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D.C. Open Government Coalition

Statement of

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On behalf of the

D.C. Open Government Coalition

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Before the Council of the District of Columbia

Committee on Government Operations

On

B19-166 (Open Government Act of 2011)

B19-714 (Freedom of Information Amendment Act)

B19-776 (Freedom of Information Amendment Act of 2012)

Madame Chairperson and members of the Committee, I am pleased to testify today on behalf of the D.C. Open Government Coalition.

Formed in March 2009, the D.C. Open Government Coalition seeks to enhance public access to government information and transparency of government operations of the District. We believe transparency promotes civic engagement and is critical to a responsive and accountable government. We strive to improve the processes by which the public gains access to government records and proceedings, and to educate the public and government officials about the principles and benefits of open government.

I appreciate the opportunity to present this statement at today's hearing. As Justice Brandeis once wrote, "sunlight is the best disinfectant"; with so much attention these days focused on investigation and prosecution of official corruption in the District of Columbia, now is a good time for the Council to ensure that more – not less – sunlight bathes the halls of the government.

Bill 19-0166 (Cheh Bill)

For that reason, the Coalition commends Councilmember Cheh for her comprehensive and forward-looking amendments to the current D.C. Freedom of Information Act – amendments designed to enhance public access to government information and increase the transparency of government operations in the District. For example, Councilmember Cheh's bill limits the timeframe that public bodies have to respond to FOIA requests, with extensions permitted only

in "unusual circumstances," ensuring that the public has prompt access to government information. Further, the Cheh bill creates an alternative to litigation by disappointed requesters by providing persons who have been denied access to government records the opportunity to have the Open Government Office review their requests.

The Coalition has several drafting suggestions for Bill 19-0166. First, we believe it is important to define the term "record" broadly to include any information maintained by a public body in any format. This broad and unequivocal definition will maximize the public's access to government information. Second, to ensure that public bodies do not delay the flow of information, the Coalition recommends that the 10-day response period commence as soon as the appropriate government unit receives the request or no later than three days after the body first receives the request. Moreover, we believe that the increased penalties for FOIA violations should be coupled with an annual report from the Attorney General describing the prosecution of these violations, which would serve as a tool to hold the government accountable. The Coalition also believes the Mayor's annual report should be expanded to include, among other things, information regarding the number of days taken to process requests, respond to requests, provide the granted information, and respond to administrative appeals. We are delighted to continue to work with this Committee and Councilmember Cheh to strengthen this legislation.

Bill 19-0714 (Alexander Bill)

Councilmember Alexander has also proposed amendments to the D.C. Freedom of Information Act that provide a broad definition of "critical infrastructure" and prohibit disclosure of information concerning "critical infrastructure." I address this subject below in the context of the Mayor's bill; in short, we believe it is premature to establish such a sweeping new exemption to the FOIA without having a much more specific focus on exactly what information – information neither already publicly available, like the location of underground utility lines, nor already fully protected under existing law – needs additional protection.

Bill 19-0776 (Mayor's Bill)

When we look toward amending FOIA, the Coalition believes our first priority should always be increasing openness and access to information; that, after all, is what freedom of information is all about. More specific goals should include making deadlines reasonable and exemptions narrow, while aligning our law with other FOIA laws, particularly the federal version, whenever possible.

The Mayor's bill does not achieve these goals. A brief glance at the mission statement clearly demonstrates the bill's intentions. While the residents of D.C. are committed to transparency and openness as goals to be pursued, the Mayor insists that we should also recognize "reasonable if narrow limits on such access for the public good." In other words, instead of understanding the benefits of an open government, the Mayor would balance openness against "the public good" as defined by the agencies and politicians in charge.

The federal FOIA was enacted in 1966 – and its state progeny (including D.C.'s FOIA) followed over the next decade – precisely to reverse the sordid history of allowing agency heads to make a discretionary determination whether the interest of the citizen requesting records merited a response. Needless to say, government bureaucracies thrive on secrecy, so asking a government official whether disclosure will serve "the public good" is likely to be a fool's errand.

The contention that openness should be limited (and not expanded) is behind many of the Mayor's more specific proposals. The Coalition strongly encourages this Committee and the public to ask the Mayor and his Attorney General why these exemptions and limitations should be included and what circumstances necessitate them. We do not deny that there have been instances of burdensome requests and obstreperous requesters. We are not blind to the resource demands of efficient FOIA processing. We fully understand that sometimes there will be exceptional circumstances that call for additional time to process requests. Nonetheless, the Mayor cannot justify the sweeping changes proposed by his bill; we address those proposals below and suggest that an emphasis on creating and empowering the Open Government Office, installing a District-wide FOIA processing system, and stepping up proactive disclosures would go far toward responding to many of the legitimate challenges identified by the Mayor's bill.

(A) Time Limits and Process

The Mayor's proposals make it significantly more difficult for citizens to access government records by allowing *expansion* of the time limits allowed to agencies responding to individual FOIA requests and requiring *contraction* of the time available to individuals to challenge denials by agencies. The Mayor's bill increases the amount of time agencies have to respond from 15 days to 20 days. This extension mirrors the federal law, but is wildly out of step with the approach taken by most states. Many states have a 10 day response time, and even more have a requirement that agencies respond in 5 days or less, with 3 or 4 days being a common deadline. Our laws already, then, give agencies longer to respond than most states do, and the Mayor's approach takes us further out of the mainstream. Additionally, annual FOIA data reports by the Secretary demonstrate that most agencies respond to most requests well within the current 15-day time deadline; the 2011 Report of the Secretary (for FY2011, dated February 1, 2012) states that, government-wide, the "median number of days to process a FOIA request" was 12.6.

While the Mayor's bill gives agencies longer to respond to requests from ordinary citizens, it gives citizens less time to address an adverse agency ruling. Under the current D.C. FOIA laws, someone who has been denied access to a document may appeal the decision to the Mayor's office or initiate litigation in Superior Court. The statute of limitations for civil claims in the District is presently three years. The Mayor's bill would amend §2-537 to require that any appeal be made 30 days after an adverse decision, and any litigation must be commenced just 30 days after the denial of such an appeal by the Mayor. In two narrow situations (where an agency refuses to turn over records after being ordered by the Mayor to do so, and where the records are in the possession of the Council), the requester would have 180 days to file suit. All of these limitations are unnecessary, draconian, and highly inefficient.

Putting a deadline on a requester's ability to appeal at best complicates, and potentially defeats, the citizen's pursuit of requested government records. People will unknowingly miss the extraordinarily restrictive 30-day appeal deadline, and even sophisticated requesters may not make a decision within 30 days (180 days in some circumstances) whether to pursue time-consuming and potentially expensive litigation. What justification is there to these deadlines other than defeating a requester's ability to pursue appellate and judicial review rights? Archival retention policies require the records to be kept far longer than these deadlines, so they don't save storage space. And there is nothing preventing the requester from filing a new request for the same information and starting the clock again – nothing other than imposing additional delays on the requester and additional costs on the government. (I note that these kinds of "statute of limitations" deadlines have been proposed from time to time for the federal FOIA, but have been uniformly rejected as being unnecessary and impractical.) The Mayor's concern with burdensome requests and obstreperous requesters appears to drive many of the changes he proposes; these limitations will actually increase the numbers of requests and expand the burdens, exacerbating the very problems he seeks to solve. These kinds of proposals best belong in a "Freedom *from* Information Act," not a Freedom *of* Information Act.

(B) Exempting Specific Information

The Mayor's proposals not only propose to impose procedural delays and roadblocks in the path of those wanting more information from the government, but they would also place new categories of information out of reach as a basic rule. Rather than making a good faith effort to reduce the obstacles to public access, the Mayor's bill would create more.

One notable example proposes a novel "critical infrastructure" exemption like that proposed by the Alexander bill. The term apparently encompasses any existing or proposed system, of a physical or virtual nature, that protects any kind of security or safety. Any document pertaining to critical infrastructure would be barred from disclosure. This critical infrastructure exemption is poorly defined and overbroad, and is not, to our knowledge, necessary, given the important protections already in place for documents pertaining to public safety preparedness and vulnerability assessments under current §2-534(10). Think of the government agencies that could claim to be covered as operating *any system* protecting economic security or public safety; perhaps the greater challenge is to think of categories of information that couldn't potentially be covered.

Another example of reduced access proposed by the Mayor's bill: instead of protecting commercial information when disclosure would likely cause substantial harm to a person (the current federal standard, as courts have construed the federal FOIA's exemption 4), the Mayor proposes to protect information that *may be deemed* privileged or confidential. Deemed by whom? Under what statutory standard? It is difficult to conjure what purpose, other than to defeat the goals of FOIA, this vague language serves. Perhaps the Mayor might offer some examples of competitive harm caused by releases of records required by the D.C. FOIA?

In addition, it is not clear why the Mayor needs to protect against disclosure of documents relating to pending litigation – not just between the District and a requestor, but between the

District and a party "clearly identified with" the requestor? We have no idea what "clearly identified with" mean in this context, and the Mayor's bill provides no clues. Let me make two predictions should this new privilege be recognized: First, it will generate more litigation, rather than saving time and resources. The District will need to use discovery against the plaintiff in any pending litigation to determine whether a requester is to be considered "clearly identified with" that party. What purpose will this serve? Second, nothing would prevent the D.C. Open Government Coalition or other nongovernmental organization that is not "identified with" any party in litigation with the District government from making a follow-on FOIA request whenever this exemption is raised; the requester could then publicly post all documents received. (I note that D.C. has already asserted this exemption to FOIA claims to litigants in order to withhold requested information. In one situation, the Coalition followed up with our own FOIA request for the same records, which was successful.) The ease of obtaining disclosure through such a follow-on request undercuts the assertion that the Mayor's bill adds reasonableness and will save resources in the FOIA process.

One more example: our current D.C. FOIA law is in line with nearly every other state and the federal law in exempting from mandatory disclosure records that reveal the techniques used by law enforcement officers. However, the Mayor's bill seeks to broaden this exemption by also banning disclosure of documents that might reveal "prosecutorial" techniques. To be effective, every lawyer in the District would have to be prevented from taking knowledge of "prosecutorial techniques" with him or her before leaving government service for private practice; otherwise, the FOIA proposal could not begin to keep information on "prosecutorial techniques" out of the public domain, but would only give former employees who did not have to use FOIA to gain this information an unfair advantage.

Without a convincing argument about why additional secrecy is required and the identification of narrow, not sweeping, categories of information requiring protection, we should summarily reject attempts to expand exemptions. The presumption ought to continue to be disclosure, and the burden ought always to remain on the government to overcome that strong presumption.

(C) Open Government Office

Finally, the Coalition opposes the revisions to the Open Government Office (OGO) proposed by B19-776. The bill would limit that Office to offering dispute resolution services as an alternative to FOIA litigation. That, indeed, is an important function of the OGO, but it should not be the only one. We also object to the more fundamental power shift the Mayor is seeking by proposing to change §2-539(b) to say that "[t]he Mayor may issue rules governing the functions and procedures of the Open Government Office." In other words, the Mayor wants to put the OGO under his regulatory thumb.

Following enactment of the law initially establishing the OGO, the Mayor had almost a year to appoint a capable and independent director to the Office and to participate in its growth and development. Now that the Council has conferred that authority in the Ethics Board to get the Office underway, the Mayor is trying to turn back the clock, at best. (Another possibility would involve the Mayor's failure to issue rules entirely and thus, once again, preventing the OGO

from getting down to business.) We believe that the OGO, if robustly independent, can play a significant role in helping make government more honest and accessible to its constituents. If the OGO is under the control of one of the most powerful actors in our city government – who already has authority over every FOIA appeal – the Office will be unable to provide the independent voice the Council envisioned for it. The Coalition recommends that, rather than being threatened by emasculation, the OGO be given additional authority and jurisdiction as part of the FOIA amendment process.

The potential for bringing greater transparency – more access to information – to the District of Columbia should not be confined to the four corners of the FOIA or stop with the creation of an strong and effective OGO. Two additional steps can and should be taken by the District government.

Additional Proposals to Enhance Information Disclosure

(A) District-Wide FOIA Processing System

In discussing how the District can enhance transparency, I would be remiss to overlook a key issue that was the centerpiece of the testimony that former Attorney General Nickles submitted to this Committee two years ago on the predecessor FOIA bill introduced by Councilmember Cheh (Bill 18-777): A District-wide electronic FOIA processing system. This notion was not a pipedream; it had apparently been reduced to an RFP by the District's technology office (OCTO) and subjected to a cost-benefit assessment. Attorney General Nickles asserted that proposed amendments to FOIA would be unnecessary and the District government's burden in processing FOIA requests would be substantially lessened with the implementation of such a system. As described in the AG's statement to this Committee:

> By the end of the year, we expect to begin to implement a new District-wide electronic FOIA tracking system that will, among other features, allow requesters to make requests on-line, assign tracking numbers to requests, track requests, allow for enhanced internal collaboration and internal and public reporting, provide documents to requesters more often in electronic form, and provide to the public documents previously released under our FOIA statute.

Rather than adding costs, while reducing delays, the proposed system, according to OCTO's own estimates, would effect "significant cost savings" to the tune of going beyond recovering capital investment costs in the first year, and actually producing about $525,000 in savings "in every subsequent year." (I append to my testimony a one-page analysis that I have been told was developed by OCTO as part of the procurement process.) We believe that Mayor and Council share a responsibility to ensure that this system is put in place without further delay, so that not only will FOIA processing be more efficient and speedy, but costs in the neighborhood of over half-a-million dollars each year can be saved.

(B) Proactive Disclosures

Finally, I would emphasize to the Mayor, the Attorney General, and this Committee the continuing need to foster – by requiring and encouraging – proactive disclosure of information from every governmental entity in the District, including the Council. Our Coalition did a study a few years ago that concluded that most D.C. agencies do not even post on their websites the basic information that is already statutorily required to be posted. Unquestionably dissemination can be speeded and FOIA requests avoided where agencies affirmatively push out to the public information that might be useful or of interest. The Attorney General's Office should devote more time to encouraging agencies proactively to disclose information and thus, in the long run, save more time in having to respond to FOIA requests. This is a lesson that has been learned at the federal level, in many states, and in many foreign countries; it might be followed here as well.

Conclusion

Our call for greater, not less, disclosure under the FOIA and my last two suggestions – adoption of an electronic processing system and more emphasis on proactive disclosure – were hardly invented by the Open Government Coalition. They merely echo the words of Mayor Gray on his first day in office, when he issued a Memorandum to his administration entitled "Transparency and Open Government Policy." (I append this to my testimony as well, and I recommend a fresh reading of the memorandum by each District official.) To quote the Mayor:

> [T]he policy is that the law be construed with the view toward "expansion of public access and the minimization of costs and time delays to persons requesting information." My Administration will ensure that information is disclosed, consistent with law and policy, promptly and in a manner or medium that is useful to the public. Responsible officials must actively encourage that records exempt from mandatory disclosure be made available as a matter of discretion when disclosure is not prohibited by law or harmful to the public interest. Moreover, the government must continue to proactively provide information to citizens, thereby reducing the need for information requests, and continue its efforts to modernize and streamline document production processes through electronic means and in a manner designed to increase efficiency, accountability and reduce time and cost.

I could not put this more clearly or eloquently myself. Neither the efforts required to manage a complex city government nor the distractions of dealing with corruption charges and investigations should excuse government leaders from ignoring the Mayor's direction.

The D.C. Open Government Coalition believes that D.C. residents deserve more, not less, access to information. And not just access to the information that the Mayor, an agency head, a bureaucrat, or even you or I might believe is "reasonable" for them to have. The FOIA is a powerful tool; it should be sharpened, not blunted.