

**Testimony of the
American Civil Liberties Union of the Nation's Capital**

by

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before the

Committee on Government Operations and the Environment

of the

Council of the District of Columbia

On Bill 18-777, "Open Government Act of 2010"

June 7, 2010

The ACLU urges the adoption of Bill 18-777.

We are especially pleased to support two provisions -- a new office that can adjudicate claims of improper denial of Freedom of Information Act (FOIA) requests, and improved rulemaking procedures. We have direct experience of problems in both areas over the years and we commended both to the committee in our letter of October 2009 when its work in the area began.

The pending proposal for revisions to the open meetings statute, Bill 18-716, is an important complement and we look forward to providing views on that as well.

Title I: Open Government Office

We support the proposal for a new office with authority to enforce the D.C. FOIA statute.

First, the need is substantial. In our experience, some agencies routinely violate the D.C. FOIA law--managing their responsibilities poorly and routinely taking too long, then often making mistakes applying the complex law of FOIA exemptions thus incorrectly denying records. The only accessible way to get violations reviewed is appeal to the Mayor's Office of General Counsel and in our experience that, too, is less effective than it should be.

Thus we agree a new office is badly needed that can set processing guidelines, train agency staff how to follow them efficiently, and—above all—promptly adjudicate disputes about the law. Here's why:

- Delay and inadequate search are not unusual: a request from July 2008 received no agency response despite repeated inquiries by telephone and letter in October and December of 2008 and March 2009. After ten months, in May 2009, we received a denial that cited not a scintilla of law (the only proper basis justifying the denial of a FOIA request). In another case, we waited months and got a single sheet of paper from one office of many that had responsive documents, a patently insufficient search in response to our request.
- Agency staff add procedural hurdles that have no basis in the D.C. FOIA law, for example when they demand our staff attorneys who sent FOIA requests on behalf of clients also provide notarized releases from those clients allowing records to be given to counsel.
- Agencies manage the FOIA process ineffectively; we deal with one agency that for a long time simply sent each request to multiple internal offices without notice to us and without coordination of replies, leaving us to wonder, as responses trickled back over months, which units were yet to be heard from and when we would have a full response (in order to start an appeal).
- Worst of all, agencies make many mistakes applying the FOIA exceptions. Since we got five incorrect denials in the last year, we brought five appeals seeking reversal by the Mayor (the next step in the law).¹ The Mayor's office has so far found errors in every one, though not all have been resolved.
- Appeals take time and finality is elusive. The Mayor's office sometimes sends flawed denials back to allow the agency to try again to come up with a lawful rationale for each denied record.
 - In three of our recent cases, the Mayor reversed the agency denial, pointing out the agency errors such as misunderstanding of legal concepts of privacy and privilege.
 - In two others, further agency review spurred by our appeals uncovered misunderstandings and errors and led to reversal of some aspects of the initial denials.
 - But success is not in sight in all five. In one, we are still waiting for an agency to provide the Mayor with the detailed rationale for its denial that the Mayor requested last November. In another, we appealed in September an agency's second try justifying its denial and we have heard nothing from the Mayor in almost nine months. The 10-day statutory deadline for completing appeals, D.C. Code § 2-537(a), is thus not observed and the Mayor's Office of General Counsel in general does not respond to inquiries about the status of appeals.
- It's not clear whether agencies follow precedent set by the Mayor's appeals decisions that reverse incorrect claims of exemption. Decisions are in letter form and the annual compilation in the Secretary's report gives no information how to obtain them.

This situation of agency delay and error, plus extended appeal, is clearly the opposite of open government.

¹ Most ACLU requests have been to MPD, which in general denies a majority of requests each year, a record far outpacing that of other agencies. In FY 2009, MPD received 880 or 16% of the 5,628 FOIA requests that year but issued 527 or 80% of the 664 denials government-wide, according to the annual report of the Office of the Secretary. Available at http://os.dc.gov/os/frames.asp?doc=/os/lib/os/info/freedom/fy09_foia_report.pdf. In testimony to the Council Committee on Public Safety and the Judiciary at its March 19, 2010, MPD oversight hearing the ACLU elaborated on our experience with the agency treatment of FOIA requests and called for a Council mandate that the agency produce a plan of corrective action. This could be the kind of work done routinely by the new office.

The option of suing in Superior Court is available to few owing to cost and complexity and of course adds months and years. Maybe not surprisingly, in 2008 and 2009 less than 10 FOIA cases were filed annually.²

Thus we support a new office if it has the authority and resources to enforce the law.

The office created by the proposal may pursue informal resolution, and at least one state with such an independent office, Connecticut, solves as many as half the appeals that way.³

But prompt formal adjudication should be clearly available, not simply mediation and advisory opinions, with simplified procedures so that appellants are not at a disadvantage and the burden on the agency to justify any claim of exemption.⁴

The commission in Connecticut enforces the state's open meetings law as well as its FOIA law. That combination may be something to consider as the D.C. open meetings law is revised.

Title II: FOIA Amendments

We support the following FOIA amendments.

Public posting of denials. Public posting of agency FOIA denials is a welcome additional requirement. First, incorrect denials are a problem, as already discussed. And second, their nature and extent are not well known.

In current law, FOIA denials, without limitation, must be retained and made available on request.⁵ But many agencies don't comply, as demonstrated by results of an ongoing review by the D.C. Open Government Coalition. The Coalition in December asked 34 D.C. agencies for the last five years of denial letters and reported interim results last month.⁶ Ten agencies couldn't find all five years of letters. And half the agencies couldn't come up with letters for all the denials reported in statistics they had given to the Office of the Secretary of the District for the annual report of denials required by law.

² *Office of the Attorney General's Fiscal Year 2009 FOIA Litigation Report*. Available at

http://os.dc.gov/os/frames.asp?doc=/os/lib/os/info/freedom/fy09_oag_foia_litigation_report.pdf.

³ On the Connecticut Freedom of Information Commission, see William S. Fish, Jr., and Paul Guggina, *Connecticut FOIA*. Available at:

http://www.northeastern.edu/firstamendment/news_and_announcements/connecticut_foia/index.php.

⁴ Requesters should be entitled to especially quick government response if they meet specific criteria. The ACLU has successfully argued for such "expedited processing" by federal agencies, under agency regulations mandated by the 1996 federal FOIA amendments. See 5 U.S.C. § 552 (a)(6)(E). Agencies must also ensure expeditious consideration of administrative appeals of denials of such requests. A framework requiring D.C. agencies to provide expeditious consideration could usefully be added by the committee as it is entirely missing from the D.C. FOIA.

⁵ D.C. Code § 2-533(b) (requiring agencies to maintain "a file of all letters of denial of requests for public records" and to make it "available to any person on request for purposes of inspection and/or copying").

⁶ James McLaughlin, *FOIA Denial Letters Project: Status and Results*. DC Open Government Coalition, May 20, 2010. Available at <http://www.dcofc.org/sites/default/files/FOIA%20Denial%20Letters%20Project.pdf>.

For example, the MPD pleaded that files were inaccessible or missing for many past years and after OGC narrowed its request to only the last two years the agency still could provide only 113 of 1,024 reported denials that should have been documented.

The usefulness of the archive is suggested by our own ongoing analysis of the MPD denials. The initial sample we reviewed showed dozens of form letters suggesting routine denials on identical (incorrect) legal grounds we have successfully challenged at the Mayor's level. We suspect many may have been as incorrect as the denial in our case, highlighting the need for more appeals through an accessible process than can lead to development of precedents and more consistent application of the law.

Attorneys' fees available where litigation is a catalyst for voluntary agency corrective action. This conforms D.C. to federal FOIA law as amended in 2007 and eliminates the narrowing effect of the Supreme Court *Buckhannon* decision. This broader incentive could change the fact that at present there are few FOIA cases litigated in Superior Court.

Title III: Agency Transparency

We endorse the proposals in Title III to require agencies to improve public access to decision-making and actions.

In hopes of improving budget transparency, we recommend any language needed to clarify that the budget presentation should be covered. Citizens' concerns about clear and timely information on spending, e.g., in D.C. Public Schools, sparked litigation in recent years.⁷ Even Council members have found it hard simply to get timely budget materials, and budget experts such as Ed Lazere of the D.C. Fiscal Policy Institute have commented on the difficulty of understanding the budget details that are released.⁸ Understanding where our money goes shouldn't be so hard.

Title IV: Administrative Procedure Act

We support the proposals in this title also.

Published guidance. The requirement is useful that agencies publish sub-regulatory guidance documents. These contain direction to staff that even though not legally binding may have significant information about how the agency views the rights and obligations of D.C. residents.

In our own work we have found citizens frustrated not being able to find out the policies of the police department. The MPD has issued a dizzying array of hundreds of General Orders, Special Orders and Memoranda that accumulated over the years form policy guidance directing members how to do traditional police tasks including searches, arrests, use of force, transport of prisoners, handling those who are sick or mentally ill, etc., as well as administrative work such as handling property, dealing with citizen complaints and disciplining employees.

⁷ Theola Labbé, "Under Pressure, City Shows Spending Plans." *Washington Post*, February 16, 2008, B02.

⁸ See October 16, 2009, testimony of Lazere to the D.C. Council, Committee of the Whole Public Roundtable on D.C. Public Schools Equalization (noting an "unacceptable lack of clarity" in the schools' budget). Available at <http://dcfpi.org/wp-content/uploads/2009/10/10-16-09COW.DCPSTestimony.pdf>.

A small subset of procedure guides may be suited to internal use only and subject to release only as required in litigation or other formal proceeding subject to court oversight where claims can be weighed of need to protect closely held police technology. But a great many are routine and merit no cloak of official secrecy. The Office of Police Complaints recommended five years ago that MPD publish its orders as many cities do, but MPD still has not fully done so and indeed has aggressively resisted disclosure under FOIA.⁹

Improved rulemaking. We also welcome the requirements for improved rulemaking, particularly the provision requiring agencies to explain their proposals and respond to comments on proposed rules. Federal courts have long required agencies to provide explanations both of proposed rules and of the agency's reasons for accepting or rejecting significant public comments and suggestions when issuing final rules after comments close, so that in any court challenge the record is clear.¹⁰

The opposite is true in D.C., where for example, the MPD twice proposed regulations that ignored the statute they were to implement and never responded to comments of the ACLU pointing out the problem.¹¹

Thank you for considering our views, and we would be happy to answer any questions.

⁹ The MPD justification for withholding many General Orders is the subject of several years of dispute under existing law. MPD did not answer our FOIA request of July 2008 until May 2009, and following our appeal the Mayor overturned the MPD denial last August as based on "inapplicable exemptions." MPD denied our request a second time and we again appealed in September but have heard nothing further. The same non-publication is the subject of 16 months of unresolved Superior Court litigation in *Partnership for Civil Justice Fund v. District of Columbia*, Case No. 2009 CA 738B (filed February 5, 2009).

¹⁰ *Reyblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997) ("unless an agency has provided a reasoned explanation for its rule" the court can't do its duty of regulatory review under the federal Administrative Procedure Act). The D.C. APA, like its federal counterpart, allows the court to set aside rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A).

¹¹ See, for example, D.C. Code § 5-105.09 (directing MPD to issue regulations providing for the "designation of one or more offices, at the command level or the department's general counsel, where service shall be accepted on behalf of the sworn member"). The MPD published proposed rules twice, at 54 D.C. Register 8816 (September 7, 2007) and at 55 D.C. Register 8894 (August 15, 2008). ACLU commented both times to offer revised texts since neither proposed rule did what the law required but instead left entirely to officers whether to accept substituted service. We learned later in meetings about the ongoing problem that MPD officials had an exotic legal theory why their text complied with the Council legislation, but they never published a word explaining it or why the agency disagreed with comments of the ACLU and rejected the ACLU recommendations.