

Fraternal Order of Police

Metropolitan Police Department Labor Committee

1524 Pennsylvania Avenue, S.E.

Washington, DC 20003

(202) 548-8300 Fax (202) 548-8306



June 10, 2010

Vincent C. Gray
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, DC 20004

Mary Cheh
Chair - Committee on Government Operations and the Environment
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite 108
Washington, DC 20004

Dear Chairman Gray and Councilmember Cheh:

As you are aware, I am the Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP). The FOP represents the approximately 3600 police officers, detectives, and sergeants of the Metropolitan Police Department. I am writing to provide a response to a letter dated June 4, 2010, from Attorney General Peter J. Nickles to you regarding the District of Columbia Freedom of Information Act (DC FOIA).

I am also addressing this letter to Councilmember Mary Cheh, so that it can be included as part of the record for the hearings on the Open Government Act of 2010 (Bill 18-777). As you may be aware, the FOP, despite being prominently featured in the Mr. Nickles' letter, was not sent a copy of the letter. I became aware of the letter while testifying before the Committee on Government Operations and the Environment on June 7, 2010.

As a preliminary matter, it is nothing short of extraordinary that Mr. Nickles admitted in the letter that his office understands and acknowledges the following:

The DC FOIA "contains no provision for extending an agency's final deadline for compliance beyond the maximum combined deadline of 25 days"; and

The DC FOIA "makes no allowance whatsoever for an agency's inability to comply with a FOIA deadline, even if the request given rise to it is extremely burdensome and the agency is doing everything in its power to comply."

These admissions are extraordinary because the District, by and through the Attorney General, has adopted the exact opposite position in virtually all recent DC FOIA litigation with the FOP, including, but not necessarily limited to, the following five (5) cases: Case No.: 4866-08; Case No.: 2009 CA 006778 B; Case No.: 2009 CA 006777B; Case No.: 4867-08; and Consolidated Appeal Nos. 09-CV-255, 09-CV-256, 09-CV-257, and 09-CV-737. Although this position has been soundly rejected by the Superior Court, the District's continued assertion of this argument has cost the FOP literally tens of thousands of dollars in attorneys' fees and costs.

In several recent DC FOIA cases, the District has asserted that is excused from the requirements of DC FOIA because of its "inability to comply" with the DC FOIA deadlines as a result of a purported lack of resources. This argument illustrates how the FOP would expect the District to act if the Council were to create the requested resource "safety valve." More specifically, the District has gone so far as to argue recently that its production of responsive material approximately eight months after service of the DC FOIA request somehow moots all of the FOP's claims and divests the Superior Court of any and all jurisdiction over the dispute. See Case No.: 2009 CA 006778 B.

The District's argument is premised upon the theory that the District can unilaterally set its own production timelines based upon an unchecked assertion of "reduced agency resources" and force requesting parties to litigate and spend thousands of dollars, while at the same time, "moot" DC FOIA disputes at whatever time it would like by partially complying prior to being forced before a judge or after months of litigation. The District's argument that the Superior Court does not have any authority or jurisdiction over the Mayor's purported allocation of resources that prohibited the subject agencies from timely responding to FOIA requests was recently compared by Judge Brooke Hedge to the arguments made by Richard Nixon's administration during the "Impoundment Cases" of the early 1970's. Those arguments were rejected on their face by the federal judiciary.

As I am sure you appreciate, such an unsupported theory and its effects would eviscerate the letter and the spirit of the DC FOIA, which is focused upon the "expansion of public access and the minimization of costs and time delays to persons requesting information." DC FOIA § 2-531.

It also is important that the Council view the four (4) rulings that the Attorney General focused on in his June 4, 2010 letter in the proper context:

Judge Brooke Hedge (Case No.: 4867-08) (March 21, 2007 DC FOIA Request): This case involves a request for electronic material that was two and one-half years old at the time the Court entered its Pre-Trial Order compelling certain productions, and that is now over three years old and still pending because of the District's refusal to complete its production obligations;

Judge Brooke Hedge (Case No.: 2008 CA 008104 B) (June 13, 2008 DC FOIA Request): This case involves a request for electronic material that is almost two years old and is still pending because of the District's over-redaction of relevant documents and refusal to comply with the redaction parameters set forth in the DC FOIA;

Judge Ramsey Johnson (Case No.: 4866-08) (March 21, 2007 DC FOIA Request): This case involves a request for electronic material that is now over three years old and is still pending because the District refuses to produce a Vaughn Index (i.e., privilege log) to support any of the alleged production exemptions; and

Judge Erik Christian (Case No.: 2009 CA 006778 B) (July 15, 2009 DC FOIA Request): This case involves a request for electronic information that is almost one year old and is still pending because the District set its own production deadline and then produced material approximately eight months after the DC FOIA deadlines, in addition, the materials produced were woefully deficient in substance and scope.

As is evident from the context described above, the District already treats the DC FOIA as if it contains the "safety valve" that it now admits it does not contain. This conduct provides an insight into how the District would treat every FOIA request if the Council were to legislate as the District has requested.

The District's conduct illustrates also the District's utter disdain for producing complete document productions regardless of the timeframe allowed for such productions. This conclusion is highlighted by the fact that each and every one of the outstanding productions described above could have been completed at least once or twice over by this time (at that is based upon the District's own time/resource estimates submitted to the Court) had the District actually begun its production activities upon receipt of the subject DC FOIA requests. In sum, the addition of a resource "safety valve" based upon an agency's internal analysis of its own resources will only embolden the District in its dilatory conduct, especially given the unchecked nature of the exception that the Attorney General has proposed.

The Attorney General's broad assertion regarding lack of resources at the agency level fails to acknowledge that each of the agencies at issue in the FOIA Requests described in his letter have direct access to: (1) its own resources; (2) the resources of the Office of the Attorney General that represents the agency in these DC FOIA actions; and (3) the resources of the Office of the General Counsel.

The District has conveniently erected resource barriers between agencies when it has suited its interests to do so, and then it disclaims any meaningful distinction between agencies when the opposite approach best meets its needs. For example, in a recent Public Employee Relations Board hearing, Jonathan O'Neill from the Office of Labor Relations and Collective Bargaining (OLRCB) entered his appearance on behalf of the Metropolitan Police Department (MPD) in place of the MPD's Office of General


Counsel, notwithstanding the fact that the District frequently asserts a bright line distinction between the OLRCB and the MPD's Office of General Counsel relating to, among other things, resource allocation. This type of approach to litigation and resource allocation raised by the District is simply unsupportable.

The FOP agrees that the current DC FOIA should be amended as proposed by Councilmember Cheh's Open Government Act of 2010 legislation. In doing so the Council should not, however, provide the District a sword that can be used to defeat any and all requests for documents, which is exactly what the resource "safety valve" the Attorney General proposes would provide.

Finally, as I indicated during my testimony on June 7, 2010, the FOP would welcome an opportunity to provide the Council with a full accounting of actions and positions taken by the District and its attorneys during the past 5 years of DC FOIA litigation. It would also provide a wonderful opportunity for the Attorney General and all involved D.C. attorneys and FOIA Officers to explain to the Council the positions they have taken with regard to DC FOIA. Given the extremes to which the Executive has gone to avoid compliance with DC FOIA, this would be an excellent chance for the Council to evaluate whether the District's attorneys and FOIA Officers are meeting their statutory and ethical obligations.

As always, if you have any questions or need any additional information, please let me know. Thank you for your assistance in this matter.

Sincerely,



Kristopher K. Baumann
Chairman
Fraternal Order of Police
Metropolitan Police Department Labor Committee