



Board of Ethics and Government  
Accountability

[www.BEGA.DC.GOV](http://www.BEGA.DC.GOV)

# 2021 Best Practices Report

Norma B. Hutcheson, Chair  
Charles Nottingham, Member  
Felice C. Smith, Member  
Darrin P. Sobin, Member  
Melissa Tucker, Member

The District of Columbia Board of Ethics and Government Accountability (“BEGA” or “Board”), is an independent agency that administers and enforces the Code of Conduct and the laws that require public meetings to be open to the public. BEGA also promotes an open and transparent government by advocating for the implementation of processes and procedures that guarantee the public access to government records under District of Columbia law.

BEGA was established in 2012 pursuant to Section 202(a) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (the “Ethics Act”).<sup>1</sup> The Ethics Act was passed to provide the District with a more robust ethics framework in order to effectively promote a culture of high ethical conduct. The Act sought to subject all employees to the code of conduct, require ethics training for District officials and employees, centralize enforcement authority under BEGA, and allow for the imposition of meaningful penalties for misconduct.<sup>2</sup>

The Ethics Act, along with the BEGA Amendment Act of 2018, established two independent, and co-equal offices within BEGA – the Office of Government Ethics (“OGE”) and the Office of Open Government (“OOG”).<sup>3</sup> OGE has responsibility for training, advice, and enforcement of the District’s Code of Conduct, as well as overseeing the Financial Disclosure System and the Lobbyist Reporting System. OOG provides training and advice on compliance with the District’s Freedom of Information Act of 1976 (“FOIA”). OOG is responsible for enforcing the Open Meetings Act (“OMA”), handling and resolving complaints of violations of the OMA, and providing training and advice regarding the OMA. The Board is responsible for appointing directors for OGE and OOG, both of whom report directly to the Board, to execute each office’s respective mission.

As BEGA approaches almost a decade in existence, it continues to advance its mission of promoting an ethical, transparent, and open District of Columbia government. In FY19-FY21 and FY22 to date, OGE negotiated thirty-four dispositions resolving Code of Conduct violations; ordered fines in five informal hearings; administered 1,848 informal ethics opinions to District employees and officials; issued six advisory opinions providing guidance on the ethics rules; conducted more than 239 trainings on various ethics topics and trained 3,492 employees and officials using its online training. In FY 19, OOG issued three OMA advisory opinions and six FOIA advisory opinions and dismissed three OMA complaints. In FY 20, OOG resolved four OMA and FOIA complaints, dismissed one OMA complaint, and issued one OMA advisory opinion and two FOIA advisory opinions. In FY 21 and FY 22, to date, OOG resolved seven OMA and FOIA-related issues, issuing three OMA advisory opinions, three FOIA advisory opinions, and one OMA dismissal.

---

<sup>1</sup> Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*).

<sup>2</sup> *See generally*, Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011 (Council of the District of Columbia, December 5, 2011) (Ethics Act Committee Report).

<sup>3</sup> D.C. Official Code § 2-571 *et seq.*; The BEGA Amendment Act of 2018 was passed as a subtitle of The Fiscal Year 2019 Budget Support Act of 2018 (D.C. Law 22-168; D.C. Act 22-442, effective October 30, 2018). In addition to clarifying BEGA’s structure, the subtitle further requires that the Mayor appoint at least one member of the Board with experience in open government and transparency. (D.C. Official Code § 1-1162.03(g)(2)).

BEGA has also continued its outreach to District government employees and officials including, through regular training and annual Ethics Week, programming which provides various courses that are designed to educate employees on ethics rules, including real life ethics scenarios, and open government issues they need to be aware of in their day-to-day work for the District. The experience gained from these efforts, along with insights gained from engaging with organizations working on ethics and open government issues, attending conferences, and staying abreast of industry trends, has prepared BEGA to meet its mandate to provide an annual assessment and make recommendations for changes to the ethics and open government laws of the District.

The BEGA Amendment Act of 2018 revised the Board's annual assessment to permit the Board to provide general commentary on best practices to improve the District's public integrity laws and to provide a discussion of open government related issues.<sup>4</sup> Accordingly, by December 31<sup>st</sup> of each year, the Board shall provide a report to the Mayor and Council with recommendations on improving the District's government ethics and open government and transparency laws, including: (1) An assessment of ethical guidelines and requirements for employees and public officials; (2) A review of national and state best practices in open government and transparency; and (3) Amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information Act of 1976.<sup>5</sup>

In anticipation of this report, the Board directed its staff to review both the OGE's and OOG's activities in carrying out their respective missions; research and assess trends in public integrity laws and enforcement; and to confer with government ethics and open government experts. What follows is the Board's 2021 annual assessment (Best Practices Report) along with its recommendations for actions to be taken by the Council and/or the Mayor to further strengthen the District's public integrity and transparency laws.

---

<sup>4</sup> Before the passage of the BEGA Amendment Act of 2018, BEGA was required to address seven specific questions in its annual assessment. Those questions were whether the District should: 1) adopt local laws similar in nature to federal ethics laws; 2) adopt post-employment restrictions; 3) adopt ethics laws pertaining to contracting and procurement; 4) adopt nepotism and cronyism prohibitions; 5) criminalize violations of ethics laws; 6) expel a member of the Council for certain violations of the Code of Conduct; and 7) regulate campaign contributions from affiliated or subsidiary corporations. BEGA has addressed these very specific questions in previous Reports which can be found on BEGA's website, <https://bega.dc.gov/>.

<sup>5</sup> Section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)).

## **I. Assessment of Ethical Guidelines and Requirements for Public Employees and Officials**

OGE is made up of the Director of Government Ethics, and a small staff of attorneys, investigators, one auditor, and administrative support staff. OGE has authority over the District government's workforce of approximately 37,000 employees, including ethics oversight of the Mayor and the D.C. Council. The primary duties of the OGE are to investigate alleged ethics laws violations by District government employees and public officials, provide informal and binding ethics advice, and conduct mandatory training on the Code of Conduct. OGE is also responsible for oversight of lobbyist registration and activity, and compliance with Financial Disclosure Statement filing requirements by high-level employees and elected officials.

The Ethics Act was passed to provide the District with a more robust ethics framework in order to effectively promote a culture of high ethical conduct. The Act sought to subject all employees to the code of conduct, require ethics training for District officials and employees, centralize enforcement authority under BEGA, and allow for the imposition of meaningful penalties for misconduct.<sup>6</sup>

In the 2018 Best Practices Report, OGE noted that the District's ethics framework was recognized by the Coalition for Integrity, a non-profit organization created to combat corruption and promote integrity, in a ranked index of "States with Anti-Corruption Measures for Public Officials" (S.W.A.M.P.).<sup>7</sup> The S.W.A.M.P. Index analyzed the laws of the 50 States and the District of Columbia based on eight factors including the scope and powers of ethics agencies, and acceptance and disclosure of gifts and contributions by public officials. The Coalition for Integrity describes the Index as an "objective analysis, based on current state laws and regulations governing ethics and transparency in the executive and legislative branches." In the 2018 S.W.A.M.P. Index the District ranked 5<sup>th</sup> out of 51 jurisdictions based on the strength and effectiveness of its ethics laws and regulations. The Coalition for Integrity added two additional questions relating to the acceptance and handling of anonymous complaints and disclosure of the source of payments for electioneering communications for the 2020 S.W.A.M.P. Index.<sup>8</sup> The District ranked 3<sup>rd</sup> in the 2020 report, due in part to its handling of anonymous complaints.

Despite giving the District high marks, one factor noted in both the 2018 and 2020 Coalition for Integrity reports that resulted in lower scoring for the District related to the requirements for financial disclosure reports. The Ethics Act requires public officials, including members of the

---

<sup>6</sup> See generally, Ethics Act Committee Report.

<sup>7</sup> The 2018 S.W.A.M.P. Index can be found at <https://www.coalitionforintegrity.org/2018/10/03/s-w-a-m-p-index/>.

<sup>8</sup> The 2020 S.W.A.M.P. Index can be found at <https://www.coalitionforintegrity.org/swamp2020/#report>.

Council to disclose the name of each business entity where the public official or his or her spouse, domestic partner or dependent child receive earned income for services rendered in excess of \$200 during the calendar year, “as well as the identity of any client for whom the official performed a service in connection with the official’s outside income if the client has a contract with the government of the District of Columbia or the client stands to gain a direct financial benefit from legislation that was pending before the Council during the calendar year.”<sup>9</sup> This requirement to disclose clients that have contracts with the District or stand to gain from legislation pending before the Council falls short of the requirement under federal law that requires disclosure of all clients that meet a monetary threshold.<sup>10</sup> Federal regulations also require a review and certification of each financial disclosure report.<sup>11</sup>

Outside employment by Councilmembers and the resulting potential conflict of interest that arises from that activity was recently considered by both BEGA and the Council in the matter of former Councilmember Jack Evans. In August 2019, BEGA reached a Negotiated Disposition with Councilmember Evans in Case No. 19-0011-P. That matter included a \$20,000 fine for violations of the Code of Conduct in connection with Councilmember Evans’ use of official time and resources and the prestige of his office by directing his Chief of Staff to send emails with his proposed business plan to prospective law firm clients. In May 2020, BEGA entered into another Negotiated Disposition with Councilmember Evans on two counts of violating the Code of Conduct by: (1) taking official actions in particular matters that could have a direct and predictable effect on the financial interests of his employer, Manatt, Phelps & Phillips, LLP, or clients of his consulting firm, NSE Consulting LLC in violation of the Rule I(a) of the Council Code of Official Conduct; and (2) representing clients through NSE Consulting, LLC with financial interests in both legislation and contracts with the District government and failing to disclose these relationships in violation of Rule II(a) of the Council Code of Official Conduct.<sup>12</sup> Councilmember Evans agreed to pay a \$35,000 fine to resolve these violations.

In addition to conducting its own investigation in the Evans matter, BEGA also adopted the factual findings from a report commissioned by the Council from a law firm, O’Melveny & Myers, LLP, into whether Councilmember Evans’ outside activities violated the Council Code of Conduct and

---

<sup>9</sup> D.C. Official Code § 1-1162.24(a)(1)(A)(II).

<sup>10</sup> See Ethics in Government Act of 1978, 5 U.S.C. app. § 102(a)(6)(B)(EIGA).

<sup>11</sup> See 5 C.F.R. § 2634.605. In reviewing financial disclosure reports, a reviewer can require reporting or additional information or remedial action in the event that the report discloses a conflict of interest. See *id.*

<sup>12</sup> Case No. 18-0006-P, In re: Jack Evans (May 22, 2020). The Council Code of Official Conduct is incorporated in the District Code of Conduct at D.C. Official Code § 1-1161.01(7)(A).

Council Rules.<sup>13</sup> The O'Melveny and Myers Report was considered by the Ad Hoc Committee, which was established by the Council in 2019 and comprised of all members of the Council except Councilmember Evans, in its decision to recommend that the Council expel Councilmember Evans pursuant to Council Rule 656.<sup>14</sup> In reaching their decision, multiple Councilmembers noted that Councilmember Evans' use of his official position to benefit his personal financial interests not only violated the ethics rules, but they also undermined the public's confidence in the integrity of the District government.<sup>15</sup> The Ad Hoc Committee report also noted that Councilmember Evans' actions were used to undermine the prospect of statehood, noting that a "member of the United States House of Representatives raised Mr. Evans's conduct to argue against the District's ability to self-govern."<sup>16</sup>

The Evans matters raised questions about whether the Council should consider modifying the Code of Conduct provisions on conflicts of interest, outside activity, and financial disclosure.<sup>17</sup> In considering any changes to the conflicts of interest rules, the federal rules provide a model that the Council could choose to adopt. Indeed, the Ethics Act explicitly recognizes that "federal law sets a base standard on which District law builds."<sup>18</sup> The Ethics in Government Act of 1978, along with the rules of the U.S. Senate and House of Representatives, prohibit public officials and certain highly compensated employees from providing any professional services for compensation, affiliating with an entity for the purpose of providing professional services for compensation, including the type of legal and consulting services at issue in the Evans matter, or permitting their name to be used by such an entity.<sup>19</sup> Unlike a ban on outside employment, a restriction on providing professional services for compensation could be narrowly targeted to the types of representational activities involving a fiduciary relationship that are most likely to create a conflict of interest or the appearance of a conflict of interest. Similarly, restricting the ability of Councilmembers and certain other District employees to provide professional services for compensation would limit the ability to trade on the prestige of office for an individual's personal financial benefit without relying on the individual to recuse.

---

<sup>13</sup> See Report of the Ad Hoc Committee in the Matter of Councilmember Jack Evans (Council of the District of Columbia, December 10, 2019) (Ad Hoc Committee Report), Attach. A, Report of Investigation of Councilmember Jack Evans Pursuant to July 9, 2010 D.C. Council Resolution 23-175, dated November 4, 2019.

<sup>14</sup> See generally, Ad Hoc Committee Report. Councilmember Evans resigned his seat on the Council in January 2020. See Letter from Jack Evans to Phil Mendelson, Chairman, Council of the District of Columbia, Jan. 7, 2020.

<sup>15</sup> See Ad Hoc Committee Report, Attach. J-R.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> See generally, Robert McCartney, *Ethics Reform in Washington Region: More is Still Needed After All These Years*. Wash. Post., Jan. 13, 2020, [https://www.washingtonpost.com/local/dc-politics/ethics-reform-in-washington-region-more-is-still-needed-after-all-these-years/2020/01/12/a2eb84e2-33e0-11ea-a053-dc6d944ba776\\_story.html](https://www.washingtonpost.com/local/dc-politics/ethics-reform-in-washington-region-more-is-still-needed-after-all-these-years/2020/01/12/a2eb84e2-33e0-11ea-a053-dc6d944ba776_story.html).

<sup>18</sup> Ethics Act Committee Report at 6.

<sup>19</sup> See EIGA, 5 U.S.C. app. § 502(a); House Rule 25.2; Senate Rule 37.5.

The Council could also consider other restrictions on the types of clients that a District official or employee could represent or extend the time that recusal is required. The current rules require disclosure of clients that have contracts with the District or stand to gain from legislation pending before the Council, but does not prohibit Councilmembers or District employees from representing a client who is a prohibited source<sup>20</sup> or benefits from legislation passed by the Council, and the recusal requirement does not extend to former clients.<sup>21</sup> On the recusal front, some model codes of conduct have suggested including language that would prevent a government employee from awarding a contract or participating in a matter benefitting a person or entity that formerly employed the individual, for a specified period of time.<sup>22</sup> This is in line with the revolving door ban for incoming political appointees promulgated by Presidents Biden, Trump, and Obama which provides that the appointee “will not for a period of 2 years from the date of [their] appointment participate in any particular matter involving specific parties that is directly and substantially related to [the appointee’s] former employer or former clients, including regulations and contracts.”<sup>23</sup>

The period of time covered by any revolving door prohibition and the activity it covers varies by locality. The City of Los Angeles conflicts of interest code provides that in the first year of employment by the city, an employee “shall not knowingly make, participate in making, or attempt to use his or her official position to influence a City decision directly relating to a contract when a party to the contract is a person by whom the individual was employed” in the year before working for the City.<sup>24</sup> The Denver Code of Ethics imposes a six-month restriction on “tak[ing] any direct official action with respect to their former employers.”<sup>25</sup>

While the Ethics Act itself does not include a similar provision, the District Personnel Manual provides that agencies “may” require disclosure of previous employment relationships and prohibit

---

<sup>20</sup> 6-B DCMR § 1803.4(b) defines prohibited source as any person or entity who: (1) is seeking official action by the employee's agency; (2) does business or seeks to do business with the employee's agency; (3) conducts activities regulated by the employee's agency; (4) has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) is an organization in which the majority of its members are described in subparagraphs (1) through (4) of this subsection.

<sup>21</sup> D.C. Code. § 1-1162.24(a)(1)(A)(ii).

<sup>22</sup> See City Ethics, Model Municipal Code of Ethics, Part A, § 100.1(c) (Nov. 25, 2006), <https://www.cityethics.org/content/full-text-model-ethics-code>.

<sup>23</sup> Exec. Order 13989, Ethics Commitments by Executive Branch Personnel, 86 Fed. Reg. 7029 (Jan. 25, 2021); see also, Exec. Order 13770, Ethics Commitments by Executive Branch Appointees, 82 Fed. Reg. 9333 (Jan. 28, 2017); Exec. Order 13490, Ethics Commitments by Executive Branch Personnel, 74 Fed. Reg. 4673 (Jan. 21, 2009); CRS Report R44974, Ethics Pledges and Other Executive Branch Appointee Restrictions Since 1993: Historical Perspective, Current Practices, and Options for Change (Feb. 23, 2021).

<sup>24</sup> See Los Angeles Municipal Code, Chap. IV, § 49.5.6.B.

<sup>25</sup> Denver Revised Municipal Code, Chap. 2, Art. IV, §2-62.

the employee from engaging in any “procurement action” for one year after the date of initial employment or for as long as the employee continues to receive an economic benefit from the former employer.<sup>26</sup> This provision, which applies to “procurement action,” is more limited than a prohibition on any “official action,” extends only to “former employers,” defined as an employer that precedes the individual’s District employment, and leaves the agencies with discretion on the type of disclosure that is required. The Code of Official Conduct for the Council does not include a comparable provision. Extending this prohibition to require recusal for outside employment that is concurrent with District employment would be an additional tool to prevent a conflict of interest or the appearance of a conflict.

Another model can be found in recent pay-to-play legislation passed by the Council, which sought to limit corruption or the appearance of corruption by prohibiting government contractors from making campaign contributions and the District from entering into contracts with an aggregate value of \$250,000 or more if the contractor or their top executives made a contribution to a public official, their affiliated political committees, or constituent-service programs during a defined “prohibited period.”<sup>27</sup> Even in the event of a recusal, the employment of Councilmembers and District employees by government contractors or other individuals or organizations that do business with the District presents similar concerns about the potential conflict of interest and the appearance of a conflict inherent in these types of arrangements.

As discussed in Section III below, we believe that a comprehensive assessment of revisions to the conflict of interest, outside activity, and financial disclosure reporting rules to address these issues should be incorporated into the Council’s consideration of a Comprehensive Code of Conduct, as we have previously recommended in BEGA’s Best Practices Reports.

---

<sup>26</sup> See 6B DCMR § 1805.

<sup>27</sup> D.C. Official Code § 1-1163.34a; Campaign Finance Reform Amendment Act of 2018 (D.C. Law 22-250; D.C. Act 22578). The pay-to-play restrictions are scheduled to go into effect in 2022.



## **II. Review of National and State Best Practices in Open Government and Transparency**

OOG is composed of the Director of Open Government, a small staff of attorneys, and an information technology specialist dedicated to ensuring the District government operations are transparent, open to the public, and promote civic engagement. OOG ensures that the District's public bodies, the District's boards and commissions, and the Council comply with the OMA by providing formal and informal advice to public bodies regarding the OMA's requirements for compliance. OOG also conducts training for public bodies and members of the public regarding the OMA and engages in community outreach. In addition to enforcing the OMA, OOG also ensures that District agencies are complying with FOIA by providing advisory guidance on the implementation of FOIA, as well as assisting members of the public in filing FOIA requests and providing training to FOIA Officers, Advisory Neighborhood Commissioners, and members of the public.

### **Open Government and the Pandemic**

In keeping with the District's policy of encouraging open government and transparency,<sup>28</sup> OOG is charged with construing the OMA broadly to maximize public access to meetings.<sup>29</sup> The OMA obligates District government entities within the Act's jurisdiction to ensure the rights of citizens to be informed about public business, which is essential in a democracy.<sup>30</sup> Open government and transparency laws build public confidence and trust in the government, and, thus, they are integral to maintaining an ethical government.

Due to the COVID-19 public health emergency, several jurisdictions adopted changes to their respective open meetings statutes to allow electronic meetings in circumstances when it would not otherwise have been permissible. For example, Tennessee temporarily suspended default rules requiring in-person meetings; Utah temporarily suspended a requirement that public bodies take affirmative action to permit an electronic meeting; and Vermont temporarily changed its open meetings statute and waived a physical location requirement for meetings.<sup>31</sup>

Even prior to the public health emergency for COVID-19, the District had adopted a broad policy of allowing electronic meetings, with the OMA allowing electronic meetings since 2011.<sup>32</sup> Emergency and temporary legislation enacted due to the public health emergency and public

---

<sup>28</sup> D.C. Official Code §§ 2-532, 572

<sup>29</sup> D.C. Official Code § 2-573.

<sup>30</sup> The OMA requires that public bodies: (1) maintain detailed records of all public meetings; (2) provide to the public advance notice of meetings to reflect the date, time, location, planned agenda, and statement of intent to close the meeting or portion of the meeting, including the statutory citation for closure and description of the matters to be discussed; and (3) strictly adhere to the OMA when conducting a public meeting by electronic means. (D.C. Official Code § 2-571, *et seq.*)

<sup>31</sup> See Tennessee Exec. Order No. 16 (Mar. 20, 2020); Utah Exec. Order No. 2020-5. (Mar. 18, 2020); Vermont Act 92, An act relating to government operations in response to the COVID-19 outbreak (approved Mar. 30, 2020).

<sup>32</sup> D.C. Official Code § 2-577(a).

emergency period recognized the need to reflect the changes in government operations necessitated by the pandemic restrictions on gathering indoors. The changes to the OMA provided that “[r]easonable arrangements . . . to accommodate the public’s right to attend the meeting” included taking steps to allow the public to view or hear the meeting either during the meeting or “as soon thereafter as reasonably practicable;”<sup>33</sup> tolled the requirements for public inspection of records of meetings;<sup>34</sup> and provided that the public posting requirements for meeting notices did not apply.<sup>35</sup>

On the FOIA front, there were fewer legislative or executive changes to state FOIA laws resulting from the pandemic. The District implemented phased changes to the D.C. FOIA requirements beginning with the Mayor’s declaration of a public health emergency on March 11, 2020<sup>36</sup> and ending on October 27, 2021. From March 11, 2020 through January 15, 2021, D.C. FOIA was fully tolled.<sup>37</sup> From January 16, 2021 through the last day of the public health emergency, July 24, 2021, processing requests under D.C. FOIA returned to their initial pre-pandemic requirements, except the response was tolled where processing required on-site reviews “that could present a significant risk to health or safety.”<sup>38</sup> During the last phase, from July 25, 2021 through October 27, 2021, tolling was available for independent agencies if the processing met the “significant risk to health or safety” standard.<sup>39</sup> Requests that were received during the last phase and tolled due to the closure of the agencies must be completed no later than 45 days after October 27, 2021, or after the end of the COVID-19 closure, whichever is earlier, but no later than on or before January 4, 2022.

The federal government did not pass legislation specific to federal FOIA or the Government in the Sunshine Act to address the pandemic.

---

<sup>33</sup> D.C. Official Code §§ 2-575(a)(4), 577(a)(1).

<sup>34</sup> D.C. Official Code § 2-578(b)(3).

<sup>35</sup> D.C. Official Code § 2-576(6).

<sup>36</sup> The Mayor issued a series of orders that impacted the processing of FOIA, beginning with Mayor’s Order 2020-046.

<sup>37</sup> Section 2 of the FOIA Tolling Emergency Amendment Act of 2020, December 22, 2020 (D.C. Act 23–555; 68 DCR 000136); section 808 of the Coronavirus Support Temporary Amendment Act of 2020, October 9, 2020 (D.C. Law 23–130; 67 DCR 008622); section 808 of the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020, August 19, 2020 (D.C. Act 23–405; 67 DCR 010235); section 808 of the Coronavirus Support Congressional Review Emergency Amendment Act of 2020, June 8, 2020 (D.C. Act 23–328; 67 DCR 007598); section 808 of the Coronavirus Support Emergency Amendment Act of 2020, May 27, 2020 (D.C. Act 23–326; 67 DCR 007045); section 503 of the COVID–19 Response Emergency Amendment Act of 2020, March 17, 2020 (D.C. Act 23–247; 67 DCR 003093); Mayor’s Orders 2020–046, 2020–053, 2020–063, 2020–066, 2020–067, 2020–079, 2020–103, 2020–127).

<sup>38</sup> Section 2 of the FOIA Tolling Temporary Amendment Act of 2020, March 16, 2021 (D.C. Law 23–267; 68 DCR 001190); section 2 of the FOIA Tolling Emergency Amendment Act of 2020, December 22, 2020 (D.C. Act 23–555; 68 DCR 000136); Mayor’s Orders 2020–127, 2021–038, 2021–069.

<sup>39</sup> Section 2 of the FOIA Tolling Temporary Amendment Act of 2020, March 16, 2021 (D.C. Law 23–267; 68 DCR 001190); Mayor’s Order 2021–096.

## Open Data

The District's open government and transparency practices focus on ensuring that information not otherwise subject to valid disclosure restrictions is made accessible to the public in a timely manner. This basic tenet is the foundation of best practices for open government at the state and federal level. To allow the public access to the large amounts of data created and collected by the government, many jurisdictions have focused on releasing datasets and machine-processable data directly to the public.

Datasets are the collection of underlying information organized or formatted in a specific manner and used by government entities to develop policies, draft reports, and otherwise inform decision making. Providing the public access to datasets or data in its "raw," unstructured form increases transparency and allows for greater utilization and analysis of the information. Other agencies can also utilize datasets to increase efficiency and aid in decision making and policy implementation.

The District of Columbia Data Policy,<sup>40</sup> establishes the process for classifying data and facilitating the sharing of enterprise datasets – "a dataset that directly supports the mission of one or more public bodies." As part of its Enterprise Data Inventory, the Office of the Chief Technology Officer ("OCTO") conducts an annual review of the enterprise datasets, including number of datasets available, the types of data available, their levels of classification, and whether any datasets were retired.<sup>41</sup> In 2020, 85 agencies recorded 1,915 enterprise datasets, up from the 1,779 datasets recorded by 75 agencies in 2019. Of the datasets, more than half of the datasets included public data, with 44% classified as Level 0, data that is open to the public and not proactively released, and 9% classified as Level 1, data that is not protected from public disclosure but not proactively published because of safety, privacy, security, or legal concerns. BEGA encourages D.C. agencies to continue to provide OCTO with data and classify its data pursuant to the District's Data Policy. This will assist in maintaining transparency and openness by making information readily accessible.

The Data Policy provides that District government datasets should be "open by default," meaning that the existence of datasets should be publicly available, and justifications should be provided for restricting access to datasets. In terms of the nexus between open data and the FOIA, the Data Policy envisions FOIA requests as a means to identify open data that is of public interest, with the FOIA and open data processes as "distinct but complementary" practices. Accordingly, BEGA supports the recommendation of the Chief Data Officer that datasets provided by District agencies to OCTO should include information those agencies have provided to FOIA requestors. This information should reside on both the Open Data Portal, located at [www.opendata.dc.gov](http://www.opendata.dc.gov), and in the FOIAXpress reading room, located at [www.foia-dc.gov/app/ReadingRoom.aspx](http://www.foia-dc.gov/app/ReadingRoom.aspx).

On the federal level, Congress passed the Open, Public, Electronic, and Necessary Government Data Act, which codified and expanded then-existing federal open data policy, including President

---

<sup>40</sup> District of Columbia Data Policy, Mayor's Order 2017-115, dated April 27, 2017, amended June 19, 2018.

<sup>41</sup> Chief Data Officer Annual Report 2020, <https://octo.dc.gov/sites/default/files/dc/sites/octo/publication/attachments/EDI-Chief-Data-Officers-Annual-Report-2020.pdf>.

Obama’s Executive Order making “open and machine readable” the default for all government data.<sup>42</sup> The OPEN Government Data Act requires federal agencies to publish government data in machine-readable and open formats and use open licenses. In addition, it directs federal agencies to support innovative uses of government data, adopt consistent data practices across government, and develop best practices for Open Data. In a recent Government Accountability Office (“GAO”) report to Congress on federal agencies’ compliance with the requirements of the OPEN Government Data Act, GAO concluded that the lack of guidance from the Office of Management and Budget (“OMB”) limited agencies’ progress in implementing comprehensive data inventories.<sup>43</sup> Additionally, the lack of public reporting from OMB on agencies’ performance and limited information on the extent to which agencies regularly update their data inventories limit publicly available information on progress with compliance with the requirements for access to government data.

### **Privacy Act and First Party Requests**

The Privacy Act of 1974 was enacted to provide a means to safeguard private individual information held in federal records and to allow individuals to seek access to their own records maintained by the federal government.<sup>44</sup> The Privacy Act protects the release of information about individuals to others, while allowing the individual access to their own information. Pursuant to the Privacy Act, federal agencies are required to have in place regulations to verify identification when a requestor makes a first-party request to seek information about themselves.

As the federal Privacy Act and FOIA work in tandem, the identify verification requirements of the Privacy Act also extend to an individual’s request for their records under FOIA. To protect the privacy rights of first-party requestors and to limit the release of an individual’s records, federal FOIA requires the subject of the request to execute and submit with a request a Certificate of Identification form or an unsworn declaration identifying themselves as the subject of the request, and where appropriate, authorizing the release of their records to a named designee.<sup>45</sup> The unsworn declaration must subject the signer to penalty of perjury.

Although D.C. FOIA is modeled on the federal FOIA, current District law does not have a statutory equivalent to the federal Privacy Act that would allow District agencies to release information to requestors about themselves without redacting the information subject to D.C. FOIA’s exemptions, primarily the personal privacy exemption.<sup>46</sup> Under D.C. FOIA, FOIA officers may not lawfully request identification from FOIA requestors. As OOG has stated in two advisory opinions, the District’s FOIA law does not require a requestor to provide or prove his or her identity to submit

---

<sup>42</sup> See Pub L. 115-435, title II, 132 Stat. 5534 (Jan. 14, 2019) (“OPEN Government Data Act”); Exec. Order 13642, Making Open and Machine Readable the New Default for Government Information, 78 Fed. Reg. 28111 (May 14, 2013).

<sup>43</sup> See U.S. Government Accountability Office, GAO 21-29, OPEN DATA: Agencies Need Guidance to Establish Comprehensive Data Inventories; Information on Their Progress is Limited (Oct. 2020).

<sup>44</sup> Pub. L. No. 93-579, 88 Stat. 1896 (Dec. 31, 1974); 5 U.S.C. § 552a.

<sup>45</sup> See, e.g., 28 U.S.C. § 1746 (providing a format for identification verification).

<sup>46</sup> See D.C. Official Code § 2-534(a)(2).

a request for records.<sup>47</sup> This creates the situation where D.C. FOIA officers may not ask a requestor to identify themselves and therefore would not be able to release unredacted personally identifiable information when the requestor is seeking information about themselves.

The federal system where the Privacy Act and FOIA work in tandem to allow agencies to release to the individual their own records, not otherwise subject to exemption under either statute, provides a model for the District to implement. Adding identification verification requirements for first party requests would also not be a novel development for the District, which requires identification verification in other contexts. For example, to ensure the proper release of vital records, regulations governing the disclosure limit their release to persons with a direct and tangible interest in the records. To establish such an interest, the law states that in addition to submitting a proper application, the “Registrar [of Vital Records] may also require identification of the applicant or a sworn statement.”<sup>48</sup>

### **Electronic Communications**

The federal government has management requirements for its electronic communications, including email.<sup>49</sup> As discussed in our last Best Practices Report, the federal government, through the National Archives and Records Administration (“NARA”), has recommended that federal agencies adopt a “Capstone” approach to retention of emails.<sup>50</sup> The Capstone approach relies on the concept that key records are held in senior official’s email records and that retention of those email records indefinitely will allow the agency to capture those key records. It also ensures email records are part of a record retention schedule; has provisions to prevent unauthorized access, modification, and deletion of permanent records; requires that all records are retrievable and usable; requires consideration of whether email records should be associated with related records; and requires the capture and maintenance of metadata.

The Capstone approach benefits from relying on increased automation of the email retention process and less on individual records retention officials to correctly identify and classify emails as permanent records, thereby reducing the risk of unauthorized deletion of emails. It also encourages the use of updated and evolving technology to manage the email retention process. As discussed in Section III below, the District does not have a current retention policy for email. The District may benefit from exploring the Capstone approach as it considers its current policy of retaining its current catalog of emails indefinitely.

Given the rise in electronic communication methods other than email, for example text messages, social media posts, and encrypted apps, the District should also consider a policy for retention of

---

<sup>47</sup> OOG-002\_8.23.18\_FOIA AO; OOG\_0001\_1.04.18\_FOIA AO.

<sup>48</sup> 29 DCMR § 2821.6.

<sup>49</sup> See 44 U.S.C. Chap. 31; 36 C.F.R. Chap. XII, Subchap B.

<sup>50</sup> With the issuance of the Managing Government Records Directive (M-12-18), Goal 1.2, federal agencies were required to manage both permanent and temporary email records in an accessible electronic format by December 31, 2016. The issuance of NARA Bulletin 2013-2 established “the Capstone Approach” as an alternative means of managing email, while the transmittal of GRS 6.1 provides disposition authority for the approach. Both issuances provide one way in which Federal agencies can meet the requirements of Goal 1.2 of M-12-18.

records produced using these other means of communication as it evaluates its email retention policy. To the extent the District agencies are using these alternate methods of communication to conduct official government business, the records produced using these methods should form a part of a request for records under FOIA. Establishing a policy to retain and search these records would facilitate the District's commitment to open and accessible government.

### **III. Recommendations for Amendments to the District’s Ethics and Open Government Laws**

The Board is also tasked with recommending amendments to the Code of Conduct, the Open Meetings Act, and the Freedom of Information in order to improve the District government’s ethics and open government and transparency laws.<sup>51</sup>

#### **Ethics Recommendations**

BEGA was established in significant part to address the lack of a “uniform, comprehensive code of conduct for all employees, including public officials.”<sup>52</sup> The Council, in establishing BEGA, noted the need “to restore the public’s trust in its government” after misconduct allegations involving multiple Members of the Council and determined that the creation of an independent agency with enforcement authority over a comprehensive code of conduct would “promote a culture of high ethical standards in District government.”<sup>53</sup> As in prior Best Practices Reports, BEGA continues to recommend that the District adopt a Comprehensive Code of Conduct that would consolidate government ethics laws in one place and standardize the practices between the legislative and executive branches. This comprehensive approach would strengthen the District’s ethics framework and would be in line with best practices in other jurisdictions.

On June 12, 2015, BEGA submitted proposed legislation in the form of Bill 21-250, the “Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2015”(“CCC”). The draft CCC bill represented a culmination of a year-long effort of BEGA personnel and incorporated feedback from the legislative and legal community. After a hearing, the Committee took no further action, and Bill 21-250 lapsed, without prejudice, at the end of Council Period 21. On February 28, 2017, BEGA introduced a substantially similar bill, the “Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2017” (Bill 22-136). Bill 22-136 was also the subject of a public hearing on November 2, 2017; however, the Council again took no action on the bill and it lapsed, without prejudice, at the conclusion of Council Period 22. On January 29, 2019, Councilmember Allen introduced the proposed legislation again as Bill 23-0103, the “Comprehensive Code of Conduct of the District of Columbia Establishment and BEGA Amendment Act of 2019.” As with the prior versions, the Council did not act on Bill 23-0103 and the bill lapsed, without prejudice, at the conclusion of Council Period 23.

The consideration of a Comprehensive Code of Conduct would allow the Council an opportunity to assess whether to implement additional changes to the Code of Conduct, such as the conflict of interest and outside activity restrictions as well as changes to the financial disclosure reporting and review requirements discussed in Section II. A Comprehensive Code of Conduct that includes restrictions on providing professional services for compensation or affiliating with an entity that provides professional services for compensation, as well as limitations on the types of clients a District official could represent, and extended timeframes for recusal would further strengthen the

---

<sup>51</sup> D.C. Official Code § 1-1162.02(b)(3).

<sup>52</sup> See Ethics Act Committee Report at 12.

<sup>53</sup> *Id.* at 2, 11.

District's ethics rules and reduce the potential for a conflict of interest or the appearance of a conflict that could undermine the public's confidence in the District government.

A Comprehensive Code of Conduct could also address some uncertainty regarding whether Advisory Neighborhood Commissioners (ANC Commissioners) must comply with the provisions of the DPM that are incorporated in the District's current Code of Conduct. OGE has consistently stated that it believes that ANC Commissioners are required to comply with Chapter 18 of the DPM, pursuant to D.C. Official Code §1-1161.01(7)(E) and §1-1162.01a, following the enactment of D.C. Law 20-122, the Comprehensive Code of Conduct and BEGA Amendment Act of 2014, effective July 15, 2014. However, others have argued a contrary interpretation that would exempt ANC Commissioners who are not District government employees from OGE's enforcement of those DPM provisions. A Comprehensive Code of Conduct would eliminate any uncertainty on the application of the ethics rule to ANC Commissioners.

In light of the shift in government operations during the pandemic, the Council may wish to consider whether changes to strengthen other provisions of Code of Conduct are necessary. During BEGA's recent Ethics Week program, "Reapproaching Ethical Values," BEGA heard from District agencies about how they approached ethics issues during the pandemic, including ethical pitfalls their agencies encountered in the remote work environment and the lessons learned from those efforts as we return to more normal operations. While the ethics rules did not change permanently,<sup>54</sup> the remote telework environment meant that the rules applied in a new context. OGE and the agencies saw an increased volume of questions related to outside employment and post-employment restrictions.

BEGA recently entered into two negotiated dispositions that illustrate that at least some District employees used the pandemic-induced virtual working environment to engage in outside employment in violation of the Code of Conduct. In one matter, a former D.C. Public Schools employee worked a full-time position as a Principal at a school in another state while simultaneously working virtually as an Assistant Principal in the District.<sup>55</sup> A second matter involved a Department of Forensic Sciences employee who conducted a virtual training for an outside organization inside a District facility.<sup>56</sup> These activities would not have been possible prior to the District government allowing telework for positions where it was not previously an option, such as at District schools, and prior to the advent of regular virtual meetings and trainings. The addition of a requirement that all District employees receive prior written approval before

---

<sup>54</sup> The COVID-19 Response Supplemental Emergency Amendment Act of 2020, § 502 (D.C. Act 23-286, 67 DCR 4178, effective Apr. 10, 2020) amended the Code of Official Conduct for the Council to allow a Councilmember to "disseminate information about, and connect constituents with, services and offers, including from for-profit entities, that the Councilmember determines is in the public interest in light of the public health emergency." This initial change in the Code of Official Conduct was incorporated into the Code of Code of Official Conduct for Council Period 24, which included identical language applicable during a public health emergency. *See* Resolution 24-0001 (Jan. 4, 2021).

<sup>55</sup> Case No. 22-0001-F, In re M. Redmond (Dec. 13, 2021).

<sup>56</sup> Case No. 21-0059-P, In re: A. Reitnauer (Dec. 2, 2021).



engaging in outside employment could prevent similar situations that undermine the integrity of the District government from occurring in the future.<sup>57</sup>

The Council could also consider whether a Comprehensive Code of Conduct should incorporate an anti-discrimination provision that would promote equity and inclusion. The addition of such a provision would be in line with the District's efforts to ensure that policy decisions and District programs are considered through a racial equity lens, as seen in the Mayor's recent establishment of the Office of Racial Equity. A recent Ethics Reform Task Force convened by the City of Dallas recommended the addition of an anti-discrimination provision into that city's ethics code that would prohibit discrimination "based on race, age, sex, religion, disability, marital or veteran status, nationality, sexual orientation, gender identity or any other protected characteristics" or other legally protected classifications that could serve as a model for the District.<sup>58</sup>

### **Open Government Recommendations**

The District continues to take steps to make government transparent and accessible to the public, including its efforts to keep the District government open to the public despite pandemic-related restrictions on its operations. BEGA has four recommendations that would allow OOG to better carry out its mission to enforce the Open Meetings Act and provide recommendations to implement the Freedom of Information Act.

First, to address the identification requirements at issue in a first party request for records under FOIA, BEGA reiterates our recommendation that the Mayor promulgate FOIA regulations that would allow agencies to seek verification of identity. In addition, the Council may also want to consider whether the District would benefit from privacy legislation in line with the federal Privacy Act, that would work with FOIA to provide a right of access to an individual's records that are maintained by District agencies.

Second, BEGA recommends that the District government implement the 2018 and 2019 recommendations of the Chief Data Officer, which called for the adoption of a "reasonable and uniform retention policy for email."<sup>59</sup> The District of Columbia does not have a retention schedule for email and stores all email for all agencies indefinitely. In the context of FOIA, the Chief Data Officer noted in the 2019 report that "the growing quantity of emails continues to slow FOIA responses, many of which include email searches." BEGA recommends that the Mayor adopt a reasonable email retention policy that requires email be stored for a fixed period of time.

Third, BEGA recommends amending D.C. FOIA to extend the response time for FOIA requests to mirror the timelines in the federal FOIA. Federal FOIA provides agencies with 20 days to

---

<sup>57</sup> The Council requires employees other than Councilmembers to obtain approval from his or her supervisor before engaging in outside employment. See Code of Official Conduct, Rule III(a)(2).

<sup>58</sup> Report of the City of Dallas Ethics Form Task Force, Sept. 2021, [https://content.govdelivery.com/attachments/TXDALLAS/2021/09/27/file\\_attachments/1949257/City%20of%20Dallas%20Ethics%20Reform%20Task%20Force%20-%20Recommendations%20Report%20-%20September%202021.pdf](https://content.govdelivery.com/attachments/TXDALLAS/2021/09/27/file_attachments/1949257/City%20of%20Dallas%20Ethics%20Reform%20Task%20Force%20-%20Recommendations%20Report%20-%20September%202021.pdf).

<sup>59</sup> See <https://opendata.dc.gov/documents/DCGIS::chief-data-officer-annual-report-2018/explore>; <https://opendata.dc.gov/documents/DCGIS::chief-data-officer-annual-report-2019/explore>.

respond to requests.<sup>60</sup> D.C. FOIA, however, provides District agencies with 15 days to respond to FOIA requests (except in the case of requests to the Metropolitan Police Department for body-worn-camera recordings).<sup>61</sup> Both statutes allow agencies to invoke a 10-day extension (excluding Saturdays, Sundays, and legal public holidays) for unusual circumstances, as defined in the respective statutes.<sup>62</sup> Amending D.C. FOIA to adopt the 20 days available to federal agencies would allow District agencies additional time to process FOIA requests. Changing the response time via statute would not require an amendment of the implementing regulations for D.C. FOIA as the provision at 1 DCMR § 405.1 refers to “the time prescribed by applicable law following the receipt of a request” in reference to the initial response time for a FOIA request.

Finally, BEGA notes that the Open Meetings Act exempts Advisory Neighborhood Commission meetings from compliance with the OMA.<sup>63</sup> Instead, ANC meetings are currently governed by a separate statute, the Advisory Neighborhood Commissions Act of 1975.<sup>64</sup> BEGA recommends that the Council make corresponding amendments to both statutes to bring ANC meetings under the requirements of the Open Meetings Act.

---

<sup>60</sup> 5 U.S.C. § 552(a)(6)(A)(i). The 20 days excludes Saturdays, Sundays, and legal public holidays.

<sup>61</sup> D.C. Official Code § 2-532(c)(1). D.C. FOIA also excludes Saturdays, Sundays, and legal public holidays.

<sup>62</sup> 5 U.S.C. § 552(a)(6)(B)(1); D.C. Official Code § 2-532(d)(1). D.C. FOIA provides for an extension of up to 15 days for requests for body-worn-camera footage.

<sup>63</sup> D.C. Official Code § 2-574(3)(F).

<sup>64</sup> D.C. Official Code § 1-309.11