



Statement of
Thomas M. Susman
On behalf of the
D.C. Open Government Coalition
June 7, 2010
Before the Council of the District of Columbia
Committee on Government Operations

Bill 18-777: Open Government Act of 2010

Madam Chair and members of the Committee, I am Thomas M. Susman, president of the D.C. Open Government Coalition. I am pleased to testify this morning on behalf of the Coalition to express our strong support for the Open Government Act of 2010.

The DCOGC was founded a year ago to bring together District residents and organizations who seek to enhance public access to government information and transparency of government operations of the District. We believe that transparency promotes civic engagement and is indispensable to maintaining a responsive and accountable government. The DCOGC has found during our short history that there is an extremely strong – if not always vocal – constituency supporting greater government transparency. And we are pleased to serve as an umbrella organization and a clearinghouse for the many groups who share the frustration of having inadequate access to public information and open meetings.

The Coalition has held two public forums on open government in the past nine months, and we are grateful to Councilmember Cheh for your encouragement of the Coalition and participation in our meetings and events.

We also have appreciated the opportunity to work with you and your staff in developing and refining this very important legislation, and we hope to stand with you when the Mayor signs this bill into law.

DCOGC Findings Illustrate Need for Bill. Two Coalition projects illustrate the need for this bill; our findings were announced at our May forum, and I would like briefly to summarize them here.

One project involved an audit of the compliance by the District's agencies of the requirements of the Freedom of Information Act (DC Code, sec. 2-536) that ten categories of public records be posted on their websites. Those records required to be posted include such basic information as the names, salaries, title and dates of employment of employees and officers of public bodies; administrative staff manuals affecting the public; final opinions and policy statements; minutes of proceedings; an index to posted materials; and the like. And yet our audit revealed that, among the 54 agencies covered—

- The agencies failed to post required information 54% of the time.
- Eight agencies offered citizens no help in seeking records under FOIA.
- Only one agency provided website users with an index to required materials.
- Only one agency provided employee salary information on the website.

Our second project involved requests to 34 DC agencies for "All FOIA denial letters, from Jan. 1, 2005 to present." We pointed out that the DC Code (sec. 2-533(b)) specifically requires each public body to "maintain a file of all letters of denials of requests for public records . . . [that] shall be made available to any person on request" While we started this project to be able to analyze the substantive reasons for the denials, we found wide variations in the timing and substance of agency responses to this straight-forward request:

- Four agencies did not even respond to the request until long after the 15-business-day deadline.
- About a third of the agencies did not search the entire time period; some provided no explanation, some said the records

had been lost or destroyed, and some said it was an unreasonable request.

- The numbers of letters we received did not correspond to the numbers of denials reported (as required by law) to the DC Office of the Secretary (for example, the MPD gave us 113 denial letters but reported 1,024 for the years in question).
- Some agencies redacted the identities of the requesters, others did not (though the fact that a person submits a FOIA request is not “private” exempt information except in very rare situations).

These examples are not isolated, but they are illustrative of the lack of uniformity, accountability, responsiveness, timeliness, and compliance with the mandates of the law that characterizes the District government in how it fulfills the FOIA’s requirements for proactive disclosure of information and responds to the public’s requests for records.

DCOGC Supports the Open Government Office Establishment Act (title I).

The DC Open Government Coalition endorses Bill 18-777, the Open Government Act of 2010, and enthusiastically urges this Committee to favorably report the bill and the Council to pass it. We have expressed some concerns about specific drafting issues since an early version was circulated, and I am pleased that a number of our suggestions have been incorporated into the draft that is the focus of this hearing. We have several additional drafting suggestions for Titles I and II, and we will be delighted to continue to work with you to perfect this legislation.

Last October when I testified for the DCOGC at a roundtable on Open Government before this Committee I recommended that the District create an independent office or agency to oversee the disclosure of public records and administration of the FOIA in the District. I cannot underestimate our enthusiasm for the creation of the District of Columbia Open Government Office that is mandated by this legislation. The Office is modeled after some bodies in other states that have proved extremely valuable and influential in assisting both the public more fully to realize the benefits of the FOIA and governmental agencies more efficiently to implement the requirements of the FOIA in those jurisdictions.

While the Office will not have a regulatory authority to direct disclosure of requested records, its authority to establish uniform procedures for public

bodies, to issue advisory opinions to agencies and requesters, to conduct audits and provide training, and to issue reports on its activities and recommendations all add up to a potentially powerful force for greater openness in the District of Columbia. The changes proposed in the recent draft prepared by staff for discussion at this hearing remove some of the powers of the Office that appear to have given it more of a police role and add authority that bolsters its ombudsman role; these are salutary. The direction added that endeavors to protect the appropriations for the Office from diversion also strengthens the potential for the Office and is welcome.

We know that it will require follow-through and vigilance on the part of the Council and Mayor to ensure the effectiveness of this Office, since it will require appointment of a strong director and allocation of adequate resources to do the job. A similar Office was created by Congress in 2007 for the federal establishment, but that Office of Government Information Services did not get underway until just last fall because of the recalcitrance of the former administration. The citizens and organizations and businesses in the District all have an immense stake in the success of this new Office, and you can be sure we will be working with you to help ensure it realizes its potential after enactment of the legislation.

DCOGC Also Supports the FOIA Amendments (title II) and the Agency Transparency Act (title III). The District's Freedom of Information Act, modeled after the federal statute, is already robust in many important ways but, as I have suggested above, primarily suffers from the absence of diligent implementation by the DC government. Many of the changes proposed to that statute are adjustments intended to clarify and refine existing provisions, or to mirror some of the improvements to the federal FOIA adopted in 2007. Those amendments are positive, helpful, and should be adopted.

Likewise, the new Agency Transparency Act appears to adopt some of the very significant transparency initiatives of the Obama administration—for example, requiring agencies to adopt transparency plans, requiring that high-value information in databases be identified and made accessible to the public, and ensuring that technology is harnessed to facilitate not only use of data by the government, but also access by the public. We applaud these requirements and see them as very important steps toward a culture of proactive disclosure of information that does not rely primarily on the outmoded, time-consuming request-and-response model.

Titles IV, V, VI and VI; Lobbying Disclosure Suggestions. The DC Open Government Coalition does not take a formal position on the balance of the legislation, though of course we welcome the added disclosure provisions contained in those titles. I do have some personal comments on the Lobbyist Disclosure Act Amendment (title VI). My experience in this area spans a couple of decades: I worked with the U.S. Congress on lobbying reform legislation enacted in 1996 and 2007; I developed the American Bar Association's *Lobbying Manual* (a guide to compliance with federal laws) in 1993 and am co-editor of its current 4th edition; I taught Legislative Process & Lobbying at the American University's Washington College of Law for 6 years; and I have for over a decade been chair of the Ethics Committee of the American League of Lobbyists.

The increased lobbyist disclosures—both in frequency and content—required by the bill are for the most part positive steps. Lobbying has received a great deal of attention at the federal level, especially with the recent significant health care and financial market regulation legislation, but there is also a great deal of lobbying in the District of Columbia that goes, for the most part, under the public's radar.

Presently the data on lobbying in DC are not very helpful. The data are not available on a timely basis; do not provide much useful information to the public or the governmental decisionmakers who are lobbied; double-counts the amount of funds expended on lobbying (by requiring both the lobbyist who is compensated and the entity paying the compensation to file); and exclude vast amounts spent on grassroots lobbying efforts. Moreover, while most states prohibit contingent fee lobbying completely, the District does not, but then does not even require the existence of a contingent fee lobbying agreement to be publicly disclosed. These deficiencies should be addressed.

There is one area where the bill, in my view, goes too far: The proposed new clause 6 in sec.1-1105.05(a) would require detailed reporting of every lobbyist's contact with an official in the legislative and executive branch. The burden on lobbyists, the potential for mischief by persons opposing an elected official, the prospect for errors' becoming grounds for criminal inquiry, and the sheer volume of useless information generated suggest to me that this provision should be revamped.

As to contingent fee lobbying, I am not suggesting that the District should prohibit it entirely, though many believe that the tendency this kind of

arrangement has toward corrupting the system warrants a prohibition. In the least, wherever there is a contingency arrangement with a lobbyist, the lobbyist's registration (or report, if it is entered into after the registration has been filed) should contain a detailed summary of the agreement, including both the compensation promised and the contingency on which it is based.

And, as to grassroots lobbying, a clear line can be drawn between community education and general promotional efforts, on the one hand, and activities designed to elicit communications with officials that are intended to influence their decisions, on the other. Federal law has long contained a definition of grassroots lobbying for use by nonprofit organizations in determining the amount of funds they are expending on lobbying activities, so that they can comply with the restrictions on lobbying by 501(c)(3) organizations. This same definition can be used for reporting purposes by all DC registered lobbyists.

Conclusion. I appreciate the opportunity to testify here on the Open Government Act of 2010 and to voice the enthusiastic support of the DC Open Government Coalition for enactment of this bill. We look forward to working with you, Madam Chair, along with members of the Committee and the Council to refine the legislation further following these hearings and ultimately to see this bill enacted into law. And we will remain active—both before and after enactment—to ensure that the open government laws in the District are implemented and enforced.