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**BEFORE THE DISTRICT OF COLUMBIA CITY COUNCIL  
COMMITTEE ON GOVERNMENT OPERATIONS AND THE ENVIRONMENT**

**TESTIMONY OF CARL MESSINEO,  
ON BEHALF OF THE PARTNERSHIP FOR CIVIL JUSTICE FUND  
IN SUPPORT OF THE "OPEN GOVERNMENT ACT OF 2010,"**

The Partnership for Civil Justice Fund strongly endorses the Open Government Act of 2010 and extends its appreciation to the Committee for its consistent attention over the years and in this immediate legislation under the leadership of Committee Chair Mary M. Cheh.

As Former Committee Chair Kathy Patterson stated in connection with the 2000 amendments to the FOIA, "[L]egislation to strengthen our FOIA law are efforts to remind all of us who work for the public that *our* business is *their* business. Public access to public records is a prerequisite for government to work."<sup>1</sup> The Committee on the 1975 FOIA enactment aptly recognized that what is needed is "a policy with operational enforcement mechanisms to break the ice of government inertia."<sup>2</sup>

The Open Government Act of 2010 strengthens existing litigation-based enforcement mechanisms and establishes a new agency based enforcement mechanism with the proposed

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<sup>1</sup> Statement of Kathy Paterson, Chairperson, Committee on Government Operations, October 12, 2000 (See Committee on Government Operations, Council of the District of Columbia, "Bill 13-829, the 'Freedom of Information Amendment Act of 2000'", Sess. 13 (October 31, 2000) at Attachment B).

<sup>2</sup> Committee on the Judiciary and Criminal Law, Council of the District of Columbia, "Bill No. I- 119, the 'D.C. Freedom of Information Act of 1975,'" 1st Sess., at 3 (September 1, 1976) at 4.

Open Government Office, an office which will be granted ample authority to enforce the FOIA on behalf of citizens without citizens having to engage the services of an attorney and conduct litigation just to get basic information about what their government is doing.

The Partnership for Civil Justice Fund (PCJF) has for years represented activists and organizations advancing FOIA requests. In general, our experience is that executive branch compliance ranges from arbitrary to apparently wilful refusal to comply with the FOIA requirements. In contrast, our occasional FOIA requests to the D.C. Council have each been satisfied in a timely and responsive manner.

In 2008, we initiated a litigation-based effort to secure the D.C. Metropolitan Police Department's standard General Orders and other directives and instructions for legal and scholarly review, and to make those materials available to the public for this purpose.

When we initiated this effort in 2008, the MPD was refusing to both disclose and publish even the most basic operational information including the MPD General Orders, Special Orders and other staff instructions and directives. In 2008, the MPD was not publishing any of its orders on its web site, notwithstanding the routine Internet publication requirements mandated by this Council's year 2000 amendments to the D.C. FOIA, despite a 2005 report issued by the Office of Police Complaints recommending Internet publication, and despite multiple requests from public interest or civic organizations seeking the same. Incidentally, the Office of Police Complaints report pointed to multiple other jurisdictions that routinely publish their police orders for online access by the public.

When we filed our FOIA request seeking both production and Internet publication of the MPD Orders as well as staff instructions and manuals, we received nothing in response. After six months of non-response, we filed litigation.

We are pleased at the success of this effort so far. The litigation has resulted in production of the majority of the MPD's General and Special Orders and materials from the Directives System, but not all.

We have established a web page at our web site, [www.JusticeOnline.org](http://www.JusticeOnline.org), organizing and making those available for the public. You can also reach that page on our larger web site, by going to a special URL we have set up for this purpose, [www.DCMPD.org](http://www.DCMPD.org). We will continue to Internet-publish the MPD directives ourselves until the MPD comes into regular and ongoing compliance with the D.C. FOIA statute.

Interestingly, in that litigation the executive branch argued that this Council's Internet publication requirements were not enforceable by citizen requestors. By Order dated September 22, 2009, D.C. Superior Court Judge Judith N. Macaluso found that that the Partnership for Civil Justice Fund does possess standing to seek an injunction compelling the MPD to comply with its Internet publication obligations.<sup>3</sup> The Court did observe, however, that because the Council did not enact a particularly time period within which public records are required to be posted, i.e., 10 days after creation, that the Court will have to conduct a trial to determine whether there has been substantial compliance with the publication requirement.

Accordingly, as detailed below, we propose that the Open Government Act of 2010 include a provision specifying a standard time period for Internet posting of that sub-set of public records that must be published on the Internet. We propose it be the same time period as exists under the statute for production in response to a formal written request.

It has taken now two years of FOIA requests and resource-intensive litigation to reach the point of production that we have to date, all with respect to basic public operational orders and

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<sup>3</sup> Partnership for Civil Justice Fund v. District of Columbia, Civil Action No. 2009 CA 000748 B, Superior Court of the District of Columbia.

directives from the police department that should have been freely available to the public all along.

Throughout the litigation with the MPD, they have taken positions in defiance of the FOIA disclosure obligations that range from ludicrous to dangerous, insofar as disclosure will benefit the interest of public safety, improvement of services and avoidance of police harms.

In terms of ridiculous refusals to disclose, the MPD, for example, citing a “law enforcement sensitivity” withheld from production its Circular CIR-08-03 (“Handling ‘I Speak Cards’”). Presumably this circular refers to the handing to citizens cards relating to foreign language ability. On the same basis, they refused to produce Special Order 03-18 (“Automated External Defibrillator”), teletype TT 02-051-08 (“utilizing Police Tape”), and teletype TT 01-005-09 (“Tip Card Distribution”). The “tip cards” and the “I can speak” cards are themselves distributed to the public. The content cannot possibly be “law enforcement sensitive.” Yet, the MPD refused disclosure completely. The MPD has since stepped backed from these most ludicrous claims of exemption.

Citing “law enforcement sensitivity,” the MPD has refused to produce General Order 302.01 (“Calls for Police Services”). The issue of how the MPD handles and prioritizes emergency and non-emergency calls for police assistance is a matter of public interest that has repeatedly arisen before this Council, in the media and in public discourse, particularly after egregious MPD failures. “Calls for Police Services” is one of the most critical and initial points of contact between the public and police, a persistent point of police failure and, indeed, an area that directly implicates matters of life and death. See, e.g., Phil Mendelson, Editorial, *Want an Explanation of D.C.’s 911 Deficiencies? Hold, Please*, The Washington Post, March 9, 2003 at

B08; Nikita Stewart, *D.C. Council Member Questions 911 Response to Armed Robbery*, The Washington Post, January 26, 2010 at B03. This refusal to disclose is ongoing.

Likewise, the MPD cites “law enforcement sensitivity” for its ongoing refusal to produce its orders and policies and procedures relating to high speed vehicular pursuits (General Order 301.03, “Vehicular Pursuits”). Yet the issue and risk of police cruisers killing civilians in ill-advised high speed pursuits through narrow and busy city streets is a matter of public interest and concern. The MPD categorically refuses to produce the general order pertaining to disaster responses for nuclear power generators. Yet, as we have seen time and again with the federal government’s failed responses to disasters, to include the response to Hurricane Katrina and the Gulf of Mexico oil spill, that the time for openness and review is in advance of accidents. For all of these, the MPD will not disclose *any portion* of the materials.

The MPD argues that it should keep secret General Order 805.01 pertaining to Civil Disturbance Unit deployment, which occurs at protests and major events. Yet, as this Council has observed and the U.S. Court of Appeals for the District of Columbia Circuit has found, the MPD’s Civil Disturbance Units have in recent years caused the largest mass-scale violations of civil rights during protests at any time since the 1970s. *See, e.g., Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (“The mass arrest at Pershing Park [on September 27, 2002] violated the clearly established Fourth Amendment rights of plaintiffs.”).

Even with the FOIA litigation struggle ongoing, litigation has been an effective means of enforcement to secure the troves of information that we have secured to date and now made available to the public. It is a functional enforcement mechanism that can be strengthened, including through the provisions requiring detailed disclosures of search efforts upon filing of a civil complaint (proposed amendments to Section 207 at subsection (b)) and the provisions

which bring the D.C. FOIA into conformity with the federal FOIA by defining a prevailing party to include persons who have secured “a voluntary or unilateral change in position by the agency. . .” (proposed amendments to Section 207 at subsection (c)). Likewise, we support the amendments to the public interest fee waiver provisions which now mandate fee waivers where standards are satisfied (proposed amendments to Section 202 at subsection (f)(1)), replacing prior language that was precatory and bringing the D.C. FOIA into conformity with the federal FOIA which also uses mandatory language for fee waivers in the public interest, see 5 U.S.C. § 552(a)(4)(A)(iii).

We stress, though, the change to the prevailing party definition is *essential* for public interest groups to be able to mount sustained enforcement efforts through litigation. Otherwise, recalcitrant agencies will mount aggressive litigation defenses and then seek to avoid attorneys fees assessments by, within litigation or at the very last minute, “voluntarily” producing the materials.

But citizens should not have to resort to litigation just to secure public records, to know what it is that their government is doing.

We strongly support the Open Government Act of 2010 because, while preserving and strengthening the litigation-based means of enforcement, it creates a new avenue of administrative enforcement through the Open Government Office, which the Act accords ample enforcement authority against recalcitrant offices which fail to comply with the disclosure obligations. See gen’ly, Title I of the Open Government Act of 2010 as introduced.

This Committee has, through its legislative proposal, thoughtfully and skillfully crafted authorization for its proposed Open Government Office to provide meaningful and effective

enforcement for those who cannot or chose to not take the litigation route, with all of its attendant costs, the need for lawyers, etc.

We strongly endorse the enactment of this legislation.

The PCJF does offer two technical changes and proposals to the legislation as introduced.

The first proposal would amend Section 206 of the FOIA to add a statutory time period within which Internet publication requirements must be satisfied for newly created or updated public records. The proposed period is the same duration for response as if a written request had been made for the record, ten days (except Saturdays, Sundays, and legal public holidays).

The second proposal would restore in Section 202 certain language referencing the minimal substantive components of a proper "response" to a FOIA request. This language may have been omitted inadvertently in the drafting process.

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**BEFORE THE DISTRICT OF COLUMBIA CITY COUNCIL  
COMMITTEE ON GOVERNMENT OPERATIONS AND THE ENVIRONMENT**  
**LEGISLATIVE PROPOSALS FOR THE "OPEN GOVERNMENT ACT OF 2010,"**  
**SUBMITTED BY**  
**THE PARTNERSHIP FOR CIVIL JUSTICE FUND**

We have carefully reviewed Title II of the Act, which pertains to the Freedom of Information Act Amendments and offer two proposals to the legislation as introduced. Our proposals address the following areas:

1. Regarding Section 206 of the FOIA - - Existing Internet Publication Requirements lack a Time Period for Compliance
2. Regarding Section 202 (c)(1) of the FOIA (addressed in Section 202 of the Open Government Act of 2010, as introduced) - - Restore language in the existing FOIA that has been omitted from the Open Government Act amendments which describe what must be included in a "response" to a FOIA request.

**SUBSTANTIVE PROPOSAL FOR AMENDMENTS TO SECTION 206**  
**(Establishing time period for Internet publication requirement)**

The D.C. Freedom of Information Act currently identifies sub-categories of public records that "must be made available to the public," without the need to file a formal FOIA request and which also must be published on the Internet. See D.C. Code § 2-536(b) (requiring Internet publication of specified records created on or after November 1, 2001).

The executive branch, however, has contended in litigation that the Internet publication obligations are unenforceable including because the Council has failed to specify a specific time period within which records are required to be published.

The Internet publication requirement was enacted into law as part of the "Freedom of Information Amendment Act of 2000." The Council's intent was explicit. Its 2000 amendments were to "[c]larify and expand documents that must be made available to the public, without the need to file a formal FOIA request. These documents must be available on the Internet by November 1, 2001." See Committee on Government Operations, Council of the District of Columbia, "Bill 13-829, the 'Freedom of Information Amendment Act of 2000'", Sess. 13, at 14 (October 31, 2000).

We propose that the Council close this alleged statutory ambiguity by specifying that records are required to be published within 10 days (except Saturdays, Sundays, and legal public holidays) of the creation of the record. This period is consistent with the standard period (as amended under the proposed legislation) for review and response under the D.C. FOIA to a formal written request for records generally.

Section 206 (D.C. Code §2-536(b)) currently reads as follows:

"For records created on or after November 1, 2001, each public body shall make records available on the Internet or, if a website has not been established by the public body, by other electronic means. This subsection is intended to apply only to information that must be made public pursuant to this subsection."

We propose that Section 206 be amended to include the following additional language:

**"Each public body shall electronically publish information or public records subject to this subsection within 10 days (except Saturdays, Sundays, and legal public holidays) of the creation of the record."**

**SUBSTANTIVE PROPOSAL FOR AMENDMENTS TO SECTION 202(c)(1)  
(Restoring language referencing minimal components of a “response” to a FOIA request)**

The Open Government Act of 2010, as introduced, would replace the following existing paragraph at D.C. Code §2-532(c):

“A public body, upon request reasonably describing any public record, shall within 15 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefore.”

with the following proposed language:

“A public body shall respond to any request within 10 days (except Saturdays, Sundays, and legal public holidays) of the receipt of the request.”

The introduced legislation establishes 10 working days to be the standard period for compliance with and response to a FOIA request, reducing the standard period to 10 working days from the existing period of 15 working days. We support this reduction of the standard response period.

However, the proposal removes the existing language that references substantively what minimally constitutes a proper “response” to a FIOA request.

In so doing, the proposed language creates an statutory ambiguity and an opportunity for recalcitrant agencies to avoid substantive compliance. The ambiguity also potentially weakens the effect of the proposed fee penalty provision at proposed Section 2-532(f)(5) which, similar to the 2007 amendments to the federal FOIA, restricts the authority of an responding entity to impose fees “if the public body fails to timely respond to a request.”

We urge that the Council maintain the existing statutory language that does reference and describe the minimal components in a proper “response.”

We also propose that the response be required to be in writing. This is an important, but minimal, requirement to ensure a proper paper trail and avoid disputes as can arise should the public body communicate its response verbally.

As such, we propose that Section 202 (D.C. Code § 2-532) in relevant part be amended at (c)(1) as follows:

**“A public body shall respond in writing to any request within 10 days (except Saturdays, Sundays, and legal public holidays) of the receipt of any such request and either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefore.”**

