

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

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Lucy A. Dalglish

Executive Director

VIA HAND DELIVERY

The Honorable Mary M. Cheh
Chair, Committee on Government Operations and the Environment
Council of the District of Columbia
John A. Wilson Building, Suite 108
1350 Pennsylvania Ave, NW
Washington, DC 20004

COUNCIL MEMBER CHEH
2010 JUN 17 PM 2:57
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Re: Bill 18-777, the "Open Government Act of 2010"

Dear Chairperson Cheh,

The Reporters Committee for Freedom of the Press submits the following comments to be made part of the record for today's public hearing on Bill 18-777, the "Open Government Act of 2010."

As you are aware, The Reporters Committee is a nonprofit organization that does free legal advocacy work on behalf of journalists working in the United States. During its forty-year existence, it has worked on numerous legal fronts to help ensure that journalists can meaningfully inform citizens on all matters of public concern. Naturally, to this end The Reporters Committee is committed to promoting government transparency and accountability through open government laws. We support your intentions in proposing Bill 18-777 and believe that it encompasses many welcomed changes. We take the opportunity below to highlight some of its particulars and underscore why they matter to journalists and, therefore, the public.

Title I, Open Government Office Establishment Act of 2010

- Sec. 104(a)(3)(B) – Discretionary record disclosures should be encouraged to the greatest extent possible at all levels of government. A technical approach to interpreting exemptions under freedom of information laws violates the spirit in which such laws are enacted. Records custodians should be empowered to make disclosures when doing so would be in the public's interest despite the possibility that an exemption may apply. A strict application of statutory exemptions can often too easily be used to withhold information that is, for example, merely embarrassing to the government or that presents attenuated

privacy interests, all at the expense of not informing the public about critical issues. At the federal level, both President Obama and Attorney General Holder have issued directives supporting presumptive disclosure under the federal FOIA. The District of Columbia should continue to encourage a culture of presumptive openness and discretionary disclosure.

- Secs. 104(b) & e(2) – The bill vests authority in the proposed Open Government Office to issue advisory opinions as to whether a particular record is subject to disclosure under the law and to conduct dispute resolution proceedings between requesters and public bodies. Some states, as well as the federal government, have established similar reviewing bodies with similar decision-making functions. We believe the District of Columbia should develop alternatives to lawsuits when a record is being withheld improperly. The reality is of course that most individuals simply cannot afford to pursue such a claim in court and the government can use this to its advantage. However, while we believe there is value in alternative dispute processes, we caution against creating what could amount to another layer of bureaucracy that may just result in greater delay when the public seeks records. We would urge the committee to explore ways to enforce public body compliance with and/or judicial deference to Open Government Office decisions and opinions lest the outcome of the process simply be ignored by public bodies. The result may then simply be to delay the inevitable, a costly lawsuit. Providing the public with a speedy and economic avenue of recourse is, of course, the purpose of creating the office.
- Sec. 104(d) – Training public body personnel on the importance of freedom of information and their statutory duty to disclose records is often an overlooked step in helping to ensure an open government. But its critical importance cannot be overstated. Too often a mentality of control can pervade with records custodians viewing themselves as protectors of information rather than the trustee of documents that belong to the public. Moreover, many of those often charged with handling requests for information are wholly uninformed about how freedom of information laws are intended to operate. But this ignorance is often not their fault. The blame partly lies in the inadequate resources given to public information offices and the poor training personnel receive. We urge the committee to develop and support full funding for the training programs described in section 104(d). Creating a culture of disclosure begins with educating those who deal with the public's requests about the role and value of open government.

Title II, Freedom of Information Act Amendments

- Sec. 202(f)(1)(B) and (C) – We support mandatory fee waivers for all requests that, as the proposed amended language states, contribute to the public’s understanding of “matters of public concern.” We agree that the former language, which applied fee waivers to requests that would aid in the understanding of “the operations or activities of the government,” is too restrictive a standard and fails to recognize that there are a variety of uses for which government information can be used to further a matter of public interest while not primarily shedding light on government operations. Under federal FOIA, a “government operations” interpretation has unfortunately taken hold in the courts and it has served to restrict vast amounts of information that could be used to otherwise inform the public. The District of Columbia should not follow that same path. We also agree that a denial of a fee waiver under the law should be readily appealable. Much like the costs of litigation, excessive fees can often serve as a practical barrier to access thereby undercutting the intent of the law. Further, we would urge the committee to add provisions to the bill to establish an expedited review process for media and similar requests that are made with the ultimate intent to inform or educate on matters of public concern.
- Sec. 204(a) – Again, we agree with the intent of this amended language to provide for a practical, rather than technical, approach to disclosure under the law. As mentioned above, custodians need to feel empowered to disclose records and should not be limited by rigid statutory language forbidding disclosure in situations where no reasonable basis exists for withholding a record. We are hopeful that the addition of the amended language will help to curtail the unintended and unreasonable consequences of sweeping and/or vague statutory exemptions.

Accounting for the above, we urge the committee to approve new legislation that will take important steps toward fostering greater public participation in government. If our organization can be of any assistance to you or the full committee in achieving this laudable aim, please feel free to contact me.

Thank you for considering The Reporters Committee’s views on this matter of great importance to the citizens of the District of Columbia and to the journalists who provide them with vital information about their government.

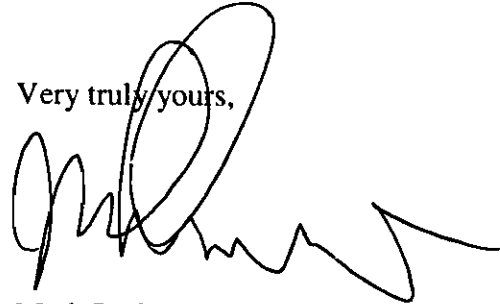
The Honorable Mary M. Cheh

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We know you will share our concerns with all members of the committee.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mark R. Caramanica'. The signature is fluid and cursive, with a large loop at the top and a long, sweeping tail that ends in a small hook.

Mark R. Caramanica
Freedom of Information Director