within BEGA that investigates allegations of ethical misconduct concerning District government employees and officials. The OGE has authority over the District government's workforce of approximately 34,000 employees, including ethics oversight of the Mayor and the Council.

The **Office of Open Government** is an independent office under the Board of Ethics and Government Accountability. The OOG advises District Government on transparency and open government policies. It ensures more than 2,000 Boards and Commissions members and the Council comply with the Open Meetings Act; and that District Government Agencies are complying with the Freedom of Information Act.

[9] The Board also wishes to note with appreciation that a number of the recommendations made in its earlier Best Practices Reports are reflected in the Comprehensive Code of Conduct and BEGA Amendment Act of 2014 (BEGA Amendment Act), effective July 15, 2014 (D.C. Law 20-122; 61 DCR 8246). Discussion of the new law is contained in relevant sections of the text below.

Recommendations of the Board of Ethics and Government Accountability

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

In both its previous Best Practices Reports, BEGA recommended that the standards in the federal ethics laws that are applicable to District government employees be incorporated into the Code of Conduct, so that BEGA could civilly enforce those standards on a local basis. The principal reason 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.

BEGA views the Council's call for a revised Code of Conduct as its acceptance of this recommendation.[10] Indeed, the federal ethics laws represent a very real part of the reason why, as the Council observed in passing the BEGA Amendment Act, there is a "continued lack of uniformity and cohesion of the District's ethics laws." [11] Therefore, BEGA will incorporate the federal standards into a proposed Comprehensive Code of Conduct. The Council should then signal its intent to adopt the standards, together with existing interpretive opinions, in the committee report accompanying the legislation codifying the Comprehensive Code.

2. Should the District Adopt Post Employment Restrictions?

For the same reasons noted in the preceding section, BEGA will incorporate applicable post-employment restrictions contained in 18 U.S.C. § 207, one of the federal ethics

[10] *See* section 2(c) of the BEGA Amendment Act (amending section 209 of the Ethics Act (D.C. Official Code § 1-1162.09) to require Ethics Board to "submit to the Council for its consideration proposed legislation … to establish a revised Code of Conduct").

[11] Report of the Committee on Government Operations on Bill 20-412, the Comprehensive Code of Conduct and BEGA Amendment Act of 2014, at 4 (Council of the District of Columbia, March 25, 2014) (BEGA Amendment Act Committee Report).

laws applicable to District government employees, into the proposed Comprehensive Code of Conduct. Several other related considerations also support taking this course.

The District's post-employment restrictions are currently set out in 6B DCMR § 1811. In particular, 6B DCMR § 1811.1 provides that "District employees shall comply with the provisions of 18 U.S.C. § 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B."[12] However, while 18 U.S.C. § 207 applies to District government employees, the implementing regulations do not. See 5 C.F.R. § 2641.104, which defines "employee" to mean, "for purposes of determining the individuals subject to 18 U.S.C. § 207, any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President, an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia." (Emphasis added.)[13]

In a word, there is a "disconnect" between the federal statute and its implementing regulations. Therefore, incorporating the standards of 18 U.S.C. § 207 – as well as those of the other applicable federal laws – into the proposed Comprehensive Code of Conduct will go far toward accomplishing the goal of subjecting District government employees to one set of ethics standards rather than multiple and conflicting standards.[14]

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[12] *See also* 6B § 1811.2 ("District government employees and public officials are subject to certain provisions of the federal criminal conflict of interest provisions set forth in 18 U.S.C. §§ 201-216. Questions regarding the application of 18 U.S.C. § 207, 5 C.F.R. Part 2641, or these regulations, to specific factual circumstances, may be addressed to the Board of Government Ethics and Accountability.").

[13] *See also* Part 2635, 5 C.F.R., which sets out the regulations applicable to standards of ethical conduct for employees of the federal executive branch. Section 2635.102(a) defines "agency" to exclude "the Government of the District of Columbia."

[14] On a related note, the Department of Human Resources amended in its entirety Chapter 18 (Employee Conduct) of Title 6B DCMR, effective April 11, 2014. *See* 61 DCR 3799. The amendments to the post-employment restrictions included, in particular, a one-year "cooling-off" period that is narrower in scope than a similar provision in 18 U.S.C. § 207. *Compare* 6B

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

In its earlier Best Practices Reports, BEGA made certain recommendations regarding the interplay of ethics laws and contracting and procurement. One of those recommendations was 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. That recommendation will be reflected in the Comprehensive Code of Conduct by incorporating all relevant provisions of the Code of Ethics that has been adopted by the Office of Contracting and Procurement.

With this report, BEGA also stands by a related recommendation 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 Federal Acquisition Regulation (FAR) § 3.1003(a)(1), which requires federal contacts that are expected to exceed $5,000,000 in value and to take 120 days or more to perform to contain a clause setting out a Code of Business Ethics and Conduct.[15] See also, e.g., Conn. Gen. Stat. § 1-101qq(a) (requiring

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DCMR § 1811.10, *with* 18 U.S.C. § 207(a)(2) (two-year restrictions concerning particular matters under official responsibility). While BEGA did provide comments during the rulemaking notice period, overhauling Chapter 18, a constituent part of the Code of Conduct, occurred outside of BEGA's authority, thus serving to highlight one of the Council's concerns in passing the BEGA Amendment Act. *See* BEGA Amendment Act Committee Report at 5 ("Because the District Department of Human Resources could amend [Chapter 18] at any point, such a significant change could take place without the Council's or BEGA's involvement. Some District employees could then be governed by a different and conflicting set of ethics rules than others.").

[15] FAR contains policies and procedures for the award, management, and completion of federal contracts. *See, e.g.,* FAR § 3.1002(a) ("Government contractors must conduct themselves with the highest degree of integrity and honesty."). FAR § 52-203-13 prescribes the terms that must be included in the Code of Business Ethics and Conduct, which terms reference and incorporate many of the criminal fraud, conflict of interest, bribery, and gratuity offenses in Title 18 of the

person seeking large state construction or procurement contract to affirm "in writing or electronically, (1) receipt of [summary of state ethics laws], and (2) that key employees of such person have read and understand the summary and agree to comply with the provisions of state ethics law[s]");[16] Executive Order 2007-01S (requiring all contracts with State of Ohio to include certification related to ethics compliance); cf. D.C. Official Code § 2-220.04 (requiring contract terms related to the living wage).

4. Should the District Adopt Nepotism and Cronyism Prohibitions?

In both its previous Best Practices Reports, BEGA made certain recommendations related to nepotism, including 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. These recommendations will be incorporated into the proposed Comprehensive Code of Conduct.[17] Pending adoption of the Comprehensive Code, the Council should, nevertheless, amend section 1804 of the CMPA and 6B DCMR § 1806 to clarify that the restrictions on nepotism relate to both paid and unpaid labor. The courts in other jurisdictions, notably Florida, which has an anti-nepotism statute substantively identical to CMPA section 1804, have reached decisions that support this recommendation.[18]

United States Code, thereby prohibiting, in a general sense, unethical conduct by contractors. *See also* FAR § 3.1003(a)(2) (providing for suspension and/or debarment of contractors who knowingly fail timely to disclose "credible evidence" of Title 18 violations or violations of civil False Claims Act).

[16] The Connecticut statute also provides that "[n]o state agency or institution or quasi-public agency shall accept a bid or proposal for a large state construction or procurement contract without such affirmation."

[17] BEGA notes that, subsequent to its second Best Practices Report, the Department of Human Resources implemented the anti-nepotism provisions of section 1804 of the CMPA as part of the rulemaking discussed in footnote 15, above. Those provisions are now set out in 6B DCMR § 1806 and, as such, are part of the Code of Conduct. *See* section 101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)) (defining Code of Conduct to include "Chapter 18 of Title 6B of the District of Columbia Municipal Regulations").

5. Should the District Criminalize Violations of Ethics Laws?

In both its previous Best Practices Reports, 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), the latter section being a constituent part of the Code of Conduct. However, several considerations have combined so as to warrant withdrawing this recommendation.

First, the more serious violations of section 223 of the Ethics Act would likely be violations of the federal criminal conflict of interest statute, 18 U.S.C. § 208, which applies to all District government employees. Such matters would be handled by the United States Attorney for the District of Columbia (USAO).

Second, with the BEGA Amendment Act, the Council accepted BEGA's recommendation that section 215 of the Ethics Act (D.C. Official Code § 1-1162.15) be amended 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 (D.C. Official Code § 1-1162.21) and refer the matter to the Office of the Attorney General for the District of Columbia (OAG) or to the USAO for enforcement or prosecution. The result of the amendment is akin to the enforcement scheme, discussed below, that BEGA has in mind in continuing to recommend concurrent jurisdiction over non-compliant lobbyists.

[18] *See Galbut v. City of Miami Beach*, 605 So.2d 466, 467 (Fla. Dist. Ct. App. 1992) (rejecting contention that Florida statute applies only to paid positions of employment); *cf. State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397, 400 (Mo. 1994), abrogated on other grounds by *State v. Olvera*, 969 S.W.2d 715 (Mo. 1998) (rejecting contention that policy behind anti-nepotism provision in state constitution did not support public official's ouster, where official participated in vote to appoint relative to unpaid position).

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

BEGA consistently has recognized the importance of being able to investigate alleged ethical violations by the District's public officials and to censure them publicly for proven violations. In both of the earlier Best Practices Reports, however, BEGA left to the Council the ability to exercise its Home Rule Act authority to expel one of its own members.[19]

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

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

BEGA is pleased and encouraged that the Council's efforts in the area of campaign finance reform have continued, especially with the passage of the Campaign Finance Reform and Transparency Amendment Act of 2013 (CFRA).[21] According to the accompanying committee report, the CFRA "respond[ed] to the District's most pressing and recurring campaign finance and ethics concerns by enacting significant

[19] *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").

[20] 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.)

[21] Effective February 2, 2014 (D.C. Law 20-79; 61 DCR 153).

reforms." [22] One of those reforms is to require lobbyists to disclose bundled contributions[23] when filing their activity reports. BEGA will promulgate rulemaking to implement the new filing requirement as part of its broader rulemaking effort, discussed below, to address electronic filing of all reports required by the Ethics Act. In so doing, BEGA will be doing its part to address the "definite need to enhance the accessibility of all information provided on both Activity Reports and Registration Forms."[24]

[22] Report of the Committee on Government Operations on Bill 20-76, the Campaign Finance Reform and Transparency Amendment Act of 2013, at 2 (Council of the District of Columbia, October 22, 2013) (CFRA Committee Report). *See also id.* ("The Committee Print of B20-0076 incorporates the best aspects of [the other campaign finance bills introduced during Council Period 20] as well as the best practices from other jurisdictions.").

[23] The CFRA amended section 101 of the Ethics Act (D.C. Official Code § 1-1161.01) by adding a new paragraph (3A) to define "bundled" (or "bundling") as meaning "to forward or arrange to forward two or more contributions from one or more persons by a person who is not acting with actual authority as an agent or principal of a committee. Hosting a fundraiser, by itself, shall not constitute bundling."

[24] CFRA Committee Report at 15. *See also id.* ("[D]isclosure of bundled contributions is meaningless without the capability to effectively and efficiently conduct a search of filed Activity Reports on BEGA's website.").

Additional Recommendations of the Office of Government Ethics (from 2013)

The following recommendations were made by BEGA in its second Best Practices Report, but, as explained above in the Introduction, warrant repeating:

Expanding Definition of "Conflict of Interest." BEGA's recommendation that the Council amend section 223(a) of the Ethics Act (D.C. Official Code § 1-1162.23(a)) to include non-financial, as well as financial, conflicts of interest will be incorporated into the proposed Comprehensive Code of Conduct. In that regard, BEGA anticipates adding a new definition to reflect the fact that there are, as one commentator has observed, "many personal interests that create a conflict, even though no money is involved."[25] Adding the definition will follow the lead of other jurisdictions. For example, section 2-801 of Atlanta's Code of Ethics defines the term "personal interest" to mean "any interest arising from relationships with immediate family or from business, partnership or corporate associations, whether or not any financial interest is involved."[26]

Tightening Requirement to File Financial Disclosure Statement When Circumstances Change. Currently, the filer of a public financial disclosure statement is not required to report an actual conflict of interest until filing his or her disclosure statement for the following year. This lag time in the reporting requirement clearly works against BEGA's ability to audit disclosure statements, as required by section 224(g) of the Ethics Act (D.C. Official Code § 1-1162.24(g)). Therefore, BEGA's recommendation that the Council amend section 224 to require that public filers file an amended financial disclosure statement when an actual conflict of interest arises will be incorporated into the proposed Comprehensive Code of Conduct. Pending

[25] Robert Wechsler, *Personal, Non-Financial Interests* (Feb. 7, 2009, 3:56 PM) http://www.cityethics.org/node/635 (last visited Nov. 16, 2014).

[26] Atlanta's Code of Ethics can be accessed at http://www.atlantaethics.org/code-of-ethics-4/ethics-issues/conflicts-of-interest (last visited Nov. 16, 2014).

adoption of the Comprehensive Code, the Council should accept the recommendation and amend section 224 accordingly.[27]

At the same time, the Council also should amend section 224 further by adding a new subsection to provide express authority for the Director of Government Ethics, upon a showing of good cause, to grant public filers extensions of up to 30 days to file financial disclosure statements. To date, extension requests have been granted based on two regulatory provisions.[28]

Barring Non-Compliant Lobbyists from Registering. There is no current prohibition against an individual who is required to file as a lobbyist from filing an annual registration form, if he or she owes BEGA unpaid fines or registration fees. Therefore, BEGA's recommendation that the Council amend section 229 of the Ethics Act (D.C. Official Code § 1-1162.29) to provide that a registrant cannot file an annual registration form without clean hands will be incorporated into the proposed Comprehensive Code of Conduct. 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. Pending adoption of the Comprehensive Code, the Council should accept the recommendation and amend section 229 accordingly.

Requiring Electronic Filing for Lobbyists. BEGA is not renewing its recommendation that it be authorized to charge an administrative fee for lobbyists who file paper activity reports. Rather, BEGA will act through rulemaking to exercise its

[27] *Cf.* section 225(b) of the Ethics Act (D.C. Official Code § 1-1162.25(b)) ("Upon review of the confidential [financial disclosure] report, any violation of the Code of Conduct found by the agency head shall be forwarded *immediately* to the Ethics Board for review." (emphasis added)).

[28] *See* 3 DCMR § 5702.4 ("A public official may request the Director, in writing, for an extension of up to thirty (30) days in which to submit the FDS.") and 3 DCMR § 5702.5 ("The Director may extend the period of time for submission of the FDS by a public official, for good cause shown.").

existing authority [29] to require electronic filing of lobbyist activity reports and registrations, as well as to require electronic filing of public financial disclosure statements by public officials and electronic filing of public financial disclosure certifications by Advisory Neighborhood Commissioners (ANCs). The rulemaking will provide for waivers in those cases where good cause can be shown. The overall intent of the rulemaking is to make information more readily available to the public as a result of a more efficient and error-free filing process.

Clarifying Reporting Requirements for Lobbyists who do not Engage in Lobbying Activities During a Particular Reporting Period. BEGA's recommendation that the Council 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, will be incorporated into the proposed Comprehensive Code of Conduct. [30] Such an amendment would obviate the argument, raised by at least one late filing lobbyist that section 230(c) only requires activity reports to be filed if activity during the reporting period has occurred. Accepting that argument would make it impossible for BEGA auditors to distinguish between non-compliant lobbyists and those who did no lobbying for a given reporting period without contacting each registrant for confirmation. Therefore, pending adoption of the Comprehensive Code, the Council should accept BEGA's recommendation and amend section 230(c) accordingly.

[29] *See* section 211(8) of the Ethics Act (D.C. Official Code § 1-1162.11(8) ("The Director of Government Ethics, approved by the Ethics Board, shall have the power to … "[r]equire any person to submit through an electronic format or medium a report required pursuant to [the Ethics Act].").

[30] Section 230(c) currently provides 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."

Enlarging the Time to File Activity Reports. The Council also should amend section 230 of the Ethics Act to allow for enlarging the time in which lobbyists are required to file activity reports. Section 230(a) currently provides that "[e]ach registrant shall file with the Director of Government Ethics between the 1st and 10th day of July and January of each year a report signed under oath concerning the registrant's lobbying activities during the previous 6-month period." BEGA's experience with enforcing the filing requirement (including the Ethics Board's having to respond to requests for waivers of the penalties imposed on late filers), however, coupled with the facts that both filing periods are shortened by federal holidays and that section 230 makes no provision for granting extensions, supports the benefit of enlarging the filing deadlines. Subsection (a), then, should be amended to require activity report filings "between the 1st and 15th day of July and January of each year," and a provision should be added to authorize the Director, upon a showing of good cause, to grant lobbyists extensions of up to 30 days to file their activity reports.

Service by Lobbyists on Certain Boards and Commissions. BEGA's recommendation that the Council amend section 231(f) of the Ethics Act (D.C. Official Code § 1-1162.31(f))[31] to clarify that lobbyists who are required to register pursuant to the Act are prohibited from serving on certain boards and commissions has been overtaken by the D.C. Circuit's decision in Autor v. Pritzker, 740 F.3d 176 (D.C. Cir. 2014), in which the court held, among other things, that federally registered lobbyists pled a viable First Amendment unconstitutional conditions claim regarding the President's ban on lobbyists serving on advisory committees. Therefore, informed by the court's decision and any further staff research,[32] BEGA's position on the issue of service by lobbyists on boards and commissions will be reflected in the proposed Comprehensive Code of Conduct.

Concurrent Criminal/Civil Jurisdiction over Non-Compliant Lobbyists. In keeping with the general principle that the District should be able to regulate and enforce its ethics laws, BEGA stands by the recommendation that it be authorized to exercise concurrent civil jurisdiction to enforce Part E (Lobbyists) of the Ethics Act.[33] Accordingly, the Council should amend section 232(a) of the Act to extend BEGA's authority over non-compliant lobbyists. By extending jurisdiction to include both criminal and civil penalties, less serious offenses could be pursued by BEGA, while the more serious violations could be left to the USAO. At the same time, the Council also

[31] 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."

[32] BEGA also will be mindful of the Council's viewpoint. *See* CFRA Committee Report at 12 ("The act of lobbying, whether by a registered lobbyist or an advocate, is an exercise of the constitutional right to petition the government and can have the effect of magnifying underrepresented voices. At the same time, the District regulates lobbyists and those who employ them in order to prevent improper conduct and disproportionate access to decision makers.").

[33] Section 232(a) of the Ethics Act (D.C. Official Code § 1-1162.32(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.

should amend section 232(b) of the Ethics Act[34] 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 an Ethics Board finding of a Code of Conduct violation.

Prohibiting Gifts from Lobbyists. Council Rule III(e)(1) of its Code of Official Conduct[35] 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.) BEGA's recommendation that the Council prohibit soliciting or accepting any gifts from lobbyists will be incorporated into the proposed Comprehensive Code of Conduct. Gifts from lobbyists should be avoided, no matter the value. Lobbyists are in the business of attempting to influence legislative activity 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. Therefore, pending adoption of the Comprehensive Code, the Council should accept BEGA's recommendation and, beginning in its next Period, amend any provision substantively similar to Rule III(e)(1) accordingly.

Providing Consistency in the Definition of the Term "Employee." BEGA's recommendation that the Council 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 will be incorporated into the proposed Comprehensive Code of Conduct. The CMPA currently defines the term "employee" as meaning, generally, "an individual who performs a function of the District government and who receives compensation for the performance of such

[34] Section 232(b) provides that "[i]n addition to the penalties provided for in [section 232(a)], any person convicted of the misdemeanor specified in that section may be prohibited from serving as a lobbyist for a period of 3 years from the date of the conviction."

[35] The Council's Code of Official Conduct is a constituent part of the Code of Conduct. *See* section 101(7)(A) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(A)).

services," whereas the Ethics Act defines the term as "a person who performs a function of the District government and who receives compensation for the performance of such services, or a member of a District government board or commission, whether or not for compensation." Making the definitions in the two laws more consistent would serve to close the gap in coverage as between compensated District government employees and certain uncompensated public officials. Therefore, pending adoption of the Comprehensive Code, the Council should amend section 301(7) of the CMPA accordingly. Amending the CMPA, furthermore, would conform with the action taken by the Council in the BEGA Amendment Act, which added new section 201a to the Ethics Act to provide that "[the Ethics Act] and the Code of Conduct shall apply to all employees and public 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."

Mandatory Annual Ethics Training for all District Government Officials and Employees. BEGA's recommendation that mandatory ethics training be reflected in the official policies of both the executive and legislative branches of the District government will be incorporated into the proposed Comprehensive Code of Conduct. As noted in the second Best Practices Report, ethics is a fluid area, and mandatory training to keep pace with ongoing developments is a best practice followed in other jurisdictions. That said, meeting BEGA's training responsibilities has become a growing challenge, and, as discussed below, a request will be made for funds in fiscal year 2016 to staff a full-time position for an attorney whose primary responsibility will be to focus on training delivery, outreach, and advice-giving.

New Recommendations of the Office of Government Ethics

Clarifying the Term "Candidate" for Purposes of Financial Disclosure Statement Filings. Candidates for election to the Democratic State Committee (DSC) run for a position that is part of a political party, not part of the District government. Nevertheless, the election itself is subject to regulation by the Board of Elections. As a

result, DSC candidates fall under the definition of "public official" for purposes of filing financial disclosure statements. On the other hand, elected DSC members are not required to file the statements because they receive no salary or expenses from the District government, perform no governmental duties, and have no control over any government funds. The proposed Comprehensive Code of Conduct, therefore, will seek to eliminate this anomaly. In the interim, the Council should amend section 101 of the Ethics Act (D.C. Official Code § 1-1161.01) – most likely paragraph (35) – which defines "office" to include "an official of a political party." At the same time, the Council also should amend section 101(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 Board of Elections (BOE), but do not thereafter obtain any signatures, announce their candidacy, or file anything with BOE at all. Such an amendment narrowing the definition, preferably to one encompassing only successful candidates, would be more logical and greatly facilitate financial disclosure enforcement efforts.

Best Practices Reporting Requirement. Section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)) should be amended to eliminate the requirement to report each year on the seven specific questions. This report marks the third year of BEGA's having to report on those same questions, and the section should be amended to read more generally as follows:

> The Ethics Board shall conduct a detailed assessment of ethical guidelines and requirements for employees and public officials, to include a review of national best practices of government ethics law, and produce a report of its recommendations by January 15 of each year.

The proposed language also would ensure delivery of Best Practices Reports to new elected officials, who traditionally take office on January 2 of the year following an election.

Enlarging the Size of the Ethics Board. The Council should amend section 203(a) of the Ethics Act (D.C. Official Code § 1-1162.03(a)) to increase the size of the Ethics Board from 3 to 5 members.[36] By way of comparison, COIB has a 5-member Board. Mark Davies, who has been the Board's Executive Director since 1994, said at the October 2014 symposium that, in his experience with different sized COIB memberships, the present 5-member body has worked the best. Here, an increase in the size of the Ethics Board would, for example, allow for 3-member hearing panels in contested cases and insulate against lack of quorum issues with the existing 3-member Board.

Authorizing Sanctions. The Council should amend section 214 of the Ethics Act (D.C. Official Code § 1-1162.14) by adding a new subsection to authorize the Ethics Board to impose monetary sanctions on parties for any actions taken during contested cases, including the filing of motions, that are without support in law or fact, that are taken with the intent to cause unnecessary delay, or that otherwise are taken in bad faith. The ability to impose monetary sanctions in contested cases would complement the Board's existing authority to require the payment of reasonable fees in certain circumstances following the dismissal of meritless claims[37] and also would augment the Board's inherent authority to control its proceedings. Administrative bodies in other jurisdictions have been granted the power to impose monetary sanctions on parties appearing before them.[38]

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[36] Such an amendment also should provide that no more than 3 of the 5 members "shall be of the same political party."

[37] *See* section 216(b) of the Ethics Act (D.C. Official Code § 1-1162.16(b)) ("The Ethics Board may require a person who made or caused to be made a claim, complaint, or request for investigation in bad faith and without merit to pay reasonable fees for time spent reviewing or investigating the claim, complaint, or request for investigation.").

[38] *See, e.g.,* Cal. Gov't Code § 11455.30 (authorizing Administrative Law Judges to "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay"); *cf.* Rule 11(c), Superior Court Rules

Confidential Financial Disclosure Statements. BEGA recommends that the Council make several amendments to section 225 of the Ethics Act (D.C. Official Code § 1-1162.25), which governs the filing of confidential financial disclosure statements.

First, subsection (b) should be amended to require agency heads, after their review of the disclosure statements, to report employees' outside employment and their receipt of gifts from prohibited sources. Currently, agency heads are required to report only potential violations of the Code of Conduct to BEGA.

Second, subsection (c) should be amended to require agency heads, by June 1st of each year, to report to BEGA the names of those employees who did not file a disclosure statement. Currently, agency heads are required to provide BEGA with only a list of confidential filers by May 1st of each year. The subsection also should be amended to require BEGA to publish the list of confidential non-filers in the *D.C. Register*, along with the list of those who failed to file required public financial disclosure statements.

Third, the Council should add a new subsection to section 225 to establish a 30-day service requirement for confidential filers of financial disclosure statements. The new provision would be similar to section 224(f), which applies to public filers, and would read as follows:

> For the purposes of a report required by this section, a person shall be considered to have been an employee if he or she has served as an employee for more 30 days during any calendar year in a position for which reports are required under this section.

– Civil (authorizing court, "after notice and a reasonable opportunity to respond," to impose sanctions on parties and attorneys for certain forms of offending conduct, *e.g.,* filing a motion "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation").

BEGA has interpreted the 30-day service requirement to extend to all filers except candidates. Codification of the requirement in section 225 for confidential filers would allow staff to refer to a specific D.C. Official Code section when explaining the requirement, especially to those agency personnel who assist in designating confidential filers.

Additional BEGA Employee to Focus on Training and Outreach. Training is one of BEGA's core responsibilities[39] and, as such, has proven to be a very effective means of agency outreach. Training, however, has also come to consume an ever increasing amount of staff time. To illustrate, in fiscal year 2014, the staff conducted 62 trainings, including its full two-hour ethics training, and specialized trainings such as post-employment, Hatch Act, and lobbyist trainings. This experience speaks to the need, which will be voiced in the next budget cycle, for another full-time employee whose job would focus on day-to-day training and outreach efforts.[40] The request for the additional staff member will be for an attorney because those who attend the training sessions often seek ethics advice, either at the time or in follow-up calls or emails.

Review of Contributions and Donations to ANCs. D.C. Official Code § 1-309.10(l) provides, in pertinent part, that "[n]o [Advisory Neighborhood] Commission may solicit or receive funds unless specifically authorized to do so by the Council, except that receipt of individual contributions of $1,000 or less need not be approved by the Council." Aside from having to include "details of all contributions" in their quarterly reports to the District of Columbia Auditor, *id.*, there is no current review mechanism or process in place regarding less than $1,000 contributions or donations to ANCs. Indeed, OAG has opined that ANCs are not subject to the Acceptance and use of gifts

[39] *See* section 202(a)(5) of the Ethics Act (D.C. Official Code § 1-1162.02(a)(5)) (requiring BEGA to "[c]onduct mandatory training on the Code of Conduct").

[40] New York City's COIB, for example, has a Training and Education Unit, headed by a Director, which conducts training sessions and develops educational videos, posters, pamphlets, newsletters and other media.

by District Entities Act of 2000 (D.C. Law 13-172; D.C. Official Code § 1-329.01), which is part of the Code of Conduct.[41] Therefore, there need to be consequences where none currently exist, and the Council should amend the law to subject ANCs to BEGA's jurisdiction regarding less than $1,000 contributions or donations and for their failure to report contributions or donations of more than $1,000.

Disclosure of Outside Employment. Pending adoption of the Comprehensive Code of Conduct, the Department of Human Resources should amend 6B DCMR § 1807 to provide that agency employees who are required to file confidential financial disclosure statements augment their filing by providing the details of any outside employment. This recommendation is made in conjunction with that above to amend section 225(b) of the Ethics Act to require agency heads to report to BEGA outside employment by confidential filers. The combined effect of adopting the two recommendations would operate to heighten overall awareness of potential conflicts of interest posed by employees having outside jobs.

State Board of Education and the Local Hatch Act. The Local Hatch Act permits District government employees to file as candidates for non-partisan offices in the District.[42] There are, however, only two such offices, the State Board of Education (SBOE) and the various ANCs. The problem is compounded by the fact that the law establishing the SBOE operates to prohibit a successful District employee candidate from retaining his or her job and serving as an SBOE member.[43] The law should be amended only to prohibit SBOE members from being employed by the Board itself.

[41] *See* section 101(7)(G) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(G)).

[42] *See* D.C. Official Code § 1-1171.02(a)(3) (prohibiting District employee from "[f]iling as a candidate for election to a partisan political office").

[43] *See* D.C. Official Code § 38-2651(e)(1)(d) (providing that each SBOE member "[n]ot be an officer or employee of the District of Columbia government or of the Board").

Subjecting Public Charter School Employees to BEGA's Authority. Employees of the public charter schools are not District government employees.[44] For all intents and purposes, however, public charter school employees function no differently than employees of the District of Columbia Public Schools, and the line between the two groups is blurred further by the fact that the former have the word "public" in their title. Therefore, public charter school employees should be held to the same standard by being Subject to BEGA's jurisdiction to enforce the Code of Conduct.

Requiring dc.gov Email Addresses. Not all District government agencies use dc.gov email addresses. For example, the Housing Authority uses dchousing.org; the Public Charter School Board uses dcpcsb.org; and the Board of Elections still uses dcboee.org., even though it is no longer the Board of Elections and Ethics. Employees in all District government agencies entities should have dc.gov email addresses and be required to use them – and only them – to conduct official business. Such a requirement would facilitate BEGA investigations (as well as those conducted by the District of Columbia Auditor and the Office of the Inspector General) when requesting email messages and also would serve to identify to members of the public who is – or who is not – a District employee.

Reservation of event space in the Wilson Building. At present, reserving space in the Wilson Building for any event requires the endorsement of a Councilmember, whether the event is to take place on the Council's side of the building or on the Mayor's. That requirement is at odds with the history of the building itself, which, for many years, was known as the District Building, and with the philosophy underlying the Local Hatch Act that the District government should not appear to be a partisan government. Therefore, BEGA recommends that the Council adopt a more open reservation policy by eliminating the endorsement requirement.

[44] *See* D.C. Official Code § 38-1802.07(c) ("Notwithstanding any other provision of law and except as provided in this section, an employee of a public charter school shall not be considered to be an employee of the District of Columbia Government for any purpose.").

Recommendations of the Office of Open Government

Significant steps have been taken over the last year to make District government more transparent and accessible to the public in ways that are in tune with technology and the 24-hours-a-day expectation of access to information. There is, however, much work to be done as the District begins to shift its focus on disclosure from a baseline assumption that government records are not to be released until proven otherwise, to the acknowledgement that there is a fundamental utility to agencies and the government as a whole to provide information proactively. If the OOG is to fulfill its mission, the Executive Office of the Mayor must afford the OOG a greater role in recommending and implementing open government and transparency mandates. Below are the recommendations of the OOG on best practices, as the District looks toward mandating open government protocols and implementing public records systems that are interoperable, efficient, and user-friendly.

Open Data and Transparency Legislation is Critical to Sustained Progress on Open Government

On October 25, 2013, Mayor Gray announced his intention to implement the Transparency and Open Government Initiative. The result was Mayor's Order 2014-170, Transparency, Open Government and Open Data Directive (hereinafter "Directive"), which spurred the re-launch of the data.dc.gov website. The site now includes nearly 600 District government datasets and some 1,500 federal datasets in machine-readable formats, including JavaScript Object Notation, Extensible Markup Language, Comma-Separated Values (CSV), and Geographic Information Systems JASON.[45]

The continued publication of datasets is critical to overall transparency, agency accountability, government efficiency, and government responsiveness. The revamped

[45] The data now offered on data.dc.gov is made available to the public free of licensing and copyright restrictions. Any proposed legislation must hold true to the Creative Commons standard, allowing users to access, build upon and modify District government data.

data portal and the issuance of the Directive represent a remarkable leap since the OOG's recommendations[46] one year ago. However, now that the Office of the Chief Technology Officer (OCTO) has identified some bulk data, and provides Application Programming Interfaces allowing users to search, retrieve, or submit information directly from online databases, the policy mandated under the Directive must now be committed to legislation.

The publication, maintenance, and archival of data must be clearly set out in a permanent measure so as not to leave any discretion among the Executive and the subordinate and independent agencies that the default is indeed set to open. Additionally, the legislation[47] must include a means of archival and retention of data[48]

[46] The OOG recommended in last year's Best Practices Report that the District implement a comprehensive citywide open data and transparency policy consistent with that of the federal government requiring all agencies to publish data in machine-readable formats.

[47] The District need not re-invent the wheel. There are numerous examples from jurisdictions, both near and far, which have adopted open data legislation.

The State of Illinois adopted in March, 2014, the Open Operating Standard Act (H.B. 1040), requiring agencies to inventory data sets; establish maintenance guidelines; and to publish a technical standards manual identifying the reasons for the selection of each technical standard and the types of data for which each is applicable.

The State of Maryland adopted in May, 2014, the Open Data Policy – Council on Open Data (S.B. 644), requiring data to be published in machine-readable formats and establishing a Council on Open Data to recommend guidelines for publishing data. The Montgomery County Government Open Data Implementation Plan is highly instructive, and provides processes that may be memorialized in legislation submitted to the Council for its approval.

The State of Washington adopted in February 2014, H.B. 2202, establishing an open data policy requiring agencies to publish data in a single portal; establish a timeline for publishing data; include in compliance plans the reasons why certain data may not be made available and steps to be taken to publish the data; description of agency changes to source data, and notations regarding why the data was modified.

In effect for nearly three years, the city of New York adopted in February 2012, Local Law 11 of 2012 – Publishing Open Data, requiring the adoption of technical standards for publishing data; agency compliance plans to include an inventory of data for publication; and an explanation of

and address protocols for inter-agency and intra-agency access to restricted data.[49] Accordingly, the OOG recommends that legislation (1) memorialize the policy set out in the Directive; (2) require agencies to submit full inventories of data; (3) create a process for ensuring data quality; (4) require all published data to be made available to the public free of licensing restrictions; (5) create a process for ensuring data quality and requiring public notice when data is modified; (6) define clearly the means by which the legislation will be regulated; (7) establish criteria for inter-agency and intra-agency sharing of data through memoranda of understanding; and (8) ensure agency document retention schedules are properly modified to include agency data and the archival of agency data.[50]

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why certain datasets may not be published.

See http://sunlightfoundation.com/policy/opendatamap/ for a more exhaustive list of open data legislation and policies currently in place at state, local, and municipal levels.

[48] As the District contemplates open government legislation, it must also ensure that open data mandates are included in agency document retention schedules. *See* 1 DCMR § 1508 (Disposition of Public Records). Document retention schedules must address documents maintained in hard, electronic, and data formats. Data formats should be reviewed every two years to ensure maintenance schedules correspond with data publication and technical standards. Additionally, documents currently maintained by agencies in hard copy must be properly archived and digitized.

[49] The OOG does not recommend that all data be made available. Restricted data encompasses the body of records maintained by an agency, but may be exempt from disclosure under D.C. Official Code § 2-534. Open government legislation must align with FOIA allowing for expansive disclosure, while aiming to protect from release personal identifying information and other records that are exempt under FOIA.

[50] *See* The LOCKSS (Lots of Copies Keep Stuff Safe) Program. The program is based at Stanford University Libraries and provides low-cost, open source tools to preserve digital content. The Directive established the Mayor's Open Government Advisory Group to make recommendations on transparency and Open Government. The Advisory Group should be broadened to include the executive director of the D.C. Public Library.

Participatory Budgeting

The District government should seize the opportunity for complete engagement by including in open government legislation a requirement that the city also adopt Participatory Budgeting (PB). PB has been proven to increase transparency, promote greater civic engagement, and build trust in government and the services it provides. Although there have been recent efforts to make the city's budget process more transparent,[51] there are no mechanisms (other than an opportunity for public testimony) in place for involving District residents in the decision-making process of public budgeting. Additionally, and perhaps most importantly, the budget itself is tremendously difficult to navigate and understand in its current structure. The budget is very difficult to review because it is contained in a completely static document and, as such, represents the antithesis of a machine-readable and searchable record.

The OOG recognizes that moving beyond institutional inhibitions about fiscal transparency to complete public engagement through PB is a monumental vault. However, the District has a wealth of resources[52] upon which to rely to shine a brighter light on its budget so that tax dollars are more efficiently distributed and spent. The budget is fodder for possible new collaborations with organizations that are right in the District's backyard – the DC Fiscal Policy Institute, the World Bank Group, and the Center for Data Innovation – to name a few. Ultimately, better budgeting data will lead

[51] In 2011, District government agencies followed a "division-based" budget structure to submit agency financials. The reporting required more detailed information on spending, tying budget allocations to performance management. Agency fiscal and performance overviews are found on Track DC, but do not provide a means for significant public engagement on where public funds are allocated.

[52] In 2011, New York City began a PB process allowing residents a say in the allocation of capital discretionary funds. Since then, PB has been extended to 24 districts, giving residents the decision-making power of nearly $25 million toward locally developed projects, proposals, and initiatives. *See* http://pbnyc.org/.
In 2013, San Francisco launched a pilot program allowing residents in District 3 the ability to decide how to spend $100,000 in discretionary funds. PB has now been extended to Districts 7 and 10. *See* http://www.sfpb.net/.

to better management of resources and a government that is truly responsive to its citizenry.

Demystify the Data

The collection and release of data is more than the mere reduction of data to zeroes and ones and colorful graphic displays. Data is the collection of agency, city, neighborhood, and community information that should be used not only to promote transparency, but to be of equal value to agency personnel to aid in better decision making and policy implementation. Personnel should be properly trained on how to analyze the data generated by their respective agencies. Further, for the larger data mining tasks, the District would do well to incorporate into its transparency program an Analytics Division at the mayoral level and charge the unit with mining large data sets with the aim of improving city services.[53]

The Freedom of Information Act

On July 21, 2014, the Executive Office of the Mayor launched FOIAXpress – the city's first central web portal for submitting, processing, and supplying documents in response to FOIA requests. Currently, 65 agencies have licenses to use FOIAXpress.[54] The OOG recommends that all agencies, both subordinate and independent, be required to process all FOIA requests through the FOIAXpress portal and that proper budget allocations be made to procure the licenses. Those agencies which process a small number of requests will have the ability to share concurrent licensing with other similarly situated agencies to reduce costs. As the OOG oversees compliance with FOIA, the OOG recommends that, as discussed below, the Mayor

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[53] *See* Data for Better State and Local Policymaking, available at http://www.datainnovation.org/2014/12/data-for-better-state-and-local-policymaking/.

[54] The Executive Office of the Mayor indicated licenses were procured for those agencies that process 10 or more FOIA requests per year. The numbers of requests were gleaned from the FY 2013 Agency FOIA Reports.

delegate the administration of FOIAXpress to the OOG[55] and allow it to work directly with FOIA officers on use of the system and to pair non-licensed agencies in a manner that is efficient for agencies and makes sense to the public.

Further, the OOG recommends that D.C. Official Code § 2-531 be amended to require all agencies to process all FOIA requests through the FOIAXpress portal, and that all documents provided in response to requests be made available through the Public Access Library (PAL) – provided that all documents are properly scrubbed for confidential and/or other personally identifying information. Such proactive disclosure should be consistently reviewed as part of agency record management systems.[56]

FOIA Annual Reporting Should Be Administered Through the Office of Open Government

Annual reporting, as mandated under D.C. Official Code § 2-538, is administered by the Office of the Secretary (OS). The OS has no input or oversight over FOIA, other than to call for yearly agency reports,[57] which responsibility was established when FOIA requests were processed by the General Council to the Mayor over a decade ago. As the OOG Director serves as the city's FOIA officer and provides advice on compliance with the measure, reporting should be submitted through the OOG.[58] Further, now that FOIAXpress is in place, reporting is automated, and no longer requires agencies to undergo the multi-step process imposed by the current reporting

[55] *See* D.C. Official Code § 1-204.22(6).

[56] The latest amendment to 1 DCMR § 408 (fees) was published in 2005, and it did not contemplate electronic production of records. Also, the regulation itself does not address the production of video, audio, and other similar formats. The regulation should, then, be amended to incorporate electronic processing and various file extensions (*i.e.*, .pdf, .wav, .docx, .xtml, .csv). The amended language also should correspond with publication criteria in PAL and reflect that, when hard copies are provided, fees should meet current reasonable copy rates.

[57] The FOIA Litigation Report (prepared by the Office of the Attorney General) and the Appeal Log (prepared by the Mayor's General Counsel) are also required to be submitted with individual agency reports.

[58] This is also a matter that may be easily delegated by the Mayor pursuant to D.C. Official Code § 1-204.22(6).

structure.[59] The OOG also recommends that the contract with the vendor for FOIAXpress be reviewed, and amended if necessary, to ensure the District's specific reporting structure may be generated, rather than a duplication of federal exemptions which do not in all instances mirror the District's FOIA.

Process for Appeals and Mediation of FOIA Disputes

The OOG recommends that the Mayor delegate administrative appeals authority to the OOG to review the public record to determine whether it may be withheld under FOIA.[60] Such delegation of authority is legally permissible under D.C. Official Code § 1-204.22(6): "The Mayor may delegate any of his functions…to any officer, employee, or agency of the executive Office of the Mayor, or to any director of an executive department who may, with the approval of the Mayor, make a further delegation of all or part of such functions to subordinates under his jurisdiction." Authority over administrative appeals has been delegated to the General Counsel, but is now misplaced, as the OOG, pursuant to D.C. Official Code § 2-593, is required to ensure compliance and issues advisory opinions on implementation of FOIA.

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 gives either binding effect to the opinions or directs parties to follow an established process to seek formal opinions.

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[59] The reporting form is created by OCTO; the OS calls for agency reports; the data is compiled and aggregated by the OS; the OS submits the report to the Council; the OS posts online agency reporting numbers. The technology the District has available through FOIAXpress eliminates the need for such a prolonged process. The number of FOIA requests processed by an agency, the exemptions applied, and the fees collected may now be generated as often as needed.

[60] *See* D.C. Official Code § 2-537(a).

In the federal government, the Office of Government Information Services (OGIS) has the authority to arrange mediation to resolve FOIA disputes,[61] but only in the process of drafting procedures for issuing advisory opinions. Mediation proceedings are conducted in accordance with Administrative Dispute Resolution Act (ADR) 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,[62] agency counsel, and ADR professionals when responding to FOIA requests and by proactively interacting with requestors.[63]

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.[64] In Illinois, Public Access Counselors in the Office of the Attorney General resolve disputes.[65]

In fiscal year 2013, 6,143 FOIA requests were made of District government agencies. Of that number, there were 84 administrative appeals and 37 reported lawsuits – 23 of which were from the same plaintiff.[66] Such a small percentage of lawsuits does not warrant a formal mediation process, but does call for the option of

[61] *See* https://ogis.archives.gov/about-ogis/ogis-procedures.htm.

[62] This is now feasible with the implementation of FOIAXpress. Agencies can collaborate and review documents within the processing system and may determine right away if a requestor has submitted the same and/or similar requests to multiple District government agencies.

[63] *See* OGIS Recommendations to Improve the FOIA Process.

[64] *See* Conn. Gen. Stat. § 1-205(d).

[65] 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 Ill. Comp. Stat. §§ 140/9.5(f) and /11.5.

[66] *See* Office of the Attorney General Fiscal Year 2013 FOIA Litigation Report. The litigation cost to the District was $122,169.93.

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.[67] Considering that the volume of administrative FOIA appeals is relatively large compared to the number of contested ethics hearings conducted to date by the Ethics Board, it is not the OOG's recommendation that procedures for contesting hearings to resolve FOIA matters be undertaken at this time.

Amendments to the Open Meetings Act

To date, the BEGA website houses the only central repository of boards and commissions meeting dates, agendas, and administrative materials – including audio and video files. The site was developed to provide all boards and commissions with the ability to upload all documents easily and within the time constraints imposed by the OMA.[68] Prior to the site being launched in January 2014, many boards and commissions were not in compliance with the OMA because they did not have the proper administrative support. Because of the lack of technical support, or no web presence at all, many public bodies were running afoul of the OMA by failing to timely post meeting notices, agendas, and meeting minutes.

The BEGA central calendar eliminates the barriers to compliance, as points of contact within public bodies have administrative access to the site to publish meeting information[69] without being required to submit a formal request through their governing agency. Although some boards and commissions are posting information to the central calendar, posting is not mandatory. The majority of public bodies listed on the website has listed yearly meetings, but has failed to post agendas, meeting minutes,

[67] *See* section 219(d) of the Ethics Act (D.C. Official Code § 1-1162.19(d)).

[68] D.C. Official Code § 2-578(b)(1) requires meeting minutes of public bodies to be made available for public inspection within three days upon the conclusion of a meeting.

[69] This is possible because the BEGA site is maintained independently of OCTO. The OOG provides direct technical support to boards and commissions.

and administrative materials. Just as the publication in the District of Columbia Register of public body yearly calendars is required in the OMA,[70] it also must be a mandatory provision under the OMA that boards and commissions publish all meeting dates, agendas, and administrative materials to the central calendar.[71]

Advisory Neighborhood Commissions Should Be Included Under the OMA

The policy of the District leans heavily in favor of full transparency. The operative intent of the 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 who are in a position to consider, conduct, or advise on District government matters.[72]

[70] *See* D.C. Official Code § 2-576(3).

[71] Additionally, points of contact and directors of all listed public bodies have the option of making their profiles on the BEGA site as detailed or as scant as they choose. Users may include in their profiles their work, educational, and biographical history. Of the 154 public bodies currently listed on the site, only 28 boards and commissions routinely post to the central calendar.

Also, the site links to all enabling statutes for the listed boards and commissions. The enabling statutes that are on the site are the result of the partnership between the OOG and the OpenGov Foundation's DC Decoded. DC Decoded makes District municipal regulations user-friendly. Visitors searching the site may easily navigate the statutes, get inline definitions of the language used, download, and share the law without being limited by copyright restrictions. DC Decoded is more than just a series of links to static PDFs or basic Word documents. Posting the statutes in this way is giving the public greater access to our laws and prompting more robust citizen engagement with public bodies and our government as a whole.

[72] *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").

However, OMA specifically exempts ANCs from its requirements,[73] even though they are elected by the public to consider and offer advice on District business.[74] ANCs are not considered "public bodies" under the 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,[75] compliance is mixed. Both the ANCs and the public are confused about which statutory provisions mandate transparency and mistakenly (although understandably) assume the applicability of the OMA.[76]

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.[77]

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

[74] 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.

[75] *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.").

[76] *See* September 20, 2014 Committee on Government Operations Hearing on B20-0471 – The Advisory Neighborhood Commissions Transparency Amendment Act of 2013 at http://lims.dccouncil.us/Legislation/B20-0471?FromSearchResults=true. The Act was introduced by Councilmembers Cheh and Grosso to make ANC and Boards and Commissions information easily accessible. *See also* the full written testimony of Traci L. Hughes, Director of the Office of Open Government.

[77] 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 official action of any kind is taken shall

Bringing ANCs under the umbrella of the OMA will eliminate confusion over which 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 the OMA, all ANCs should be required to be trained by the OOG on compliance with D.C. Official Code §§ 1-207.42 and 1-309.11, inasmuch as those statutes fall squarely within the OOG's mission.

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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 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.