Testimony on behalf 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 18-716, the

"Open Government is Good Government Act of 2010"

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More than four years ago we testified before this committee to urge the passage of Bill 16-747, the "District of Columbia Open Government Meetings Act of 2006." We congratulate Councilmember Muriel Bowser for taking the lead in bringing this matter before the Council again, and for incorporating many of the suggestions made to improve the earlier bill. The ACLU of the Nation's Capital urges the Council to revise the District's inadequate open meetings law by enacting Bill 18-716.

James Madison put it precisely: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

Those who reject the teachings of Madison argue that the current law is adequate. D.C. Code § 1-207.42 requires that only meetings "at which official action of any kind is taken" need be open to the public. Following that command, public officials meet secretly to deliberate and formulate their positions and invite

[1] James Madison, letter to W.T. Barry, August 4, 1822, in 9 Writings of James Madison 103 (Gaillard Hunt ed. 1910)(reprinted in Fred R. Shapiro, The Oxford Dictionary of American Legal Quotations 174 (1993)).

the public in only to witness the formal voting. The Council should put an end to this farce.

Opponents of open meetings believe that obliging public officials to deliberate in public, to disclose the rationale for their decisions will cause the wheels of government to grind painfully slowly. Public officials will be unwilling to compromise, to abandon positions previously taken, if they have to horse trade in public view. Opponents of open government conclude that good government and social progress will suffer.

This position rests on two fallacies: Most importantly, it denigrates the capacity of citizens for self-government, their ability to understand and evaluate the work of public officials. When deliberations take place behind closed doors, citizens are denied both the opportunity fully to comprehend the matter being discussed and to assess the performance of the public servants.

Second, opponents to open government assume that a decision that follows closed deliberations will be superior to one where the entire process is open to the public. There is no persuasive evidence for this position. But there is every reason to believe the contrary: backroom deals favor special interests, and thwart the public good.

The open meetings requirements of Bill 18-716 are well crafted so as not to impose unreasonable burdens on public bodies. We shall review the key parameters of the bill and in a few cases offer suggestions for amending them. Our suggestions are made in the same spirit of practicality that guided the bill's drafters.

Statement of Policy and Rules of Construction[2]

This section does not admit improvement. James Madison would approve.

"Public Body" Defined[3]

This definition importantly provides the boundaries for the requirement for open meetings. The public entities that are and are not included are correctly specified.

"Meeting" Defined[4]

This definition provides the trigger as to when a gathering of members of a "public body" must be open to the public. Bill 16-747 defined "meeting" as "a

[2] Bill, Sec. 2, adding new sub-sections 313(a)and (b).
[3] Bill, Sec. 2, adding new sub-section 313(c)(2).
[4] Bill, Sec. 2, adding new sub-section 313(c)(1).

majority of a quorum" of the body's members. The bill before you defines "meeting" simply as "a quorum of the members." While this change could allow more gatherings of public officials to be closed, we accept it as a practical change. For example, under the earlier proposal, a conversation between two of the members of a public body with five members would have to be open.[5] That would be unduly onerous.

Exceptions to the Requirement for Open Meetings[6]

We urge the Committee to revisit the following exceptions:

(K) Discussion of the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials, unless the person requests an open meeting;

We cannot tell how this rule would apply when a public body that is considering personnel actions involving more than one person (e.g., selecting among applicants for a position), and some but not all of the individuals request an open meeting. In that case, we recommend that the meeting should be closed.

(L) Discussion of any proprietary or confidential information;

The term "confidential" is too open-ended, and therefore subject to being improperly invoked. The exception should be rewritten to read:

> "Discussion of any proprietary information or information that is confidential pursuant to statute or court order."

(N) Meetings held solely for the purpose of deliberating to make a decision in an adjudication action or proceeding by a public body exercising quasi-judicial functions;

This exception is too broad, as it would allow agencies such as the Zoning Commission and the Alcoholic Beverage Regulation Administration to conduct most of their important business in closed session. The exception should be deleted.

Notice for Meetings[7]

We recommend that a "harmless error" provision be added to the bill's enforcement provision to make clear that technical errors in providing notice that

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[5] The quorum of a body with five members is three. A majority of the quorum is two.
[6] Bill, Sec. 2, adding new sub-section 313(d)(2).
[7] Bill, Sec. 2, adding new sub-section 313(e)(1)(B).

do not result in actual harm (i.e., where the plaintiff had adequate actual notice) are not the basis for invalidating agency action.

Notice for an Emergency Meeting[8]

As drafted, this provision would allow an agency to give notice of an emergency meeting simply by choosing whichever single method of public notice would be *least* effective, e.g., posting at the agency's office. To be reasonably effective, notice for holding an emergency meeting should be provided by more than a single method, and should, at a minimum, include notice by publication on the agency's website and by e-mail. These electronic forms of notice place minimal burden on an agency and are often the most effective in reaching the public.

Ombudsman to Monitor Compliance with Open Meetings Law

The bill before you is the perfect complement to Bill 18-777, the "Open Government Act of 2010." We strongly support that bill, and commend Chairperson Cheh for introducing it. Among other things, Bill 18-777 would strengthen the District's Freedom of Information Act. And as part of that reform, the bill would create an Open Government Office with ombudsman-like authority to monitor compliance with the District's Freedom of Information Act. We recommend that the responsibility of the Open Government Office be extended to include the same authority for the Open Meetings law. Absent a single office to monitor how agencies comply with the law, we fear that the requirement for open meetings will suffer the same fate as the requirement for the production of documents under FOIA.

Thank you for considering our views in this matter.

[8] Bill, Sec. 2, adding new sub-section 313(e)(1)(C).