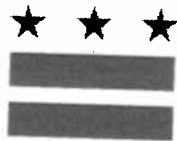


**Statement of  
Irvin B. Nathan  
Attorney General for the District of Columbia**

**Before the  
Committee on Government Operations  
Muriel Bowser, Chairperson**

**Bill 19-776, Freedom of Information Amendment Act of 2012**



**July 11, 2012**

**11:00 A.M.  
Room 500  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, D.C.**

Good morning, Chairperson Bowser, Councilmembers, staff, and guests. I am Irv Nathan, Attorney General for the District of Columbia. On behalf of the Executive, I am pleased to testify today regarding Bill 19-776, the Freedom of Information Amendment Act of 2012, and several other pieces of legislation concerning FOIA pending before this Committee. With me is Ariel Levinson-Waldman, my Senior Counsel, whose roles in our office include supervising our FOIA officer.

We commend the Committee for taking up reform proposals on this important topic. FOIA is about transparency and open government. It is one important tool of achieving these ends. Let me begin by addressing the Gray Administration's commitment to an open and transparent government more generally. Then I will turn to FOIA specifically, the problems the District government is experiencing under the statute, and our proposals for FOIA reform. As I will discuss, our proposals reflect the suggestions of the Superior Court judges who are charged with interpreting the statute and, if adopted, would substantially align the District's FOIA with federal law.

### **Government Transparency**

On the first day of this Administration in January 2011, Mayor Gray, tracking the Obama administration's approach at the federal level, issued formal guidance directing all District employees to release records exempt from mandatory disclosure when disclosure is not prohibited by law or harmful to the public interest. Consistent with this policy, the Mayor's office has published each decision issued by the Mayor sitting in review of District agency decisions to withhold information under FOIA, many of which have led to reversals of the agency and directives to produce the document in question. Those FOIA appeals decisions are published online in a searchable database. Publication of these decisions and those of the courts

in the District in which DC FOIA issues are litigated helps ensure that District agencies are held accountable for their decisions under FOIA, and lets the public know the reasons and the underlying authority in such cases for withholding a document that the government has concluded warrants confidential treatment. In addition, the EOM and a number of agencies including OAG, have moved toward, when possible, electronic production of FOIA responses. These electronic productions help reduce the cost and delays associated with paper production.

In addition, the Mayor's office has instituted a program of regular press briefings with the Mayor and other senior executive branch staff, and of releasing the Mayor's daily schedule to the media and the public. The Mayor has also ensured that a representative of the Executive is available at all legislative hearings.

Further, under this Administration, the District government's website gets high marks from outside organizations for transparency. As was reported in the *Washington Post* earlier this year, the Sunshine Review organization evaluated DC.gov along with the websites of over 6,000 state and local governments, and the District received an A-minus, one of only 214 out of more than 6,000 jurisdictions to receive such a grade, putting us in the top 1 percent.<sup>1</sup> Just yesterday, the Mayor issued an order setting forth a District-wide policy making clear that District employees should not use private email accounts to transact public business and that if they do, the employees must copy their District government email address so that government servers capture these emails, making them available for FOIA and other types of requests. The Order makes clear that employees violating this policy may face disciplinary actions.

These are just some examples of our commitment to getting the transparency issue right. One reporter from a major newspaper recently told us, ironically in a not-for-attribution quote, "I have had an easier time under the new Administration getting answers to basic questions and

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<sup>1</sup> See Mike De Bonis, *DC.gov Website Gets High Marks For Transparency*, *The Washington Post*, March 12, 2012.

getting records that I've requested. There's been no instance where I've been met with brick walls." While there is always room for improvement, we believe this Administration is quite transparent.

FOIA is one of the important components of transparency. As we have evaluated our system and experienced the current FOIA rules in this Administration, it has become clear that reform is needed to make the FOIA request system more sensible and effective for all participants – agencies, courts, and the members of the public who submit FOIA requests.

### **Need for FOIA Reform – An Imbalance in the Statute**

Our proposals as reflected in Bill 19-776 are necessary to correct imbalances that have developed in recent years – imbalances that the courts have repeatedly said only the Council can correct. These imbalances threaten the effective and efficient running of the government.

The federal FOIA was originally developed in the 1960s and, as recognized by the Supreme Court, was designed to balance two competing needs: on one hand, citizens' right to access public information gathered or created by their government, and on the other, as the Supreme Court put it, the "realiz[ation] that legitimate governmental and private interests could be harmed by release of certain types of information."<sup>2</sup> Governments have a responsibility to maintain the confidentiality of certain information that is appropriately shielded from public disclosure, such as attorney-client communications, details of government investigations, and sensitive information on individuals – such as social security numbers or medical history – that may be contained in government files. For burdensome FOIA requests, Congress addressed the often-significant time and resources needed to perform this review by providing courts clear statutory authority to grant – where facts warrant it – extension of time for the agency to process

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<sup>2</sup> *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal citation omitted).

resource-intensive requests so long as the agency is “exercising due diligence” to the court’s satisfaction.<sup>3</sup>

The Council, unfortunately, has included no such mechanism in the District FOIA, and we unfortunately are sometimes faced with burdensome, unreasonable and abusive requests for documents. First enacted in 1977, the District’s FOIA originally largely tracked the federal statute and was intended to do so. However, in the years since, balance reflected in the original District statute has been undone by two factors: technological advances and a failure in the law to provide for flexibility as the federal statute does.

First, rapid changes in technology have created new forms of communication and information storage – such as emails, computer databases, and smart phones – that had not been contemplated in the pre-digital era when the FOIA was enacted. What government officials used to do on the phone or in meetings – that is, informal discussion – was not subject to FOIA before the days of email. Email and other forms of technology have caused a vast amount of communication and information on these platforms to become written and electronic, and therefore, subject to access through FOIA. The result has been an exponential increase in both the amount of information that must be searched by District officials to respond to a FOIA request, and in the size of the responses that must be prepared by those officials. In Fiscal Year 2011, for example, the District received a total of 5,699 FOIA requests. MPD alone received 1,055 FOIA requests, which MPD estimates required well over 8,000 staff hours to provide responses. In responding to a FOIA request, the FOIA officer must first locate and collect all potentially responsive documents in both paper and electronic form, and then review, analyze, redact, organize and produce all non-privileged documents, as called for by the statute. The responding FOIA officer must also produce an often equally large index listing the reasons and

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<sup>3</sup> 5 U.S.C. § 552(a)(6)(C)(i).

legal basis for each redaction or withheld document. This review process must be done by the FOIA officer or reviewing attorney on a document-by-document basis; it is labor-intensive. So, the first problem: with technology and email developments in recent years, the volume of review required is high, and the work required to perform the review is significant.

Second, the District, unlike the federal government, has never updated its FOIA timing rules to reflect the reality of massive FOIA requests, some of which require extra time for an appropriate response. Under District law, all of the tasks I just described must be completed in a 15-business-day timeframe, with no flexibility beyond a single one-time statutory 10-day extension.<sup>4</sup> As a practical matter, what that means is that if a request asks for a category of items with 2 responsive documents or 200,000 responsive documents, under the statute, the answer is the same: 15 days, and one 10-day extension for “unusual circumstances.” No further time is allowed. If the District does not respond within this strict timeline, the requester may either petition the Mayor or bring an action directly in the Superior Court, for an order requiring disclosure of the requested documents and attorneys’ fees and costs paid from the District’s treasury.<sup>5</sup> Where an agency has denied a request in whole or part or has failed to respond within the current deadlines, a Superior Court judge currently may not take into account the volume or reasonableness of a request, nor may it grant the agency additional time to respond.<sup>6</sup> The judge is limited simply to determining whether the District has failed to meet the deadlines or improperly withheld a document – if so, the Superior Court may order the agency to produce the documents and award attorneys’ fees and costs.

The lack of flexibility in the current D.C. FOIA has been exploited and abused by some document requesters. To take one recent example, the Fraternal Order of the Police (“FOP”)

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<sup>4</sup> See D.C. Official Code § 2-532(c)-(d).

<sup>5</sup> See D.C. Official Code § 2-532(e).

<sup>6</sup> See D.C. Official Code § 2-537(b).

recently demanded – and was, under the law, entitled to receive – every email and other communication mentioning the union or its leadership sent to or from the Chief of the MPD or any of the assistant chiefs, over a period of four years.<sup>7</sup> Seven members of MPD’s staff – including members of the General Counsel’s office and command officials – were diverted from their duties to respond to this request. They reviewed almost 18,000 pages of emails and attachments and indexed each individual email by date, time, author, recipients, subject matter and, if the document was redacted or completely withheld, the MPD’s reason for doing so. The MPD also compiled, as required by the statute, the index identifying each individual redaction or withheld document and giving the legal bases for doing so; this index ultimately had over 7,000 entries. Yet this entire process was required under law to be completed within the 25 days allowed under the current statute – no exceptions or allowances. When the District failed to timely respond, the FOP sued the MPD in the Superior Court, where, after a great deal of litigation, it won a judgment that the MPD had not responded in time and had improperly withheld documents. Fortunately, in this case, although the FOP sought attorneys’ fees and costs, the judge denied that request, stating in part that “The Court remains unpersuaded of the public benefit inherent in the documents sought by the” FOP.<sup>8</sup> Still, on the basic question of liability, the court was powerless to tailor its ruling to the facts or equities of the case or reasonableness of the behavior of the parties.

Another recent example comes from the Department of General Services (“DGS”). A requester sought certified payroll information and the only exempt information on the documents was the social security numbers and home addresses of the contractors. DGS must review approximately 100 files and redact hundreds of pages of responsive records in each of those

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<sup>7</sup> *FOP v. District of Columbia*, 2009 CA 006777 B (Sup. Ct.).

<sup>8</sup> *FOP v. District of Columbia*, 2009 CA 006777 B , Order at 4 (April 1, 2011) (Josey-Herring, J.).

hundred files. DGS is able to devote only one employee, 10 hours per week – a quarter of his workweek – to handle this request. At this rate, the request will not be complete until September. DGS spoke with the requester and told her they will be able to produce records on a rolling basis. The requester did not find this acceptable, and under current District law, the requester could sue the District for not being responsive to the FOIA request and the court may be forced to award judgment against the District and consider awarding costs and attorneys' fees to the requester.

These are just a few of many similar examples but they illustrate the point. The statute's lack of flexibility on timing, combined with sometimes massive requests (for which no reason must be given), and finite resources to handle FOIA, combines to cause significant resource-draining problems for the District's agencies, all of which we consulted in developing the Administration's proposal.

Members of this Council and District residents should ask themselves how they would react if the Government could subpoena all of their records, no matter how voluminous, without giving a reason, demand that they be produced in a matter of days, and have the courts powerless to get any explanation for the demand, place any substantive limits on it, or even extend the time for response. That, in effect, is what the current D.C. FOIA allows any requester to do to any DC agency.

Our proposed amendments, based largely on the federal FOIA model, seek to allow the courts discretion to limit abusive demands – such as those for all emails that mention the police chief or the police union – and to allow overworked, under-resourced D.C. personnel adequate time to respond to legitimate requests for documents. Several Superior Court judges have suggested that the Council should amend the law to give neutrals the power to bring a rule of



reason to abusive requests. The judges have indicated that, while they are aware of the chronic shortage of resources and would like the authority to be flexible where warranted, they simply cannot provide relief under the current provisions of the DC FOIA.

For example, in another FOP case, Judge Hedge of the Superior Court told the District's attorneys on the record: I'm asking you to comply with the law and however you do it is *your problem . . . .* The statute is very clear and just because you don't have the resources doesn't eliminate your burden of having to comply with the [FOIA]."<sup>9</sup> She noted later in the same case: "*I sympathize with your plight, but it's the legislative branch that has to save you . . . .*"<sup>10</sup>

Similarly, Superior Court Judge Josey-Herring, in yet another FOP case in which the Court ruled against the District, likewise noted the unfortunate contrast with federal law in a recent opinion, stating "There is no safe harbor provision in the local FOIA statute although there is one in the federal FOIA statute."<sup>11</sup> Although sympathetic to the District's plight, the judge could not grant the District additional time or narrow the size of the request. Other Superior Court and federal judges have expressed the same frustration – on and off the record – to me and to the District's attorneys.

A comment by Judge Josey-Herring sums up our challenge:

*Unfortunately the Act provides certain constraints that may or may not be practical, but it's the law . . . . [and] it seems to me, that the legislature has to understand what position the District is in. . . .*<sup>12</sup>

Our role today is to help the Council and the public understand what position the District is in. As the courts have recognized, under current D.C. law, courts are powerless to protect

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<sup>9</sup> 2008 CA 004867, November 13, 2009 (Hedge, J.) Hr'g Tr. at 4

<sup>10</sup> See 2008 CA 004867 B, March 12, 2010 (Hedge, J.) Hr'g Tr. at 14.

<sup>11</sup> See 2010 CA 006565 B, January 14, 2011 (Josey-Herring, J.) Hr'g Tr. at 17.

<sup>12</sup> See 2009 CA 006777 B, July 6, 2010 (Josey-Herring, J.) Hr'g Tr. at 35-36.

against large and sometimes abusive requests. This impairs the District government's ability to provide core services.

This situation is made worse by a separate policy choice by this Council – in another significant and unwarranted departure from the federal law – to *criminalize* an agency official's decision to withhold a document if that decision is found to be arbitrary and capricious. Under current law, an agency director or FOIA officer risks being arrested, tried in criminal court and, if convicted, fined for each violation of the statute. Moreover, changes to the FOIA proposed in Bill 19-166 would add imprisonment for up to 6 months to the list of penalties. We note that, in most District agencies, employees take on FOIA responsibilities *in addition to* their substantial other job responsibilities, and indeed in many of the agencies the Executive is recruiting for a good FOIA officer to join the team. I assure you that the threat of criminal liability and potential imprisonment does not help this effort. Subjecting well-intentioned and already-overworked civil servants to the threat of criminal prosecution and jail time is inappropriate, and the potential punishment is grossly disproportionate to the failure to meet deadlines. Criminalization discourages government workers from accepting FOIA duties: why would any employee volunteer for such duties when a simple decision to withhold a particular document, or even a part of a document, could result in criminal prosecution? Such an approach makes little sense, and for good reason has not been adopted by the federal government or in most states.

Let me turn now to our proposals to address these problems and help our FOIA system.

### **Proposed Changes**

The core of our proposed changes deals with the statute's lack of flexibility concerning timing. Our proposal also deals with the problem of criminal penalties in our FOIA, makes some changes to clarify the scope of certain exemptions, and calls on the Open Government Office to

offer training on FOIA to the agencies, and to offer non-binding informal mediation in FOIA disputes before they reach the Superior Court.

**A. Reforming the Timing Rules**

Our proposed amendments give the courts the much-needed flexibility that they have requested. The proposal would permit judges to take into account whether the requester's demands were reasonable and whether the responding agency acted reasonably. The proposal would, based on the facts of the particular case at hand, permit tolling of the deadline where the agency has asked for necessary clarifying information from the requester and is awaiting the requester's response. Currently, some FOIA requesters take advantage of the rules. They refuse to provide clarification within the statutory deadline and then claim, successfully, that the agency missed its deadline. That is wrong and should not be allowed.

While our proposed amendments make clear that in run-of-the-mill cases agencies must meet the deadline, they also allow the courts to consider whether compelling circumstances exist to justify giving the agency extra time to respond, such as where an agency is exercising due diligence but is confronted with the refusal by a requester reasonably to modify the scope of a request or arrange an alternative time frame for processing a request after being given an opportunity to do so by the responding agency. These amendments will provide necessary discretion to the courts to allow them to apply more sensibly the FOIA standards to the particular facts of the case. There is no good reason to continue to deny Superior Court judges the authority that federal judges have enjoyed in identical circumstances for 35 years.

In addition, our proposal restores parity between the federal and District standard on the deadline for agencies or public bodies to respond. The bill would allow 20 business days in which to respond to a FOIA request.

This modest addition of five business days would mean our rules match the response time in the federal FOIA statute, which is a sensible congruence, consistent with the original approach of the statute. We note that, in 1996, Congress increased this deadline from 10 to 20 days. The Chairman of the Senate Judiciary Committee, Patrick Leahy, termed the shorter deadline “a joke,” and further stated that “few agencies” were able to meet the deadline and that routine failure to do so was bad for both agency morale and citizen respect for government.<sup>13</sup> The experience of the many District agencies shows that the current 15-day deadline is no less problematic. Many agencies would prefer an even longer deadline, but this modest compromise puts the District at the federal level. This is at the minimum where we should be<sup>14</sup> and, if matched with increased flexibility to account for unusual circumstances, should be sufficient.

Similarly, our proposal would, like the federal statute, create a deadline for disappointed FOIA requesters to sue, providing that the requester must file any appeal within 30 days of the agency’s denial. Currently, there is no deadline under District law, which creates unnecessary uncertainty and a lingering lack of finality. Like the federal FOIA, there should be a finite amount of time under the District FOIA during which the requester can appeal.

#### **B. De-Criminalization**

Our proposal removes the statute's current, criminal penalties for agency employees who are found to have withheld requested documents arbitrarily, which for the reasons laid out earlier make little sense and are if anything counter-productive. Consistent with this view, we strongly oppose the provision in proposed Bill 19-166, also pending before this Committee, which would criminalize any willful withholding of documents under the FOIA, and impose a penalty of up to

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<sup>13</sup> 142 Cong. Rec. S10,894 (daily ed. Sept. 18, 1996).

<sup>14</sup> Indeed, even with the less stringent deadline, federal agencies’ struggles to meet the timing deadlines have been noted. *See e.g.* Martha Mendoza, *Agencies Missing FOIA Deadlines*, The Appleton Post-Crescent, May 13, 2010, available at <http://www.postcrescent.com/viewart/20060313/APC0101/60313003/Agencies-missing-FOIA-deadlines>.

180 days in prison and a fine of up to \$1000 or both, making what is in our view a bad previous policy choice by the Council even worse.

### **C. Clarifying and Improving the Scope of Exemptions**

Our proposals also would clarify the scope of various exemptions found in the District's FOIA, generally tracking federal law or addressing gaps that have emerged in the District's exemptions, based on the feedback from the District agencies' FOIA officers.

- Trade Secrets. The bill conforms the District's standard regarding protection of trade secrets to the one governing in the federal FOIA. The District would no longer have to demonstrate actual competitive harm from release of a document, but rather only that they were trade secrets. Like the federal standard, the exemption should avoid requiring the District having to engage in a potentially resource-intensive and speculative economic analysis just to resolve the question of whether the document should remain confidential.
- Personal Privacy. The bill improves the personal privacy exemption by better describing what constitutes personal privacy, making clear that this category includes "personnel, disciplinary, internal Equal Employment Opportunity complaint, medical, educational, and peer review files, and personal identifying information, such as social security numbers, telephone numbers, home addresses, and personal email addresses."
- Law Enforcement Investigations: The bill clarifies the exemption from disclosure of documents related to ongoing law enforcement investigations, again to match that in the federal FOIA. This would be done by striking the word "would" and inserting in its place the phrase "could reasonably be expected to" interfere with a law enforcement proceeding. It makes little sense to require law enforcement officials to state with certainty that disclosure would interfere before we prevent disclosure; a reasonable,

good-faith concern of harm to the investigation is the federal standard and should be in the District, too.

- MPD Internal Affairs: Our proposal would make clear that the law-enforcement-proceeding exemption includes internal investigations conducted by MPD, including internal affairs and other internal administrative proceedings. In this vein, we note that Bill 19-166, also before this Committee, would alter the existing exemption for investigatory records to read that such documents may be withheld “but only to the extent that the production of such records would . . . deprive a person of a right to a fair trial or an impartial adjudication *in a criminal proceeding*.” We do not recommend this approach; the existing provision exempts records that might interfere with *any* impartial adjudication, whether civil or criminal. There is no good reason why those involved in a civil matter are less entitled to impartial adjudication than those in a criminal matter.
- Critical Infrastructure: The bill exempts emergency response plans, including critical infrastructure plans or information. This exemption plainly should be in the statute to protect potential wrongdoers in our nation’s capital from getting access to such documents. I note that Councilmember Alexander’s pending bill (Bill 19-714), would also exempt “critical infrastructure” records from disclosure. While there are some technical differences between the two bills on this issue, the two provisions could easily be reconciled and we commend the Councilmember for also addressing this significant gap in the statute.
- Pending Litigation. The bill protects records or information related to pending litigation in which the District is a party and which fall within the scope of discovery, until that litigation or claim has been finally resolved. This is not a federal FOIA rule but various

states, such as California, have a version of such a rule,<sup>15</sup> and the proposed rule makes good sense. Those suing the District should not be able to evade the rules and limitations of court-ordered discovery by use of the District's FOIA statute to get information not available to them through the discovery process.

#### **D. Training and the OGO**

In terms of improving training and agency performance and reducing litigation, our bill also addresses those important parts of the FOIA equation.

Let me start here by saying that, separately from any legislation, we have begun an ambitious FOIA training program in the executive branch, focusing first on the agencies that handle the most FOIAs such as MPD and DCRA, to help educate the agencies and ensure that the Mayor's open government directive permeates the agencies' cultures, which is absolutely key to the system's success. Further, improving our system will require not only a more sensible statute, but also continued and better training and perhaps better technology to make our FOIA system more effective and efficient.

In terms of the legislation, our proposal would call for an important role to be played by the newly created Open Government Office, or "OGO" – the leadership of which is expected to be appointed soon by the Ethics Board when its recently nominated Commissioners are, as urged by this Committee, confirmed by the Council. Under current law, the OGO will be empowered to provide advisory opinions. Our proposal calls for the OGO to provide FOIA training and, like its federal analog the U.S. Office of Government Information Systems ("OGIS"), to offer informal, non-binding dispute resolution services. Such mediation could help resolve a FOIA dispute before it reaches the Superior Court and reduce the amount and scope of FOIA litigation

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<sup>15</sup> See, e.g., Cal. Civ. Code § 6254(b) (. . . nothing in this chapter shall be construed to require disclosure of . . . [r]ecords pertaining to pending litigation to which the public agency is a party . . . unless the pending litigation or claim has been finally adjudicated or settled . . .).

in the courts. It is also our hope that the OGO will help develop best-practice recommendations for the technology and systems used by the District agencies to help improve efficiency and lower the exorbitant cost of document review.

As regards OGO's role, we have considered and do not recommend a vast expansion beyond current law the likes of which is proposed for OGO by Bill 19-166. That bill would significantly and unnecessarily expand the powers and functions of the OGO, effectively placing it over all other agencies in the implementation of FOIA. Without addressing every detail of that bill, suffice it to say that in our view it goes in the wrong direction, and I'll just mention a few of the major problems here.

First, Bill 19-166 would provide that any person denied the right to inspect a public record may request that the OGO review the public body's response for compliance with the FOIA. A requestor could therefore conceivably take 3 different avenues to appeal an agency's FOIA denial – to the Mayor, to the OGO, or to the Superior Court. So many legal paths are not necessary to ensure that the requestor may be heard. Under Bill 19-166, if the OGO finds that the public body's response does not comply with the FOIA, it may “in its discretion, issue an order enjoining the public body from withholding the record and compelling the production of the requested record.” In a separate provision, the bill also endows the OGO with subpoena powers to compel “the attendance and testimony of witnesses and the production of documents” in handling such an appeal. If the OGO decision is not meant to be final and dispositive, then the agency or the Council (or requestor) would still have a right of review by the Superior Court in any lawsuit brought to enforce an OGO order; the right to appeal to the OGO would therefore be meaningless and would simply result in additional briefing and postponement of a judicial decision ultimately resolving the dispute. Adding to the lack of necessity for this provision is



that FOIA requestors already have the right to file an administrative appeal with the Mayor, and many take advantage of that opportunity. Of the 79 appeals that were submitted to the Mayor in FY 2011, 75 were resolved in 2011, and many were reversed and remanded to the agency.<sup>16</sup> Either the requestor or the agency may appeal the Mayor's decision to the Superior Court. There is simply no good reason to create an additional non-dispositive administrative alternative, given that perfectly adequate avenues of appeal to an independent, competent court already exist and that the establishment of a new quasi-judicial structure within OGO would require significant public funds.

If, however, a decision by the OGO that documents should be released is intended by the proposed bill to be conclusive and without a right to review, then the proposed provision raises serious separation-of-powers concerns. There is no evident constitutional basis for giving an appointed official unreviewable power to order a District agency to turn over documents to a requestor, essentially giving OGO veto authority over the decisions of District officials or, ultimately, the Mayor. Adopting a bill purporting to do so would likely cause far more problems and cottage litigation than any problems it was intended to solve.

A further problem in the approach reflected in Bill 19-166 is its purporting to empower the OGO to sue the District for injunctive and declaratory relief for any asserted violation of the statute by an agency. More lawsuits and more government offices in court is not the answer here, I assure you. Further, these provisions run counter to another provision in the bill that would empower the OGO to informally mediate disputes between agencies and requestors. The OGO could potentially be first mediator, then judge, and then prosecutor in the same FOIA dispute. This is not the way to build trust in the OGO's neutrality, and any District agency

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<sup>16</sup> See Annual Freedom of Information Act (FOIA) Report for Fiscal Year 2011, *available at* <http://os.dc.gov/node/125872/FY%2011%FOIA%Report.pdf>.

would justifiably be wary of submitting itself to such a tribunal. This muddling of roles would not help either party; granting these proposed powers would likely result in an increase, not a lessening, of the amount of FOIA litigation. Tellingly, in those state jurisdictions that have established offices analogous to the OGO, none have conferred this power on those agencies.<sup>17</sup> Nor should the District's OGO be called on to play such a problematic role. The FOIA requesters in the District have proven repeatedly that they are fully able on their own to invoke the courts when they feel it necessary.

Finally, we note also under Bill 19-166, when a requestor has filed an action in Superior Court alleging that the agency's records search was inadequate, the agency must, within 30 days of first receiving the Complaint, file an affidavit "describ[ing] in detail" the records searched, by whom, the type of search performed and the search terms used, and "each record withheld, the exemption claimed, and the reason that the disclosure would damage the interests protected by the claimed exemption." Further, if the agency fails to timely file this affidavit, "the plaintiff shall be deemed to have substantially prevailed under subsection (c) of this section" and may immediately be awarded attorney's fees and other costs – before the merits of the case have even been litigated. To the extent that the agency would essentially be required to divulge the relevant aspects of the very documents it seeks to withhold, and at the earliest stage of litigation, this proposal conflicts with the well-established rules of civil discovery and would be unwise policy. Further, legislating what is in effect a concession of liability for the District is not the right course and would make worse the problems that we are urging the Council to fix, not exacerbate.

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<sup>17</sup> For example, the Connecticut office does not have the general power to sue over FOIA violations. *See* Conn. Gen. Stat. § 1-205. Likewise, Hawaii's Office of Information Practices lacks this power. *See Olelo the Corp. for Community Television v. Office of Information Practices*, 173 P.3d 484, 493 n.2 (Hawaii 2007) (observing that the Hawaii Uniform Information Practices Act "does not provide" the Hawaii office "with enforcement powers to compel an agency to make government records available, or to itself seek court assistance to compel disclosure.").

## Conclusion

To sum up, the Executive urges the Council to pass the proposed amendments in Bill 19-776, and to reject the policy choices reflected in Bill 19-166. We look forward to working with the Council and the stakeholders from the open government and media groups to the extent feasible to help the Council craft comprehensive FOIA reform legislation that balances the right of citizens to access public information gathered or created by their government with the need for the District government to be able to respond to FOIA requests and continue to function effectively and efficiently, all while promoting government transparency.

Before closing, I want to address a harmful piece of misinformation that has circulated in recent days about our proposed reforms. Some in the press have made the unfortunate suggestion that our proposals for FOIA reform should be rejected because of recent corruption investigations. The Council, tempting as it may be to be influenced here by events concerning some of its recently resigned members, should reject this illogic. Juxtaposing the proposed modest amendments with the recent corruption investigations is a total red herring. None of these investigations resulted from FOIA requests; indeed, several were initiated by D.C. agencies, including the OAG. The key documents were personal financial records of Councilmembers or private citizens, none of which are available under FOIA. Our proposals are not designed to keep any important information from the public that is appropriately disclosed, nor would they do so.

Rather, the proposals are intended to ensure there is balance and fairness in the statute, and that its rules – especially those governing timing – make sense for the government, the courts, and ultimately the public that they are intended to serve. Thank you for the opportunity to testify. We are happy to answer any questions you may have.