



SOCIETY OF
PROFESSIONAL
JOURNALISTS

Testimony of
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On behalf of

The Society of Professional Journalists

D.C. Professional Chapter

July 11, 2012

Before the Council of the District of Columbia

Committee on Government Operations

B19-166: Open Government Act of 2012

B19-714: Freedom of Information Amendment Act of 2012

B19-776: Freedom of Information Amendment Act of 2012

Thank you very much for inviting me to address you on behalf of the Society of Professional Journalists' D.C. Professional Chapter. I am the chapter's freedom of information chair and I assist journalists seeking information under the D.C. and federal open records and meetings laws. I am also chair of the D.C. Open Government Coalition's Government Relations Committee.

Of the two Freedom of Information Act amendments before you today, the kindest thing I can say is that their submission demonstrates the importance of passing the Open Government Act as soon as possible.

If enacted, Bill 19-776 would erect very significant roadblocks to government transparency and provide none of the benefits the Attorney General has ascribed to it. By creating an unneeded exemption, Bill 19-714 would merely cause confusion in an area where there is none now.

Standing up a strong Open Government Office with oversight over FOIA, as well as open meetings, is the only safeguard against bills like these. One of the Office's main duties should be taking the lead in drafting and vetting amendments to ensure they maximize transparency and exempt only truly sensitive information. After all, in the words of the FOI Act preamble, "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

For that reason we urge you to either reject bills 19-714 and 19-776 entirely, or set them aside until the Open Government Office director and staff have had an opportunity to weigh in on them. But if you choose to consider them now, we hope you will recognize that provisions in the Open Government Act more effectively address concerns the Attorney General raises than the FOIA bill he and the mayor put before you.

In light of the mayor's strong statement on his first day in office in support of increased government transparency, introduction of Bill 19-776, an

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anti-openness bill, is very troubling. What makes the mayor's action appalling is that he introduced this bill while fully aware of provisions in Ms. Cheh's bill and yours, Madam Chair, that would strengthen the independent Open Government Office. This is so because his bill attempts to wrest control of the Office, and to narrowly circumscribe its role in ensuring transparency.

PROPOSED AMENDMENTS WILL NOT CURB ABUSIVE, OVER-BROAD FOIA REQUESTS

According to Mr. Nathan, the main goal of Bill 19-776 is to provide the government a defense against abusive, over-inclusive FOIA requests that stretch agency resources to the breaking point. To that end, the administration proposes greatly expanding the scope of several exemptions, increasing request processing time, and drastically shortening the time in which an appeal must be filed. All of these measures would, in fact, increase disputes between agencies and requesters, increase the likelihood of litigation and, in the end, consume more scarce agency resources.

On the other hand, an amendment to Ms. Cheh's bill that you proposed in March would allow an agency, confronted with what it considers an abusive request, to seek a ruling from the Open Government Office. If the Office agrees, it can ratify the agency's decision and dismiss a requester's appeal without a hearing. Such action by the Office would discourage the requester from suing and serve as a deterrent to over-broad requests in the future.

AGENCIES DO NOT NEED MORE TIME TO PROCESS REQUESTS

Mr. Nathan, like his predecessor, Peter Nickles, complains that agencies need more, not less, time to respond to FOI Act requests. He suggests that the response deadline be increased from 15 business days to 20 days to conform with the federal statute. He also would liberalize circumstances under which agencies could extend response time.

This argument is based on several erroneous premises. The analogy to the federal statute is inapposite. First, nearly all federal agencies have offices spread throughout the United States and many have overseas branches. As a result, the task of locating and gathering responsive records is much more complex than it would be for D.C. government agencies, even in multi-site agencies like the D.C. Public Schools and Department of Public Works. Second, the volume of requests the federal government receives is exponentially greater than the volume of D.C. FOI Act requests. In fiscal year 2009 the Department of Justice alone received over 10 times the number of requests all D.C. agencies combined received.

The majority of state open records laws give agencies 10 days or less to respond.

- States that by statute or regulation allow agencies 10 business days to respond are Alaska, California, Delaware, Hawaii, Iowa, Massachusetts, Rhode Island, Texas and Utah. In Alaska an agency must obtain the attorney general's permission for an extension exceeding 10 days. California permits one 14-day extension. The Hawaii statute gives agencies an additional five days to process records, but only if they require redaction. Utah gives agencies an additional 15 days if extensive editing is required to segregate exempt material.

- Statutes in Arkansas, Arizona, Florida, Idaho, Maine, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio and Vermont create a presumption of immediate access. Vermont permits agencies two days to disclose records not immediately available. Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Missouri and New Mexico give agencies three days to respond if records cannot be made available immediately, and New Hampshire gives them five business days. New Mexico permits an extension until no later than 15 days after receipt of a written request.
- Connecticut and Nebraska require a response within four business days, and Connecticut permits one extension to a total of 10 days.
- Michigan, Virginia, Washington and West Virginia give agencies five business days to provide requested records. Virginia permits a seven-day extension and Michigan permits one 10-day extension.
- Agencies in Illinois and Indiana have seven business days to respond. Illinois permits one seven-day extension. Mississippi requires disclosure within 14 business days. South Carolina requires a response within 15 business days. Maryland requires a response within 30 calendar days, effectively 20 business days.

More importantly, because most D.C. agencies are responding to FOIA requests within 15 days, there is no evidence supporting the administration's claim that they need more time.

Fiscal year	Total requests	Proc. w/in 15 days	Avg. response time (days)
2005	5,795	3,504	10
2006	4,861	3,036	26
2007	5,399	3,471	16
2008	5,989	4,139	14
2009	5,637	3,704	12
2010	4,234	2,887	13.2
2011	5,699	4,028	12.6

There is no reason D.C. government agencies cannot comply with the 10-day time limits established by § 202(a) of Ms. Cheh's bill.

THE MAYOR'S BILL WOULD ERECT ROADBLOCKS TO APPEALS

Another administration amendment would require requesters denied access to appeal administratively within 30 days or to the Superior Court within 30 or 180 days of denial, depending on whether an agency or the Council denied the request. The 30-day deadline for an administrative appeal when an agency formally denies an FOI Act request is not a problem. In fact, your bill, Madam Chair, includes a similar deadline for appealing to the Open Government Office.

The difference is that the Open Government Act envisions a process in which the requester files a notice of appeal that initiates an inquiry by the Open Government Office. The administration bill envisions a procedure now used to appeal to the mayor. In that procedure the

requester must file a petition to overturn the agency denial. Because the requester may not get another opportunity to do so, the petition must fully argue the case against the agency decision.

In addition, the administration bill would apply the same deadline when an agency, in violation of the statute, misses a response deadline or issues an inadequate response. On this point, the mayor's bill is so ambiguous that it would be impossible in many cases to determine when the 30- and 180-day clocks begin ticking.

As a practical matter, it would be impossible for most requesters to vindicate their rights under the FOI Act in the Superior Court if they were required to file suit within 30 days after an agency or the mayor denies an administrative appeal or 180 days of when the Council denies a request. The default statute of limitations in the District for bringing a civil suit is three years,¹ and the filing deadline proposed in your bill is established by the Administrative Procedures Act.²

If the goal is to reduce appeals by so-called abusive requesters, as the Attorney General claims, the mayor's amendments would be a dismal failure. A sophisticated FOI Act requester will quickly understand that if s/he has missed the deadline all s/he need do is file a new request, starting the clock again and making more work for agency personnel.

Your proposed amendments to Ms. Cheh's bill would establish realistic deadlines for appealing, to facilitate resolution of disputes in a reasonable amount of time.

NO EVIDENCE SUPPORTS THE MAYOR'S CALL FOR BROADER, VAGUE EXEMPTIONS

The mayor has proposed several amendments to broaden the scope of exemptions or place certain types of information outside the FOI Act. The attorney general erroneously argues that these changes bring the D.C. statute in line with federal law.

The first would exempt any commercial information obtained from outside the government that an agency considers "privileged" or "confidential," regardless of whether disclosure would cause harm to the entity that provided it. This amendment could be invoked to withhold massive amounts of information submitted to influence agency decisions to award government contracts, and could thus prevent scrutiny of questionable contracting decisions.

The next would allow agencies to invoke the law enforcement exemption based on speculation that disclosure "could reasonably be expected to" cause the enumerated harms. In addition, it would exempt "prosecutorial techniques and procedures not generally known outside the government." No state or federal open records statute exempts prosecutorial techniques and procedures, and we hope the Council, before considering this amendment, will demand to know what records the mayor hopes this exemption would keep secret. It is worth noting that the Department of Justice publishes on its website the U.S. Attorney's Manual, the U.S. Attorney's Bulletin, and other documents detailing prosecutorial techniques and procedures employed by federal prosecutors nationwide.

¹ D.C. Code § 12-301(8).

² D.C. Code § 2-510(a).

The law enforcement exemption in currently law provides ample protection against disclosure of records that would deprive criminal defendants and targets of other types of investigations of fair adjudications, or would invade personal privacy.

The mayor and Ms. Alexander have proposed amorphous exemptions for critical infrastructure information, but it is impossible to tell from them what information now available under the FOI Act could be withheld if their amendments pass.

Ms. Alexander would define critical infrastructure to include “existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which could negatively affect security, economic security, public health or safety, or any combination of these matters.” The mayor’s bill brings within the ambit of critical infrastructure any

system of physical assets used for: (A) Transportation; (B) Communications, including but not limited to telephone, data, postal, radio, television, video, wireless, satellite and internet communications; (C) Gas, electricity, or steam generation, storage, transmission or delivery; (D) Water storage, treatment, or delivery; or (E) Sewage or stormwater collection, treatment, or disposal, or flood control.

It would exempt any “infrastructure system, or an asset therein, that is so vital to the District of Columbia that the incapacity or destruction of such infrastructure system or asset would adversely affect the physical security, economic security, health, safety, or welfare of the public.” Under these definitions, the government could refuse to disclose information about public utilities that construction contractors are required by law to obtain before starting building projects.

We do not believe amendment of § 2-534(10) is needed. If the Council is inclined to consider an amendment, it should apply definitions of critical infrastructure in the comprehensive federal information security statute, 44 U.S.C. § 3541, *et seq.*

The mayor asks you to create a “pending litigation” exemption that applies to

litigation between the District ... and the requester or a party clearly identified with the requester, and which fall within the scope of discovery subject to the jurisdiction of the court, until the pending litigation or claim has been finally adjudicated, settled, or otherwise resolved.

Such an exemption is not unique under state open records laws. California, Connecticut and Delaware have such exemptions. They have been interpreted to prevent a litigant from obtaining records under the open records statute that would not be available to them through judicial discovery. The rationale is that the pending litigation exemption maintains a level playing field on which a litigant against the government should not be able to obtain a strategic advantage using the FOI Act to get information about its governmental opponent where the agency could not get similar information about the private litigant.

But the interpretation of this concept used in the past by the District’s attorney general to deny FOIA requests is that a litigant against the government cannot obtain information under FOIA that would be available to any other requester who is not in litigation against the

government. The net effect is that agencies asserting this uncodified exemption have refused to disclose any information to a requester who has sued to enforce the FOI Act, even when disclosure would not give the requester a strategic advantage in the litigation and where the agency would disclose the same information to another requester. In short, agencies have invoked this principle to penalize requesters who had the temerity to sue to gain access to non-exempt information.

The mayor would broaden the privacy exemption to put a large amount of information about individuals outside the reach of the FOI Act, even where individuals routinely provided similar information with no expectation of privacy and where it relates directly to a public employee's performance of his or her duties. In effect, this exemption would prevent disclosure of virtually all personal identifying information without regard to whether disclosure would constitute a "clearly unwarranted invasion of personal privacy."

Finally, the mayor's amendments would allow any agency that has obtained records from another agency or public body to withhold that information if it believes the providing entity might have grounds to invoke an exemption. Implementation would discourage consultation among agencies and lead to unnecessary delay and confusion. The better practice, applied under the federal FOI Act, is to say that the receiving agency, if it believes information might be exempt, should consult the providing government entity or refer the requester to the source of the record.

CONCLUSION

We urge you to augment Ms. Cheh's Open Government Act with provisions added in Bill 19-736 and send it to the floor as quickly as possible. It is imperative that the independent Open Government Office have the full panoply of tools these measures provide to ensure transparency in the D.C. government.

The appropriate course regarding Bills 19-714 and 19-776 is to hold them in abeyance until the Office is in operation and has an opportunity to assess the benefits and detrimental effects those amendments would have.

Thank you again for inviting me to testify today and for your efforts to improve public access to records through the Open Government Act. The D.C. Chapter of the Society of Professional Journalists and I would welcome the opportunity to assist and advise you through the remainder of the legislative process and on implementation of these amendments.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ also promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press. The D.C. Professional Chapter, with members representing local and national news media, is one of its largest chapter with nearly 300 members.

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