



November 28, 2016

Hon. Mary M. Cheh
Chair — Committee on Transportation
and the Environment
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

*Re: Notice of Public Oversight Hearing on the Department of General Services
Contracting and Personnel Management*

Dear Councilmember Cheh:

We are writing in regard to the Committee's decision to exclude D.C. residents from its December 1 oversight hearing on the Bowser administration's awarding of two contracts about which there is great community interest and public controversy. Beyond stating the obvious, that a hearing from which the public is barred is not a public oversight hearing, we believe closing the hearing would be bad public policy on several levels.

The hearing notice provides little information about what the Committee hopes to learn concerning these contracts and the bidding process for infrastructure projects at Buzzard's Point and the St. Elizabeth's East Campus, the dismissal of two DGS employees, and the resignation of DGS Director Christopher Weaver. It states that because the hearing will address "sensitive and confidential ... disciplinary and personnel matters," the public must be excluded from the entire hearing.

Before addressing our concerns about the closure, we would like to make clear that we understand the privacy interests and the need for confidentiality when public bodies conduct personnel and disciplinary proceedings. If we had more details about the hearing agenda we might agree that some portions of it should be closed, or we might suggest ways to tailor the discussion to permit public attendance and maintain an appropriate level of confidentiality.

In August and September, news outlets extensively covered the controversy surrounding the contract awards, interactions between Mr. Weaver and City Administrator Rashad

Young, the dismissals, and Mr. Weaver's apparently forced resignation.¹ Closing the December 1 hearing will not prevent the public from learning about the Executive Branch disciplinary proceedings.

In context, it appears that the critical questions to which the Committee seeks answers are: whether the DGS acted properly in awarding the contracts to Gilbane Building Co., rather than Ft. Myer Construction; whether the Mayor, the City Administrator, or others in the administration attempted, apparently without success, to influence that decision; and whether the administration acted improperly in ousting Mr. Weaver and the two employees.

Residents of the District have great interest in the answers to each of these questions. It is unlikely that either the first or the second question presents any confidentiality concerns because the contracts have been awarded, and public discussion of them will not adversely affect the District's negotiations.

It is clear from preambles to the Open Meetings Act and the Freedom of Information Act that the public has a right to know whether government contracting decisions have been tainted by political influence. This is particularly true where, as here, the contracts involve large expenditures of public funds that will benefit sports franchises and other private entities.

If the administration acted improperly in dismissing two DGS employees and forcing Mr. Weaver to resign, the public has a right to know that as well.² But testimony by the City Administrator or other government employees about the personnel actions arguably could be exempt from public disclosure, warranting closure of portions of the hearing.

In the hearing notice the Committee relies on two provisions in the Council's rules,

¹ See, e.g., REPORT: DGS DIRECTOR FORCED OUT OVER CONTRACTING DISPUTE, DCist, Aug. 26, 2016, http://dcist.com/2016/08/report_dgs_director_forced_out_over.php; TURMOIL AT D.C. AGENCY AFTER DISPUTES WITH PROMINENT CONTRACTOR, CAMPAIGN CONTRIBUTOR, WAMU-FM, Aug. 25, 2016, http://wamu.org/news/16/08/25/turmoil_at_dc_agency_linked_to_contract_disputes_with_top_campaign_donors; D.C. AGENCY HEAD OVERSEEING BUILDINGS, HOMELESS SHELTERS ABRUPTLY RESIGNS, *The Washington Post*, Aug. 12, 2016, https://www.washingtonpost.com/local/dc-politics/dc-agency-head-overseeing-buildings-homeless-shelters-abruptly-resigns/2016/08/12/c609895e-60aa-11e6-9d2f-b1a3564181a1_story.html.

² See, e.g., FIRED D.C. OFFICIAL WINS \$1.7 MILLION WHISTLEBLOWER SUIT AFTER LOTTERY CONTRACT COMPLAINT, *The Washington Post*, Nov. 22, 2016, https://www.washingtonpost.com/local/public-safety/fired-dc-official-wins-17-million-whistleblower-suit-after-lottery-contract-complaint/2016/11/22/555fc2d8-b102-11e6-be1c-8cec35b1ad25_story.html.

§§ 504(b) and 375,³ as permitting the closure. To the extent that the hearing addresses matters beyond the scope of § 375(9) and (10), the Open Meetings Act and the rules intend that the hearing be public. *See* D.C. Code § 2-575.⁴ To the extent that witnesses may testify about not yet public aspects of “disciplinary matters,” § 2-575(c) would require members of a public body other than the Council, before going into secret session, to vote in public on closure and explain why closure is necessary.⁵ In recognition of the intent that Council rules “shall comply with” § 2-575, the Committee should follow the same statutory procedures.

As the Open Meeting Act states unambiguously, “[t]he public policy of the District is that all persons are entitled to full and complete information regarding the affairs of government and the actions of those who represent them.” D.C. Code § 2-572. Without question, a Council committee hearing addressing the possibility that administration officials exerted political pressure in the contracting process, or that they retaliated against government employees who refused to yield to such pressure, falls within the

³ § 504. ... (b) Except as provided in subsection (c) of this section, testimony taken and evidence received in a closed hearing or roundtable shall be confidential and may not be released to the public.

§ 375. EXCEPTIONS TO OPEN MEETINGS.

A meeting of the Council may be closed for the following reasons:

...

(9) To discuss disciplinary matters;

(10) To discuss the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials, including Councilmembers and staff....

⁴ D.C. Code § 2-575

...

(d) A public body that meets in closed session shall not discuss or consider matters other than those matters listed under subsection (b) of this section.

...

(f) Notwithstanding any provision of this chapter, the Council may adopt its own rules to ensure the District’s open meetings policy, as established in § 2-572, is met with respect to Council meetings; provided, that the rules of the Council shall comply with this section and the definition of meeting in § 2-574(1)....

⁵ § 2-575(c)

(1) Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of the members of the public body present vote in favor of closure.

(2) The presiding officer shall make a statement providing the reason for closure, including citations from subsection (b) of this section, and the subjects to be discussed. A copy of the roll call vote and the statement shall be provided in writing and made available to the public.

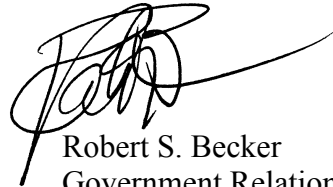
scope of that policy. Therefore, the Committee's decision to close the entire hearing runs counter to public policy.

In the past several years, the Council has set an example for other public bodies by admitting the public and news media to substantive discussions that previously had been secret, including budget deliberations and breakfast meetings. Your Committee's decision to close the entire December 1 hearing would set a very bad example, ignoring the admonition that the Open Meetings Act "shall be construed broadly to maximize public access to meetings. Exceptions shall be construed narrowly and shall permit closure of meetings only as authorized by this chapter." D.C. Code § 2-573.

We ask that you reconsider the decision to close the entire hearing, and if necessary, that you reschedule it to give interested individuals timely notice that they may attend. If you elect to go forward December 1, we ask that you provide a much more detailed justification for closure that conforms with requirements of § 2-575(c), and that the Committee post video recordings as quickly as possible of all non-exempt portions of the hearing.

We would welcome the opportunity to discuss this matter more fully with you. Please contact me at (202) 364-8013.

Yours truly,

A handwritten signature in black ink, appearing to read 'R. Becker', with a long horizontal flourish extending to the right.

Robert S. Becker
Government Relations Chair
rbecker@dcapeals.com

cc: Councilmember Jack Evans
Councilmember Kenyan McDuffie
Councilmember Charles Allen
Councilmember Brandon T. Todd