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February 12, 2018

Hon. Charles Allen
Chair
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

*Re: Board of Ethics and Government Accountability
Performance Oversight Hearing, February 8, 2018*

Dear Councilmember Allen:

I was out of the Washington area Thursday and could not attend the Judiciary Committee Board of Ethics and Government Accountability (BEGA) performance oversight hearing. But I was able to watch it beginning shortly before the end of the last public witness's statement and ending when you shifted focus from the Office of Open Government (OOG) to BEGA operations. I am writing as the D.C. Open Government Coalition's government relations chair to respond to some of the questions you and other Council members posed about the OOG and its relationship with BEGA.

You asked Fritz Mulhauser what difference it would make to create a new Office of Open Government board to oversee the OOG, as BEGA oversees the Office of Government Ethics (OGE). You also asked about our proposal that appointments to an OOG board should be split between the Council and the Mayor.

Why create a separate Office of Open Government board?

Our rationale for creating a separate board is fairly straightforward and is borne out by BEGA Chair Tameka Collier's testimony. In 2011, when then-Councilmember Muriel Bowser proposed putting the OOG under BEGA, we raised several significant concerns, which the Council heeded in the legislation. The first was that a primary qualification for appointment to BEGA would be the candidate's expertise in government ethics, campaign finance, lobbying and related fields. That is appropriate because BEGA's mandate is government ethics, which is a complex undertaking.

Expertise in government transparency law is not required, and to my knowledge only Laura Richards, among the eight members appointed since BEGA's creation, had any acquaintance with open records and open meetings law. We were concerned that because oversight and enforcement of the Freedom of Information Act (FOIA) and the Open Meetings Act (OMA) are not within the board's primary mandate and BEGA members generally have had no demonstrated interest in government transparency, staff resources would be allocated to ethics investigations first, and to government transparency only when time allowed. Over the past five years, our assessment has proven correct.

An OOG board with a mandate to oversee and enforce FOIA and the OMA would be populated with individuals having government transparency experience. There are numerous experts in the District, including members of the Coalition board, to choose among. Such a board would be a better advocate for the OOG in the budget process and in guiding legislative and policy decisions than BEGA has been. It could provide better guidance to the staff, and would be better prepared than BEGA to take ownership of OOG rulings and respond to the types of complaints highlighted at the hearing Thursday. As noted in the Coalition's written testimony, BEGA has not advocated for the OOG and has failed to protect the Office's authority against infringement by the Executive Office of the Mayor (EOM) and attacks from other executive branch bodies.

Who should appoint OOG board members?

The Coalition's written testimony suggested that an OOG board might be made up of some individuals appointed by the Mayor and others appointed by the Council. We made that suggestion because BEGA, the OOG and the OGE hold positions in the D.C. government that are different from the positions of other agencies and public bodies. Like the D.C. Auditor and the Inspector General, the OOG and OGE straddle the divide between the executive and legislative branches. Unlike the Auditor and the IG, which are established as part of the D.C. Charter, an appointed board oversees them.

If the Home Rule Act permits, it might be reasonable to conclude that, because the OOG enforces FOIA and to some extent the OMA as they apply to the Council and its staff, as well as the executive, the Council should be able to appoint members to an OOG board. It should not be in the position of merely providing advice and consent to appointments the Mayor makes.

On the other hand, if the Council were to insist on making appointments to the board, would it have to give up its veto of mayoral appointments? I am not convinced either approach is superior. I am merely suggesting that if the former is legally permissible, this is worthy of discussion.

The Council intended not to put BEGA in control of the OOG

In her testimony, Ms. Collier asserted that the relationship between BEGA and the OOG is "untenable" because the board cannot exercise control over OOG investigation and enforcement actions but must respond to complaints like those of the Commission on Selection and Tenure of Administrative Law Judges (COST). She argued that the Council could not have intended to give the OOG operational independence from BEGA. The Coalition's written testimony explains the

Council's decision to make the OOG operationally independent, one with which Ms. Collier clearly disagrees.

In a 2011 hearing on the BEGA bill, the Coalition noted that the federal Office of Government Information Services (OGIS) is a subdivision of the National Archives and Records Administration. But the statute establishing OGIS gives it independent responsibility for overseeing federal transparency laws. COMMITTEE REPORT, Bill 19-511 – The Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (B19-511 Report), 205. *See attached* Testimony of Robert S. Becker, November 30, 2011 (November Testimony), 4.

Ms. Collier said the decision not to re-appoint Traci Hughes was driven by BEGA's desire to redefine through the personnel process the OOG director's role. You correctly pointed out that the problem about which she complained is structural. It cannot be fixed by drafting a new job description for the OOG director position. If that were possible, there would be no reason to replace Ms. Hughes. The board and the director could amend the job description to include reporting and consultation requirements.

What Ms. Collier appears to be proposing is a new job description that requires the OOG director to operate under parameters similar to the statutory restraints on the OGE director's authority. For example, the OGE director must obtain board approval to open or close a formal investigation, and before issuing an advisory opinion or sanction. The OOG's enabling statute does not give the board such authority, and a job description cannot substitute the board's wishes for the Council's intent.

In other words, Ms. Collier's justification for not re-appointing Ms. Hughes represents a futile effort to rewrite the statute without having to convince the Council to change its 2011 decision.

As you heard in the hearing, Ms. Hughes has done an exemplary job, a fact Ms. Collier conceded. She repeatedly evaded requests for explanation of the board's action with vague statements about improving "collaboration" and achieving "efficiencies," and being legally unable to discuss personnel matters.

Because I was deeply involved in negotiations over the FOIA and OMA bills in 2010, and the BEGA bill in 2011 and 2012, I believe I can provide some insights into her "collaboration" and "efficiency" arguments. In discussions about placing the OOG under BEGA, Councilmember Bowser's initial idea was that the OGE and OOG could share staff resources. Lawyers and investigators could be tasked as needed to either ethics complaints or FOIA/OMA matters.

For the reasons outlined above, the Coalition argued that the OOG needed its own staff. B19-511 Report, 76 – 8, 204 – 5; November Testimony, 3 – 4. *See attached* Testimony of Robert S. Becker, October 26, 2011 (October Testimony), 2 – 4. First, consistent with its mandate, BEGA would hire lawyers interested in and experienced with ethics issues, not transparency issues. Second, the ethics case load would always take precedence over the FOIA/OMA case load. BEGA's history since 2013 supports our view. It has asked every year for more lawyers, investigators and auditors to deal with its growing case load, and lent meager support to Ms. Hughes's very modest staffing requests. Third, BEGA is subject to both the FOI Act and the

OMA, and it would be a clear conflict of interest for its staff lawyers to adjudicate complaints that the board violated either statute. The legislative history demonstrates that the Council agreed with us then because it removed a provision from the bill that stated, “(1) The powers and duties of the Open Government Office pursuant to section 503 are transferred to the Board of Ethics and Government Accountability.” B19-511 Report, 204; November Testimony, 3. We hope you will agree as well. If the Council were to give BEGA operational control over the OOG, oversight and enforcement of the FOI Act and the OMA would suffer significantly.

Conciliation is not a tool used to resolve transparency complaints

Prompted by Ms. Collier’s complaints about Ms. Hughes and her decision to amend the OOG’s rules, you asked about conciliation in the FOIA/OMA complaint resolution process. As our attached 2011 testimony explains, the fundamental principle underlying both transparency laws is bringing public bodies and agencies into compliance, not on punishing violators. Transparency laws provide relatively minor sanctions for non-compliance, and impose such sanctions only where a judge determines that a violation was willful or arbitrary and capricious. In other words, the process is remedial, and resorts to sanctions only when all attempts at remediation have failed. B19-511 Report, 77; October Testimony, 3.

As Ms. Hughes explained at the hearing Thursday, when the Office receives a complaint, or when an audit identifies a body’s lack of compliance, the OOG offers advice and training. With regard to the Mayor’s Advisory Commission on Caribbean Community Affairs, Ms. Hughes also offered use of a BEGA conference room that had equipment to record meetings. The OOG took formal action to compel OMA compliance after months of attempting to convince commissioners to follow the law. The Coalition’s written testimony provides more detail.

As that example demonstrates, I do not understand how use of conciliation would change the OOG’s process or the ultimate resolution of a OMA complaint or a FOIA appeal. Ms. Collier’s lack of understanding on this point supports our contention that BEGA is ill-equipped to assert operational control over the OOG.

BEGA’s lengthy secret session raises Open Meetings Act questions

The length of the closed meeting at which BEGA decided not to reappoint Ms. Hughes and Ms. Collier’s testimony lead us to believe that her reliance on the OMA’s personnel exemption was disingenuous. Ms. Collier is correct that a public body may go into closed session to discuss a personnel matter, and the narrow question of whether to re-appoint Ms. Hughes falls into that category. But there are two caveats: an OMA exemption is discretionary – it does not prohibit disclosure; and the person under discussion can waive the protection the exemption provides. BEGA never determined that Ms. Hughes opposes discussion with the Council of the reasons for its decision.

More importantly, the Coalition understood before the February 1 BEGA meeting that the board probably would not re-appoint Ms. Hughes, and we wrote a detailed letter in an effort to change members’ minds. The board met in closed session for an hour, and asked Ms. Hughes to leave the room less than five minutes into the meeting. It is conceivable that our letter prompted some

discussion among the three members present, but unlikely that our argument required an hour-long discussion.

Considering Ms. Collier's testimony, it seems logical that BEGA spent a portion of that meeting discussing how it would take greater control over the OOG. That discussion would not be exempt under the OMA, and nothing prevented Ms. Collier from answering Councilmembers' questions. In fact, if the board discussed plans for selecting a new, more compliant OOG director, its failure to return to open session for that discussion probably violated the OMA.

Conclusion

I hope this letter answers some of the questions you and other Council members raised at the hearing. In addition, I hope in light of testimony at the BEGA performance oversight hearing, when the budget cycle concludes, you will schedule a hearing on Councilmember Grosso's omnibus transparency bill. BEGA's decision not to re-appoint Ms. Hughes and Ms. Collier's testimony demonstrate the importance of resolving these issues.

Yours truly,

Robert S. Becker
Chair
Government Relations Committee
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cc: Councilmember Mary Cheh
Councilmember Anita Bonds
Councilmember Vincent Gray
Councilmember David Grosso

Testimony of Robert S. Becker
October 26, 2011



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Testimony of Robert S. Becker

On behalf of the
D.C. Open Government Coalition and
The Society of Professional Journalists
D.C. Professional Chapter

October 26, 2011

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

Thank you very much for inviting me to address you on behalf of the D.C. Open Government Coalition and the Society of Professional Journalists' D.C. Professional Chapter. I chair the Coalition's Government Relations Committee, the SPJ chapter's Freedom of Information Committee, and I assist journalists seeking access under the D.C. and federal open records and meetings laws.

My main focus today will be on establishment of the D.C. Open Government Office and where, within the government's organizational structure, it properly fits. At the outset it is important to note that, although the Council enacted the Open Meetings Act in December and it took effect in early April, the Open Government Office has not been established and its director has not been appointed. Recent events involving the Taxicab Commission and the Council demonstrate that the Office is urgently needed.

Chairwoman Bowser has aptly noted that transparency is an essential component of government accountability. Following that logic, she suggested that the new Office might appropriately be placed within an

umbrella entity overseeing government ethics and accountability. Although that issue is beyond the scope of the bills before the committee today, she asked the Coalition to address it at this hearing.

We agree that it is at least theoretically possible to incorporate the Open Government Office into a framework with the Board of Elections and Ethics, the Office of Campaign Finance, the Office of Inspector General and the D.C. Auditor. But crafting a bill to meld the Office and other independent government accountability agencies into an umbrella entity would be very challenging. Despite our concerns, if you wish to pursue legislation combining oversight of government accountability and transparency functions, we are committed to helping you explore that idea.

Assuming passage of the Open Government Act of 2011 (Bill 19-166) that Council Member Mary Cheh introduced in March, the Open Government Office will have investigative and adjudicatory functions. It could issue advisory opinions, initiate litigation to compel compliance with the Freedom of Information and Open Meetings acts, and seek judicially imposed penalties against public officials for willful non-compliance. It will be an independent agency headed by a director appointed for a five-year term.

The Open Government Office would closely resemble in form and scope of authority the other agencies that might be brought within the Ethics and Accountability mandate. But, the BOEE, the OCF, the IG and the Auditor draw authority and immunity from political interference from the D.C. Charter. We believe the Open Government Office, established by D.C. Code § 2-592, rather than the Home Rule Act, needs to be insulated similarly from political and budgetary interference.

Legislation must address the fact that all of the Office's potential sibling agencies are subject to the FOI Act, and the Board of Elections and Ethics is subject to the Open Meetings Act as well. Because it is very likely that the Open Government Office will be called upon to resolve access issues involving those agencies, a bill creating the umbrella entity must make clear that the Office has independent authority to act on complaints against those agencies.

The Ethics and Accountability Act of 2011 was not drafted to create an umbrella entity, and it lacks a framework for bringing the agencies together while safeguarding their independence. But it illustrates some of the challenges of creating an umbrella entity.

For example, the Ethics and Accountability Act is focused exclusively on imposing ethical standards and accountability on elected officials and their agents. In contrast, the Open Government Office's focus is on public bodies — executive branch agencies, the Council, and boards and commissions made up of elected and appointed members — not individuals.

Many of the laws overseen by the BOEE, the OCF, the IG and the Auditor, which would be the basis for Committee investigations under Bill 19-358, make violations felonies and impose civil penalties. Their goal is to punish malfeasance and compel compliance with laws critical to maintaining public trust and the public fisc.

The goals of the FOIA and Open Meetings Act are mainly to induce agencies to comply with the laws and to prevent future violations. Willful non-compliance with the FOI Act by government employees is a misdemeanor for which the maximum penalty is a 180-day jail term and a \$1,000 fine. Willful violation of the Open Meetings Act is a civil infraction carrying a fine of no more than \$250. The Council has been very resistant to imposing more serious penalties on agency personnel for violation of these transparency laws.

The Office is fundamentally different from the proposed Committee on Ethics and Accountability in that the Committee cannot avoid becoming enmeshed in the political process. The Open Government Office, on the other hand, can succeed only by establishing itself as an honest broker capable of rendering opinions and giving advice respected by D.C. residents, agency personnel, political appointees and elected officials. Undoubtedly its action will have political implications, but it must strive to demonstrate that its decisions were not motivated by political concerns.

Having spent my time telling you why we have serious concerns about incorporating the Open Government Office into an umbrella government ethics and accountability body, I'd like to make some specific observations about the bills you are considering today.

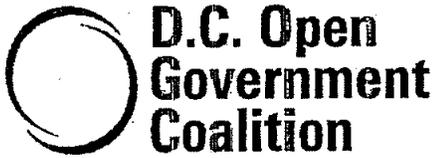
The Ethics and Accountability Act of 2011 (Bill 19-358) states in § 106(e) that "All CEA investigative proceedings shall be closed to the public." The Ethics and Accountability Task Force Act of 2011 (Bill 19-359) states in § 106(a) that "The EATF shall: ... (4) Conduct meetings that are closed to the public."

Each of these entities clearly is a "public body" under D.C. Code § 2-502(18A), and there is no procedural or logical reason to exempt them from the requirements of the Open Meetings Act and the FOIA. The matters that will come before these bodies are, without doubt, of great public interest and concern. There may be occasions when members discuss matters that are exempt from public access. In those situations the bodies should be required to state in open session the subjects to be discussed and to vote to close the meeting, and their actions should be subject to review by the Open Government Office. We believe these bills should be amended to affirmatively state that the Committee and Task Force must comply with D.C. Code §§ 2-531, *et seq.*, and 2-571, *et seq.*

Finally, we appreciate Chairwoman Bowser's efforts to keep transparency front and center as the Council seeks ways to improve public integrity and government accountability. We hope you will bring the Open Government Act of 2011 to a public hearing very soon and we look forward to working with you on these issues.

Thank you.

Testimony of Robert S. Becker
November 30, 2011



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**Testimony of
Robert S. Becker**

On behalf of the
D.C. Open Government Coalition and
The Society of Professional Journalists
D.C. Professional Chapter
November 30, 2011
Before the Council of the District of Columbia
Committee on Government Operations and the Environment

Thank you very much for inviting me to address you regarding the proposed Ethics and Accountability Act of 2011, which would establish the Open Government Office created by the Open Meetings Act passed a year ago. The Office is essential to increase transparency, a key component of government accountability. I am speaking on behalf of the D.C. Open Government Coalition and the Society of Professional Journalists' D.C. Professional Chapter. I chair the Coalition's Government Relations Committee and the SPJ chapter's Freedom of Information Committee, and I assist journalists seeking access under the D.C. and federal open records and meetings laws.

As it was originally envisioned in the Open Government Act of 2010, the Open Government Office was to be an independent agency charged with overseeing and enforcing the D.C. Freedom of Information Act. It would establish government-wide procedures for processing FOI Act requests, provide informal advice and statutory interpretation to agency FOI officers, investigate complaints from requesters, issue advisory opinions and binding

orders to disclose, and, when necessary, litigate in the Superior Court to enforce its orders and to seek sanctions against officials who willfully violated the statute. It was to have subpoena power to gather evidence and compel testimony. In summer 2010 the Coalition proposed that the Office's portfolio be expanded to include oversight and enforcement of the Open Meetings Act which Council Member Bowser introduced in March 2010 and championed through floor debate in December.

Last December, the Open Government Act did not come to the floor. But the Council amended the Open Meetings Amendment Act of 2010 to establish the Open Government Office with authority to issue advisory opinions in response to complaints under the Open Meetings Act and the FOI Act, to establish procedures implementing both statutes, and to train public officials and employees regarding compliance.

To ensure the Office's independence, its Director is to be appointed to a five-year term by the Mayor with the advice and consent of the Council. The Director could be removed only for cause.

Although we believe the Open Government Office should be a totally independent agency, we appreciate your efforts, despite tight budgets, to find a way to stand up the Office under the administrative supervision of the proposed Ethics Board. As a next step we hope the Council will enact the Open Government Act of 2011 introduced last March by Council Member Cheh. We stand ready to work with you to maximize the Office's ability to enforce the Freedom of Information and Open Meetings acts, to provide guidance to government agencies on transparency issues, and to educate D.C. residents and agency personnel about these transparency laws.

As I stated when I appeared before you in October, crafting a bill to meld the Open Government Office with the proposed Ethics Board is a very challenging task. We commend you for your efforts to overcome those challenges, and we hope to work with you to overcome the remaining hurdles.

Several provisions of the proposed ethics legislation cause us to question whether the

Open Government Office would be able to carry out its mission as defined in the already enacted Open Meetings Act and the proposed Open Government Act. Chief among them are Title V, Sec. 502 and Title II, Sec. 201(a)(4). The former will create a conflict of interest between the Ethics Board and Open Government Office. Together, these provisions cast doubt on the independence of the Open Government Office, which undoubtedly will be called upon to rule on whether the Ethics Board has violated the transparency statutes.

The proposed Ethics Board clearly is a "public body" under D.C. Code § 2-502(18A), and matters that will come before it are, without doubt, of great public interest and concern. The bill recognizes this in Title V, Sec. 501(a), which requires the Board to comply with the Open Meetings Act.

But, the bill unnecessarily transfers to the Board authority to administer and enforce the Open Meetings Act.

Sec. 502. Open Government Office; Duties transferred.

(a) The Open Meetings Amendment Act of 2010, effective March 31, 2010 (D.C. Law 18-350 D.C. Official Code § 2-571 *et seq.*) is amended as follows:

(1) The powers and duties of the Open Government Office pursuant to section 503 are transferred to the Board of Ethics and Government Accountability.

...

Title II, Sec. 201(a)(4), states that the Ethics Board shall "[a]dminister and enforce the Open Meetings Amendment Act of 2010, effective March 31, 2010 (D.C. Law 18-350 D.C. Official Code § 2-571 *et seq.*)." The Board cannot be both subject to the Open Meetings Act and enforcer of the same statute. The conflict of interest will be greatly exacerbated if and when the Council enacts the Open Government Act of 2011.

These provisions conflict with D.C. Code § 2-592, which states

(a) The Open Government Office shall:

...

(2) Issue advisory opinions to public bodies on compliance with subchapter 4 of this chapter;

(3) Provide training to public bodies, officials, and employees related to subchapter 4 of this chapter; and

(4) Issue rules to implement the provisions of this subchapter and subchapter 4 of this

chapter.

(b) The Open Government Office may bring suit to enforce § 2-578.

(c) The Open Government Office may issue advisory opinions on implementation of subchapter 2 of this chapter.

They also conflict with D.C. Code § 2-578, which states:

(a) The Open Government Office may bring a lawsuit in the Superior Court of the District of Columbia for injunctive or declaratory relief for any violation of this subchapter before or after the meeting in question takes place; provided, that the Council shall adopt its own rules for enforcement related to Council meetings....

...
(g) A public body may seek an advisory opinion from the Open Government Office regarding compliance with this subchapter.

To have administrative supervision of the Open Government Office, the Board does not need authority to administer and enforce the Open Meetings Act. Title V, Sec. 502 and Title II, sec. 201(a)(4) will cause confusion and easily could lead to pointless litigation under the FOI Act, if not the Open Meetings Act. Most importantly, these provisions will reduce, rather than improve, government transparency.

An good model for establishing the relationship between the Board and the Open Government Office is the relationship between the National Archives and Records Administration and the Office of Government Information Services. OGIS exists administratively as an entity within NARA, but the enabling legislation places substantive responsibility for oversight of federal transparency laws and regulations solely in OGIS.

A major benefit of this model is that the Open Government Office staff can develop the expertise to help other agencies avoid running afoul of the transparency statutes. If the Office is effective in this area and in mediating disputes between agencies and the public, the need for enforcement and related costs will decrease markedly.

The Board's staff and lawyers borrowed from the Office of Attorney General, the Auditor and the Inspector General — who mainly will focus on ethics and procurement issues — do not have such expertise. Relying on them to oversee the Open Meetings Act and FOI Act will divert their attention from the Board's main responsibility and will make the D.C. government's transparency initiatives much less effective.

Our second major concern is Title II, Sec. 203, which establishes the Board's meetings procedures. This section of the bill is duplicative of the Open Meetings Act and much of it should be removed. The Council passed the Open Meetings Act a year ago to establish uniform requirements for all public bodies within the D.C. government. Activities of the proposed Ethics Board do not present any unique issues not anticipated by the Open Meetings Act. Inclusion of specific open meetings provisions will lead to confusion, litigation, and less, rather than more, transparency.

As proposed, Title II, Sec. 203 states:

(a)(1) The Board shall hold regular monthly meetings in accordance with a schedule to be established by the Board. Additional meetings may be called as needed by the Board. Except in the case of an emergency, the Board shall provide at least 48 hours notice of any additional meeting.

(2) The Board shall make available for public inspection and post on its website a proposed agenda for each Board meeting as soon as practicable, but in any event at least 24 hours before a meeting. Copies of the agenda shall be available to the public at the meeting. The Board, according to its rules, may amend the agenda at the meeting.

(3) All meetings of the Board shall be open to the public, unless the members vote to enter into executive session. The Board shall not vote, make resolutions or rulings, or take any actions of any kind during executive session, except those that:

(A) Relate solely to the internal personnel rules or practices of the Board;

(B) Would result in the disclosure of matters specifically exempted from disclosure by statute; provided, that the statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(C) Would result in the disclosure of trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(E) Would result in the disclosure of information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(F) Would result in the disclosure of investigatory records compiled for law enforcement purposes or information which, if written, would be contained in the records, but only to the extent that the production of the records or information would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy; or

(iv) Disclose investigative techniques and procedures; or

(G) Specifically concern the Board's issuance of a subpoena, the Board's participation in a civil action or proceeding, or disposition by the Board of a particular matter involving a determination on the record after opportunity for a hearing.

(4) The Board shall keep the minutes of each meeting of the Board and shall make them available to the public for inspection and distribution, and shall post the minutes on the Board's website, as soon as practicable, but in all cases within 72 hours.

It should be amended to read:

(a)(1) The Board shall hold regular monthly meetings in accordance with a schedule to be established by the Board. Additional meetings may be called as needed by the Board.

(2) The Board shall provide notice of meetings and shall conduct its meetings in compliance with the Open Meetings Amendment Act of 2010, effective March 31, 2010 (D.C. Law 18-350 D.C. Official Code § 2-571 *et seq.*).

If the bill passes as currently written, it is a virtual certainty that disputes will arise over whether the statute allows the Ethics Board greater secrecy than the Open Meetings Act allows any other public body and how the two statutes inter-relate.

Title II, sec. 209 raises similar concerns.

Sec. 209. Penalties for public officials.

(a) (1) Notwithstanding section 208 of this act, the Board shall censure a public official for a violation of the Code of Conduct that the Board adjudges to violate the public trust.

(2) The Board may recommend in such censure that the Council immediately convene an executive session to consider suspending or removing a Council member's committee chairmanship, if any, committee membership, if any, or suspending or removing the member's vote in any committee.

(b) The Rules of Organization and Procedure for the Council of the District of Columbia, Period XIX, updated August 8, 2011 are amended as follows: (1) New Council Rule 202(e) is added to read as follows:

"(e) The Council shall convene an executive session within 72 hours, or as soon as practicable, to consider a censure issued by the Board of Ethics and Government Accountability recommending suspension or removal of a member's committee chairmanship, if any, committee membership, if any, or suspending or removing the member's vote in any committee. An executive session shall be called in accordance with these Rules.

...

Under Title II, sec. 202(h)(2), if the Mayor seeks removal of a Board member, the member has a right to a public hearing before the Council. This right should be accorded any public official brought before the Council in a censure proceeding. Therefore, neither the statute nor the Council rules should require an executive session.

We are concerned about Title III, sec. 306, which states:

... Confidentiality. The identity of the complainant and respondent shall not be disclosed

without such individual's consent unless or until the Director has found reason to believe a violation occurred and presentation thereof pursuant to section 303 of this act, and the Board finds that disclosure would not harm the investigation.

We note that the identity of a person charged with a crime is made public when formal charges are filed. This has been a foundation principle of our system of justice to counteract the evil the Founding Fathers perceived in the Courts of Star Chamber and the Inquisition. Public disclosure of the charge protects the accused. This is no less true for government personnel accused of ethics violations. Once the Director determines that there is sufficient evidence to refer a complaint to the Board for a hearing, the identities of the parties and the charges should be made public. To the extent that disclosure of records related to the case may interfere with the investigation, those records would be exempt under the FOI Act law enforcement exemption, D.C. Code § 2-534(a)(3).

Finally, the bill should provide greater transparency regarding transition committees, inaugural committees, constituent funds and legal defense funds. Additional amendments should be made under Title VIII, Sec. 801; Title IX, Sec. 901; Title X; and Title XI, Sec. (b) requiring the Campaign Finance Office to publish reports submitted by those entities on its website in compliance with D.C. Code § 2-536. The amendments should include a deadline for posting the reports.

On behalf of the D.C. Open Government Coalition¹ and the D.C. Pro Chapter of SPJ,² Thank you for listening. We look forward to working with you to improve D.C.'s open meetings and freedom of information statutes.

¹ The Coalition's board of directors includes former D.C. Councilmember Kathy Patterson, journalists, open government advocates and representatives of civic associations and non-profit organizations. In addition, we count the D.C. Federation of Civic Associations, the D.C. Federation of Citizens Associations, the D.C. Fiscal Policy Institute, DCWatch and other citizen-focused groups among our members. A wide variety of individuals and organizations in the District have communicated their concern to us – they're frustrated, and they want to participate in the Coalition to ensure that the city's residents have access to public information. Formed in March 2009, the D.C. Open Government Coalition seeks to enhance public access to government information and transparency of government operations of the District. We believe transparency promotes civic engagement and is critical to a responsive and accountable

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For more information please call me, (202) 364-8013.

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government. We strive to improve the processes by which the public gains access to government records and proceedings, and to educate the public and government officials about the principles and benefits of open government.

² 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 approximately 300 members.