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July 12, 2010

Hon. Mary M. Cheh
Chair — Government Operations and Environment Committee
D.C. City Council
1350 Pennsylvania Avenue, N.W.
Suite 108
Washington, D.C. 20004

Re: Bill 18-777 – Response to Attorney General's Testimony

Dear Councilwoman Cheh:

These comments address the testimony D.C. Attorney General Peter J. Nickles submitted on behalf of his office, District Secretary Stephanie Scott and Chief Technology Officer Bryan Sivak regarding Bill 18-777, the Open Government Act of 2010. The Board of the D.C. Open Government Coalition takes this opportunity to reiterate the Coalition's support for your legislation and would like to address some of the inaccuracies in Attorney General Nickles's testimony.

Mr. Nickles goes to great length to cast the Fenty Administration generally, his office and the Office of the Chief Technology Officer as champions of government transparency over the past three years. For more than seven pages he cites statistics from the Secretary's annual FOIA reports in support of his argument, and he claims that by the end of this year, after the election, a system will be in place to track Freedom of Information Act requests government wide.

OCTO, which actively participated in working group sessions on the bill, deserves praise for its efforts to put D.C. government data online. We believe those efforts should go a long way toward reducing the number of routine FOI Act requests agencies now receive because they do not put data of value to the public online. We anticipate that OCTO will continue to facilitate public access, and that it will partner with the Open Government Office if Bill 18-777 is enacted.

We open with some specific observations on the Attorney General's testimony; we then proceed to address his opposition to sanctions, to shorter response times, and to the Open Government Office. Finally, we offer some

observations on his positions on litigation and certain exemptions.

1. Under the 2000 amendments to the FOI Act, the Secretary's office mainly is responsible for compiling data on FOIA compliance. According to its FOIA reports, the Secretary received no FOIA requests in fiscal years 2007 through 2009, despite the fact that it is the custodian of the government archives. The previous administration reported what appear to be 11 FOIA requests to the Secretary in 2005 and six in 2006.

2. It is noteworthy that many of the transparency initiatives Mr. Nickles cites revolve around compilations of statistical data useful to researchers, academics, commercial resellers and advocacy organizations, not D.C. residents and businesses trying to find out what the government is doing in their neighborhoods.

3. Websites describing the city's procurement process and providing information on contracts that have been awarded are helpful. But they do not provide a meaningful window into how the government is spending tax dollars. The D.C. government has not been so forthcoming with records related to expenditures on specific contracts. For example, it denied a D.C. resident's request for details of a $50 million expenditure for improvements to the privately-owned Verizon Center, forcing him to sue for access.

4. A recent audit by the D.C. Open Government Coalition revealed that very few agencies comply even modestly with D.C. Code § 2-536, requiring them to publish a broad range of information on their websites. "[O]verall, the agencies appear to have failed to post any relevant information almost half the time."[1] Among 54 agencies surveyed, only one posted a statutorily required index on its website of records the FOI Act requires each agency to post online.

5. The Open Government Coalition found similarly poor performance by D.C. agencies in making available, upon request, a basic category of records expressly covered by the statute — FOIA denial letters. The FOI Act expressly requires agencies to "maintain a file of all letters of denial of requests for public records" and make it available "on request." D.C. Code § 533(b). But the Coalition's FOIA requests to 34 D.C. agencies for such records resulted in numerous delays, incomplete responses, redactions, and one agency claiming such records are exempt from disclosure. More than six months after the requests were made, only about half of the agencies have provided records in numbers approximating their denial rates stated in the Secretary's annual reports. Although the Metropolitan Police Department reported 1,024 denials in 2008 and 2009, it disclosed only 113 denial letters for that period.

Opposition to sanctions

The bill's new sanctions provisions target only agency employees' willful and reckless failure to perform their duties under the FOI Act. Even so, the Attorney General's testimony opposes them, arguing that the criminal penalties in § 205(d) should be removed because the federal FOI Act does not impose similar penalties. It incorrectly asserts that no state imposes such sanctions. Arkansas and Texas make negligent violation of their FOI acts a misdemeanor subject to fines and a jail sentence. Colorado, South Carolina, West Virginia and Wyoming make willful

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[1] http://www.dcogc.org/efoia_audit.

violation a misdemeanor subject to fines and a jail sentence. Georgia makes willful violation a misdemeanor subject to a fine. An Iowa court can remove a records custodian from office after two previous violations of the statute in which the court assessed damages against the official. An Idaho court can impose a civil fine of up to $1,000 against a public official for deliberate, bad-faith refusal to disclose records. Agencies in Kansas can be fined up to $500 for each violation of the FOI Act. A Missouri court can assess a civil fine of up to $1,000 for negligent violation and up to $5,000 for willful violation of the statute. New Jersey and Virginia impose escalating civil fines on officials who knowingly and willfully violate their statutes. Wisconsin imposes civil fines for arbitrary and capricious failure to disclose. In Connecticut, it is a misdemeanor to violate an order to disclose issued by the Freedom of Information Commission.[2]

In fact, arbitrary and capricious refusal to disclose records under the D.C. FOI Act has been a misdemeanor since passage of the 2000 amendments. The original bill would have allowed jail sentences as well as fines, but the Council amended the sanctions provision before enactment.

The Attorney General asserts that an agency FOI officer could be convicted for missing a deadline or for making a good-faith, although erroneous, determination that a record is exempt from disclosure. A judge's finding of willful non-disclosure inherently means the FOI officer lacked a good-faith basis for claiming exemption. Furthermore, the bill does not give FOI Act requesters power to initiate criminal prosecutions. A complaint that an FOI officer willfully violated the statute would be brought to the Attorney General's office, or possibly the U.S. Attorney's office, which would exercise broad discretion to decide what, if any, charges to file. Even if the agency employee is charged, a judge or jury would have to determine guilt beyond a reasonable doubt.

Although many states' open records laws include criminal and civil sanctions against agency employees, some with thresholds much lower than "willful" violation, there have been few prosecutions. There is no reason to expect that enactment of § 205(d) will produce a spate of prosecutions or seriously impair the ability of D.C. FOI officers to do their jobs.

The Attorney General also criticizes §§ 205(e) and (f), saying the former, punishing reckless violation of the FOI Act, does not provide for judicial review and the latter would violate 31 U.S.C. § 1342.[3] Section 205(e) places such sanctions in the context of a personnel action, invoking procedures that guarantee due process, and in many cases provide for judicial review. It acknowledges that under the federal FOI Act, "the Special Counsel may bring disciplinary proceedings against a federal employee if a court makes a finding that an employee acted arbitrarily with respect to a mistaken withholding." Nickles Testimony, 10.

The government already has the authority to discipline an employee, either by docking pay or suspension, for dereliction of duty; the legislation simply focuses needed attention on the applicability of sanctions to such dereliction in the context of FOI implementation.

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[2] The above information is taken from the Open Government Guide published by the Reporters Committee for Freedom of the Press. http://www.rcfp.org/ogg/index.php.

[3] The Attorney General's references to these sections of the bill appear to be reversed.

Opposition to shorter response times

The Attorney General complains that the bill would reduce the time agencies have to respond to FOI Act requests from 15 to 10 business days, noting that the federal statute gives agencies 20 business days to respond. It also complains that the bill would allow only one 10-day extension of time, not, as it interprets the federal FOI Act, an unlimited number of extensions.

This argument is based on several erroneous premises. The analogy to the federal statute is inapposite. First, nearly all federal agencies have offices spread throughout the United States and many have overseas branches. As a result, the task of locating and gathering responsive records is much more complex than it would be for D.C. government agencies, even multi-site agencies like the D.C. Public Schools or the Department of Public Works. Second, the volume of requests the federal government receives is exponentially greater than the volume of D.C. FOI Act requests. The Administration concedes that in fiscal year 2009 the Department of Justice alone received over 10 times the number of requests all D.C. agencies received. In addition, under federal law, if an agency says it needs more than 20 days to respond it must give the requester an opportunity to narrow the request to make it possible for the agency to comply with the statutory deadline. If the requester narrows the request the agency can no longer justify an extension.

The majority of state open records laws give agencies 10 days or less to respond.

- Many states by statute or regulation allow agencies 10 business days to respond, among them Alaska, California, Delaware, Hawaii, Iowa, Massachusetts, Rhode Island, Texas and Utah. In Alaska an agency must obtain the attorney general's permission for an extension exceeding 10 days. California permits one 14-day extension. The Hawaii statute gives agencies an additional five days to process records, but only if they require redaction. Utah gives agencies an additional 15 days if extensive editing is required to segregate exempt material.[4]

- Statutes in Arkansas, Arizona, Florida, Idaho, Maine, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio and Vermont create a presumption of immediate access. Vermont permits agencies two days to disclose records not immediately available. Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Missouri and New Mexico give agencies three days to respond if records cannot be made available immediately, and New Hampshire gives them five business days. New Mexico permits an extension until no later than 15 days after receipt of a written request.

- Connecticut and Nebraska require a response within four business days, and Connecticut permits one extension to a total of 10 days.

- Michigan, Virginia, Washington and West Virginia give agencies five business days to provide requested records. Virginia permits a seven-day extension and Michigan permits only one 10-day extension.

- Agencies in Illinois and Indiana have seven business days to respond. Illinois permits one

[4] Reporters Committee Open Government Guide, *supra.*

> seven-day extension. Mississippi requires disclosure within 14 business days. South Carolina requires a response within 15 business days. Maryland requires a response within 30 calendar days, effectively 20 business days.

There is no reason D.C. government agencies cannot comply with the time limits established by § 202(c).

Opposition to attorney's fees

The Attorney General argues that the possibility of winning attorney's fees will somehow induce requesters who have filed "burdensome requests" to "file suit on the 26th (or 20th) day" because § 205(c) of the bill would remove "all incentive to work with agencies." He worries that after a requester has sued, an agency might be deterred by the possibility of having to pay attorney's fees from legitimately invoking an exemption. Simultaneously, Mr. Nickles concedes that the attorney's fee provision will effectively discourage agencies from violating the FOI Act, and that enactment of that provision would make creation of the Open Government Office unnecessary. Nickles Testimony, 17.

There are three fundamental errors in this argument. First, requesters seek access to government information because they need the information, often to make significant business or personal decisions. The requester is not likely to file suit merely because the agency missed a deadline because doing so would delay disclosure for many months, if not years, and will incur significant cost. Second, to win attorney's fees the requester must demonstrate that but for the litigation the agency would have withheld at least some requested records. It is not enough to show that the agency missed the deadline. Third, a requester who sues cannot profit from the litigation, even if attorney's fees are awarded.

The testimony alludes to a letter dated June 4, 2010 to Council Chairman Vincent C. Gray arguing that the time limits need to be increased because agency FOI officers are overburdened. According to the letter, Superior Court judges in recent cases have been unsympathetic to the Attorney General's arguments that tight budgets and reduced agency resources make it impossible to comply with the current FOIA deadlines. The FOIA cases cited in the letter involved the Fraternal Order of Police, and Kristopher K. Bauman, FOP president, responded to that letter; we will not reiterate his arguments addressing distortions in Mr. Nickles's testimony.

But the letters highlight another invalid premise underlying the Attorney General's testimony, that when agencies disregard FOIA deadlines the burden of enforcing the statute should be shifted to requesters to sue for access and to judges to act as referees over the process.

Agencies need more time to respond, according to Mr. Nickles, because the number of FOI Act requests has increased 14 percent since fiscal year 2006 and the requests have become more complex. He cites the Secretary's annual FOIA reports in support of his claim that the volume of requests has risen, but he cites no evidence supporting his argument that FOI Act requests filed in 2009 were more complex than those filed in 2006. The table below demonstrates that by selecting 2006 as the starting point the Attorney General distorted the analysis. The number of requests filed each year fluctuates, but the volume in 2009 was slightly less than in 2005, and in every year since Mr. Fenty became mayor the average time it took agencies to respond to FOI

requests has been greater than the average in 2005.

Fiscal year	Total requests	Proc. w/in 15 days	Avg. response time (days)
2005	5,795	3,504	10
2006	4,861	3,036	26
2007	5,399	3,471	16
2008	5,989	4,139	14
2009	5,637	3,704	12

There is no reason government agencies in D.C. need more time than agencies in other jurisdictions to process FOI Act requests, and there is no basis to conclude that 10 days for an initial response and one 10-day extension in complex cases will overburden them. Furthermore, nothing in this legislation would preclude an agency and a requester from negotiating a longer response time in complex cases.

Opposition to the Open Government Office

The Attorney General argues that establishment of the Open Government Office is unnecessary because the Fenty administration will implement a system for tracking FOIA requests by the end of this year and because the Attorney General's office, with the Mayor's general counsel, provides semi-annual training classes for agency FOI officers. He characterizes the new Office as "a genuinely harmful drain on taxpayer resources." Furthermore, he says, of 20 states his office surveyed only Hawaii has an independent office to oversee FOIA. He concedes that Arizona and Washington have open government ombudsmen and grudgingly accepts that Connecticut, a state he apparently did not survey, has such an independent agency.

The Office has great potential to reduce, rather than increase, the D.C. government's expenditures for FOI Act operations. We anticipate that the training and support the Office's small staff will provide to agency FOI officers will reduce the time agencies spend processing requests. By helping to resolve disputes informally and through its appeal process the Office will reduce the amount of FOI Act litigation and its attendant costs.

Mr. Nickles avidly urges you to look to the federal FOI Act for guidance on amending the D.C. statute. But his opposition to Title I of the bill acknowledges creation last year of the Office of Government Information Services within the National Archives and Records Administration only to demonstrate that its power is more limited than the proposed D.C. Open Government Office. He incorrectly states that the proposed D.C. Office was loosely modeled on OGIS. Rather, the models for the Office are other states' agencies that oversee and enforce open government statutes.

Many states have open government agencies

To set the record straight, Connecticut and New York have had independent FOI agencies for over 30 years. Amendments to the New Jersey Right to Know Law enacted in 2002 created a Government Records Council modeled on the Connecticut Freedom of Information Commission. Hawaii's Office of Information Practices is similar. Virginia created its 12-member FOI

Advisory Council in 2000 to train FOI officers and the public and to issue advisory opinions on access to meetings and records. Since 1999 the Indiana Public Access Counselor's office has provided training to government employees, investigated complaints that agencies have improperly withheld records or closed meetings, and issued advisory opinions interpreting the statutes. The Minnesota Commissioner of Administration is empowered to issue advisory opinions at the request of a government body or a citizen interpreting the open records and open meetings laws.[5]

Since last year, Illinois's Public Access Counselor, an assistant attorney general, has had authority to resolve disputes under the open records and open meetings laws and to issue binding opinions. That office has conducted training and issued advisory opinions since 2004. The Iowa Office of Citizens' Aide/Ombudsman mediates access disputes between government agencies and requesters. Since 2007 Florida has had at least one full-time position in its Attorney General's office to mediate access disputes, and an Office of Open Government oversees compliance with open meetings and public records laws. The Maryland Legislature created the Open Meetings Compliance Board in 1991. It addresses complaints about violations of the state open meetings laws and issues advisory opinions. The Washington state ombudsman is an assistant attorney general who issues advisory opinions and assists citizens and public bodies. Arizona's Ombudsman-Citizen Aide is a legislative office that assists citizens and state agencies regarding access to records and an Open Meetings Enforcement Team in the Attorney General's office deals with open meetings act complaints. Pennsylvania is the most recent addition to the list, having created an open government agency last year to investigate and issue advisory opinions interpreting the FOI Act.

The Massachusetts Supervisor of Records has discretion to investigate access denials, to review withheld records and issue non-binding opinions. Utah's State Records Committee can investigate and hold hearings on access complaints and, in response to an order to disclose, the agency must either comply or appeal. If it does neither the Committee can impose civil fines up to $500 a day. Under most circumstances, Texas law requires agencies that plan to withhold records to obtain an opinion from the Attorney General before doing so. Kentucky's Attorney General may investigate claimed violations of the state open records and open meetings laws and issue binding opinions. Attorneys General in Rhode Island and Nebraska must investigate access complaints and may sue agencies that disregard disclosure orders. Attorneys' General in Arkansas and North Dakota may issue advisory opinions regarding access complaints.

In many states where FOI ombudsmen may issue advisory opinions but lack enforcement authority courts give those opinions very significant weight, and agencies that go against rulings of the open government office do not fare well. It is anticipated that the D.C. Superior Court and the Court of Appeals will accord the D.C. Open Government Office's opinions such deference.

This bill gives the Open Government Office appropriate powers

The Attorney General views the Open Government Office as a chamber of horrors headed by a rogue Director on a crusade to ferret out government secrets s/he believes the public needs to

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[5] Harry Hammitt, *Mediation Without Litigation*, National Freedom of Information Coalition, Columbia, Mo.

know and who will use the Office's investigative power to invade privacy and breach privileges:

> The proposed legislation appears to envision a sort of master FOIA requestor with a roving commission to demand access to records on any topic that might capture its interest, heedless of the burdens that it might impose on an agency or on the ability to respond to competing requests from members of the public….
>
> … [T]he exemptions that apply to requests from the public do not appear to limit the Office's "right of access." At the same time, nothing in the proposed legislation prohibits the Office from disclosing otherwise exempt records once it has obtained them from the Agency. The right of access, coupled with the absence of any duty to respect confidentiality, thus threatens the important interests that those exemptions are designed to protect, including the privacy of District citizens. The right also would undermine the Executive and Legislative decision-making process with respect to documents protected by Executive Privilege and certain documents protected by the Attorney-Client; Work-Product, or Deliberative-Process Privileges…. Adding to the problems is the lack of any accountability for the Director of the Office…. [T]he Director would have a five-year term and be removable only "for cause," a limitation that presumably would not encompass the unrestrained exercise of the powers that would be bestowed by this legislation.

Nickles Testimony, 18 – 19.

Plainly put, it would be the duty of the Open Government Office to establish procedures and promulgate rules to enforce the FOI Act and to employ those procedures and rules when an agency or a requester seeks assistance. It is just as likely that an agency, faced with an unreasonable request for information, will seek the Office's help as it is that a requester, having been denied access, will complain.

Nothing in this bill gives the Office authority to initiate investigations absent the filing of a formal complaint, and it is extremely unlikely that the Office would initiate actions against agencies on its own behalf. In fact, the history of highly effective open government offices in Connecticut, New York and elsewhere demonstrates that the Office will be most successful if it establishes a reputation as an honest broker to which agencies and requesters will look for assistance.

Nonetheless, the Attorney General's fear that the Open Government Office will launch a campaign against its sibling agencies can be alleviated by adding language such as, "In an investigation opened in response to a complaint filed by a requester or an agency … " at the beginning of § 105(b). That would preclude the Office from seeking access to records based on what the Attorney General characterizes as the Director's mere curiosity or whim.

The Administration's concern that the Office will have broad access to records is meritless. While investigating a requester's complaint that an agency improperly applied an exemption, the Office will review the agency's decision *de novo*. It must have access to all records the FOI officer reviewed, and perhaps others, to determine whether the agency made the correct decision. If an agency denies having records responsive to a request, prompting an apparently well-founded complaint, the Office must have access to the file system in which such records might be stored to assess the adequacy of the search.

Similarly, it is erroneous to assume, as the Attorney General does, that the Office, having access to nearly all relevant agency records, will abrogate privilege and disclose exempt records at will. As noted above, to be most effective the Office must be an honest broker, not only in requesters' eyes, but in agency officials' eyes as well, and it cannot achieve that status by doing what the Attorney General suggests.

But there is a far more basic reason the Office will not disclose records it obtains during an investigation. Nothing in the bill gives the Office authority to disclose information obtained from other agencies.

The Attorney General's objection to § 205(b) of the bill, adding a new subsection a-2 to D.C. Code § 2-537, is incomprehensible. Nickles Testimony, 15 – 16. If the Office determines that an agency improperly withheld records it will issue an opinion explaining its decision and an order enjoining the agency from withholding the records. If the agency disagrees with the Office's interpretation of the FOI Act it can appeal to the Superior Court or ignore the Office's directive. If the agency ignores the order it risks being sued by the Office to enforce its decision or by the requester for access to the records.

The Attorney General's concern that the Office's Director will have and will exercise unchecked power is specious. The Director is no less accountable than the Inspector General or the head of any independent agency.

The Attorney General claims the Open Government Office does not need the power to compel agencies to disclose records because the D.C. Auditor, the Council and the Inspector General have that authority. Because only the Office would have authority to investigate alleged individual violations of the FOI Act, it is irrelevant that other bodies with different duties have similarly broad powers. In fact, that other agencies with investigation authority have broad access to agency records demonstrates that the authority granted the Office by this bill is not unusual. There is no evidence that the Auditor or the Inspector General has abused similar authority, and the Attorney General cites no reason to anticipate that the Open Government Office will do so. The Attorney General makes the conclusory statement that giving the Office such broad power would, without justification, impose new burdens on city agencies. But he offers no evidence that offices with similar powers in other states have significantly impaired government operations.

Additional Issues

A thread running through the Attorney General's assessment of the Fenty administration's FOI record and its opposition to the Open Government Office is that D.C. agencies are doing a good job providing requesters the information they seek. It relies on the statistics compiled by the Secretary and the small number of FOI suits filed each year. But the picture changes dramatically when you examine the statistics more closely.

According to the Attorney General, out of 11,000 FOI Act requests processed in 2008 and 2009 only 17 lawsuits have been filed, and 10 of them involve the Fraternal Order of Police. Nickles Testimony, 6, 7, 20. "That statistic strongly suggests that agencies and requestors have been

capable of resolving disputes on their own without the need for litigation or a brand new agency serving as an informal mediator," Mr. Nickles argues. *Id.* at 20.

The small number of lawsuits indicates nothing more than that most FOI Act requesters give up after their requests are denied or they lose administrative appeals. Litigation is costly and time consuming. It is much more likely that most requesters lack the resources to sue, and the possibility that a judge, months or years later, will award attorney's fees is too speculative. Those with the resources often need the information immediately, and its value would be greatly reduced by litigation delays. For them, a simple cost-benefit analysis militates against suing.

Mr. Nickles concedes that the administration's record has been roundly criticized, but insists that critics have misinterpreted the statistics. *Id.* at 6.

> After breaking out the agencies whose work is almost entirely investigative and thus necessarily contains at least some confidential material …, the percentage of requests granted in total increases to 75 percent. [] If MPD (whose work is largely, albeit not entirely, investigative) is removed from the list, the percentage of requests granted in total for the 43 remaining agencies increases to 87 percent with only 6 percent of requests denied in part and 4 percent denied in full…. It also bears noting that, for requests that are denied in whole or in part, by far the most consistently relied upon statutory exemptions appear to have been under the two provisions that protect the personal privacy of individuals.

Id. at 5 – 6.

The Attorney General appears to interpret D.C. Code § 2-534(a)(3) far more broadly than it is written. He is correct that it exempts investigatory records, but it makes them exempt only under certain circumstances and, in most cases, for a limited time while the investigation is ongoing. His interpretation of the two privacy exemptions, §§ 2-534(a)(2) and (a)(3)(B), is similarly broad and unfocused. For example, several agencies responding to the Open Government Coalition's requests for letters denying FOI Act requests blacked out the names of the requesters. The agencies erroneously believed that disclosure of personal identifiers is *per se* a clearly unwarranted invasion of personal privacy.

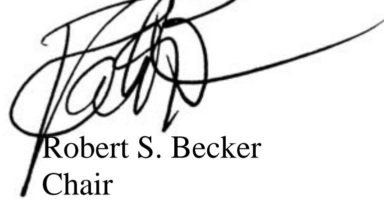
The statistics on which the Attorney General relies indicate which exemptions agencies applied when they withheld requested records. They do not demonstrate that agencies properly applied those exemptions or that the agencies did not violate the FOI Act by withholding the records.

Embedded within Mr. Nickles's argument is an attempt to read into the FOI Act an exemption from disclosure covering all records related to litigation. He says, "parties in litigation with the District should be required to abide by the rules that govern civil discovery and not permitted to utilize FOIA during litigation to circumvent that process." His office has invoked this so-called litigation exemption in recent cases as justification for withholding records. Neither the federal nor the D.C. statute permits an agency to deny access under the FOI Act to otherwise public records merely because the requester is in litigation against the government. The bill makes clear that no such exemption exists.

In the final analysis we believe that the Attorney General's testimony demonstrates the

importance of Bill 18-777 and the urgent need for the Open Government Office to ensure the public's right of access to information under the D.C. Freedom of Information Act.

Yours truly,



Robert S. Becker
Chair
Government Relations Committee