



SOCIETY OF
PROFESSIONAL
JOURNALISTS



Testimony of
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On behalf of
The Society of Professional Journalists
D.C. Professional Chapter

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Before the Council of the District of Columbia
Committee on Government Operations

Bill 18-777 — Open Government Office Establishment Act of 2010

Thank you very much for inviting me to address you on behalf of the Society of Professional Journalists' D.C. Professional Chapter. I am the chapter's freedom of information chair and I am chair of the D.C. Open Government Coalition's Government Relations Committee. I assist journalists seeking information under the D.C. and federal open records laws, and I use those statutes in my law practice to obtain information to assist clients. Perhaps more importantly, I have been a D.C. resident since 1982, and without moving have lived in Wards 3 and 4.

I helped draft major revisions to the D.C. FOI Act in 2000, and a few days ago I looked at the testimony I gave this Committee October 12, 2000 on those amendments. I said then that the amendments were needed because agency implementation of the statute was erratic and slow. I cited three contributing factors: "the individuals charged with implementing [the FOI Act] are not aware of its provisions, are inadequately trained in dealing with public disclosure of government information, or have FOI as but one of several duties within the agency."

As I sit here today, those three factors still contribute significantly to the difficulties residents and local businesses experience when attempting to obtain public records from government agencies, records created or compiled at taxpayer expense. The potential presented by the 2000 amendments has never been realized, even though every agency now has an FOI officer, and

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according to the Attorney General's office, those FOI officers regularly receive training.

Those amendments could not break the culture of secrecy long ingrained in the D.C. government bureaucracy. They could not elevate the importance of transparency for officials focused on carrying out their agencies' stated missions. They could not compel the Mayor and City Administrator to impress on agency heads that transparency is a goal, not an afterthought. In short, since the enactment of the first D.C. FOI Act, no government entity has been its champion.

The bill before you would create such an entity, one that owes its allegiance to the principle of government transparency and has as its main task enforcing the FOI Act. Properly implemented, the Open Government Office can increase public access to government records, reduce requesters' frustrations and distrust of agencies, and reduce the wasteful expenditure of agency resources now devoted to resisting disclosure.

What troubles me is the thought that, although this bill has great potential, as the 2000 bill did, unless the Open Government Office has the power to enforce its decisions, we might be back here in five or 10 years groping for a way to unleash that potential. As Title I is now written, I think we have alleviated that concern, and I hope it survives the legislative process intact.

For the Open Government Office to succeed it needs three things: political independence, fiscal independence, and a director who can establish a reputation in government and outside as an honest broker. As the bill now says, the Office will gain a degree of political independence from the fact that its director has a five-year term and can only be removed for cause. With the addition of funding provisions similar to those applied to the Inspector General's office the Open Government Office will be relatively immune from politically-motivated budget cuts. If either the tenure or funding provision is weakened I fear that the Office will fail.

In the end, however, the Office's success will hinge on the skill of the person selected as its first director. That individual will encounter considerable skepticism within government agencies and among people requesting records under the law. Thorough knowledge of the FOI Act, the power to demand compliance, and the ability to vindicate a requester's rights through

litigation will help, but none of these tools will ensure success. The office will have to demonstrate its ability to fairly consider agency concerns, as well as requesters' needs; to educate government employees and requesters; and to use its considerable litigation power effectively and judiciously.

Proposed amendments to the FOI Act will strengthen the Office's hand. They include substantial improvements to D.C. Code § 2-537, the sanctions statute. But I am mindful that the introduced version of the 2000 amendments had stronger sanctions than the enacted version. Then, Council members expressed concern that minor infractions of the FOI Act would lead to jail time. Agency employees, fearing retaliation for disclosing information against their superiors' wishes, viewed the proposed sanctions as an inevitable cost of keeping their jobs.

The truth is that no one wants to impose penalties for FOI Act violations, nor will fining FOI officers solve the city's fiscal problems. Sanctions are in this bill to discourage and punish willful, deliberate denials of access to public records. Agency heads and line employees who withhold non-exempt public records to avoid embarrassment or inquiry into improper action deserve to be penalized.

Here, the Open Government Office may be the conscientious FOI officer's best friend. Agency personnel can ask the Open Government Office for informal advice about how to respond to specific records requests. In such a case a supervisor would be hard pressed to fault the FOI officer for disclosing records on the Office's recommendation.

Another amendment could bring the Open Government Office's considerable power to bear on the disclosure process within a month after the initial request. It does this by declaring that an agency's failure to meet FOI Act deadlines shall be deemed a denial of the request, permitting the requester to file an appeal to the Mayor, the Office or the Superior Court. I anticipate that most such appeals will be directed to the Office, which would have authority to review the records and make an independent disclosure determination. In short, an appeal to the Office provides many of the benefits of litigation without the expense and delay associated with filing suit, or the expense to the city of defending against one.

Several amendments address requesters' complaints about chronic impediments to transparency. One of those complaints has been that agency personnel insist that you make written requests and wait for a formal response, even if you seek records the agency is required to publish or should have readily available. An amendment to the main disclosure provision, D.C. Code § 2-532, specifically eliminates the need to file written requests for broad categories of records, including formal opinions, policy statements, regulatory enforcement letters, meeting minutes, agency staff data, and records frequently requested.

Another chronic complaint is that agencies quote exorbitant charges for searching and reviewing records, and insist on payment before they begin processing a request. Several proposed amendments rectify this problem by limiting the charges that can be levied for locating and processing records for disclosure, limiting when agencies can request advance payment, and giving the Open Government Office authority to declare an agency's charges excessive. Another amendment would encourage establishment across the government of more uniform search and copy fees.

We cannot avoid what is sure to be one of the main objections to creating a new Open Government Office and strengthening the FOI Act in these hard fiscal times, cost. This bill will impose a new annual expense and may increase agency outlays to process FOI Act requests. But it will reduce the number of administrative appeals and suits filed annually, saving the city substantial amounts of money.

Furthermore, opponents ignore the considerable non-monetary costs of doing nothing. Elected and appointed government officials and the agencies they lead depend on the public's trust and cannot achieve their goals without it. When an agency acts in secret, it arouses suspicions among those affected by its decisions; and when an agency's decisions affect a broad cross-section of the community, that suspicion is pernicious.

Government transparency is a key element in economic development, and a large percentage of FOI Act requests are filed by businesses. Agencies that respond slowly, withhold requested records unnecessarily, or fail to respond at all cost the city jobs and revenue.

One of the most effective state agencies of this kind is the Connecticut Commission on Open Government, which has been in operation for over 30 years. That office oversees the state's open records and open meetings laws as they apply to state agencies and 169 municipalities spread over 5,500 square miles. Connecticut's population is 3.4 million people. The Commission has 23 employees and a budget for the 2010 fiscal year of about \$2.3 million. The per capita cost of ensuring government transparency is about 68 cents a year.

The proposed D.C. Open Government Office has many of the attributes that have made the Connecticut Commission so effective. But it would interact with fewer than 100 agencies and about 600,000 residents crammed into 61 square miles. I do not think it is too much to ask the District to spend less than 70 cents a person a year to guarantee government transparency here.

I would like to comment briefly on Title III of the bill because it could have a major impact on D.C. government transparency going forward. All agencies are making the transition from paper to electronic recordkeeping and transparency should be built into new data storage system. If databases are designed with disclosure in mind the cost of locating records responsive to FOI Act requests and processing them for disclosure will be greatly reduced.

Furthermore, this bill contemplates that much of the data the government gathers will automatically become part of the D.C. Data Warehouse, available to the public without the need to file requests.

Thank you.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ also promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press. The D.C. Professional Chapter, with members representing local and national news media, is one of its largest chapter with more than 330 members.

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