D.C. Open Government Coalition

*Enhancing **access** to government information*
*Ensuring **transparency** of government operations*
*Promoting civic **engagement***

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May 10, 2019

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Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, NW = Suite 504
Washington, D.C. 20004

Subject: Freedom of Information Clarification Amendment

Dear Mr. Chairman:

On behalf of the D.C. Open Government Coalition, I am writing to voice our strong objection to both the procedure for the Council's consideration of the Freedom of Information Clarification Amendment and the substance of that Amendment. We request that changes to the District's Freedom of Information Act (FOIA) be stripped from the Budget Support Act and that hearings be held on any proposed amendments to that important statute.

As to the process being used to move these amendments, this attempt to slip these provisions into the Budget Support Act suggests recognition that D.C. residents would oppose them if given a chance to express their views. Unfortunately, the author of these amendments has chosen an opaque avenue to gut the District's primary transparency law, and has mischaracterized the impact those changes would have on the public's right to know.

- The amendments initially appeared buried at page 135 of a 138-page budget document.
- They have no budget impact and do not pertain to the budget at all.
- They are entitled a "Clarification Amendment," but they are clearly substantive changes that would add new, undefined terms and unworkable requirements.
- They are proposed for Council enactment without public hearings or debate.

Setting aside the procedural issue, which itself should be an embarrassment to the Council, the D.C. Open Government Coalition vigorously opposes the substantive amendments to the Districts FOIA. In summary:

(1) Limiting the reach of the FOIA to records pertaining to "the affairs of government and the official acts of public officials and employees" imposes an unprecedented limitation on the reach of that statute. Rather than clarifying the law, this amendment introduces a level of vagueness and uncertainty that is likely to be litigated extensively.

(2) Electronic records and personal devices are already subject to FOIA when they contain public records or are used for public business; personal devices that are provided to employees for their government work should not be off limits to FOIA requests when the employees improperly use those devices for personal purposes.

(3) Deleting the word "all" and inserting the word "may" in the definition of "public record" can only be read as an effort to introduce discretion and uncertainty regarding what records are covered by the FOIA, and ultimately to shrink the scope of coverage of that law.

(4) The term "Reasonably describing" already requires a "description of the subject matter" of the requested record; the additional requirements that names of sender and recipient and a timeframe be provided by the requester constitutes a blatant attempt to keep from D.C. residents information to which they are entitled.

Let me elaborate on these objections.

(1) "Affairs of government" and "official acts"

It is ironic that a "Clarification" amendment would insert into D.C.'s FOIA a term that has no generally understood meaning. Google searches 30 trillion webpages, yet a search for "affairs of government" turned up not a single explanation or definition applicable to public records. (The only site using that precise term relates to standard-setting by the American National Standards Institute; all the rest refer to "government affairs" – that is, public affairs advocacy.) That should not be surprising, because the term "affairs of government" is not used in any other open records law.

If this is a "clarification" amendment, the Council should clarify whether the proposed limitation would encompass records now subject to FOIA, such as—

> MPD body cam footage showing police interaction with District citizens: Are such interactions "affairs of government"? If the officer goes beyond sanctioned conduct, is that officer's action an "official act"?

Regulatory agency data collected from private businesses: Does the business information collected by the agency constitute "affairs of government"?

Information on the execution of contracts by private parties doing business with the District: Are the reports, contracts, and other data relating to the contract "affairs of government"?

Information disclosing a government official's use of District resources for private purposes and personal gain. Surely they are neither "official acts" nor "affairs of government."

We do not mean to suggest that the above records would be excluded from the FOIA. However, the amendment would introduce a high level of uncertainty on the issue and might induce some public bodies to deny access to information revealing how police interact with the public, whether agencies are even-handed in enforcing regulatory laws, how the District spends taxpayer dollars, and whether officials or employees are corrupt or have abused their official positions.

A suggestion has been made that a personal email from a Councilmember's daughter sent to his government email address could be disclosed under FOIA without an amendment; not so. That is precisely what the privacy exemption in § 2-534(a)(2) is there to protect. On the other hand, there have been a number of reported concerns about members of the Council and officials in other public bodies doing "outside business" on government time and using government devices or computers. This is precisely the kind of material that would be claimed as outside the "affairs of government" – and precisely the kind of material that ought to be disclosable under FOIA. Accountability is a core goal of the FOIA; it should not be diminished through a restrictive FOI amendment.

The D.C. FOIA's current statement of "Public Policy" says that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." This language is intended as a broad statement of principle. The terms "affairs of government" and "official acts" in that aspirational policy statement are inapposite for use in the definition governing day-to-day implementation of the statute. Using them as limitations on the reach of the FOIA is diametrically in conflict with the next sentence of that Public Policy statement – that "provisions of this act shall be construed with the view toward expansion of public access . . . ."

In short, this is a very bad amendment.

(2) "Electronic records" and "personal devices"

Personal devices are already subject to the FOIA. And the information in those devices are subject to public disclosure under FOIA when they contain public records. Mayor's Order 2012-

102 (July 10, 2012) made this clear for private email use by District employees transacting public business; the Council agreed to require its members and staff to use government email accounts and to search private accounts if there is a reasonable basis to believe that records subject to a FOIA request may be found there. *D.C. Open Government Coalition v. Council of the District of Columbia*, No. 2012 CA 008118 (consent stipulation).

Just as private email accounts should be subject to FOIA disclosures when they contain information about the business of government, so also should public email accounts be subject to FOIA disclosures even if they do not relate to public business. A public employee's use of government devices is the people's business, and no regulation or statute prohibiting private use of public resources is as effective a deterrent as the possibility that personal communications on those devices may be subject to disclosure.

Finally, the claim that legislation is needed to protect wholly personal, private communications over government devices ignores the fact that D.C. FOIA already contains a privacy exemption, § 2-534(a)(2), which allows withholding of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Anyone familiar with D.C. FOIA practice can attest that D.C. agencies are not the least bit shy about invoking Exemption 2 for almost all kinds of nonofficial business.

(3) "Public record"

Since the first day of operation, the D.C. Freedom of Information Act has incorporated the definition of "public record" in the District of Columbia Administrative Procedure Act, now § 2-502(18). (D.C. Law 1-96, Freedom of Information Act of 1976, § 209, now § 2-539(a)(10).) No explanation is given regarding why a new definition of "public record" is required (or even desirable), although the addition of the word "may" in the last sentence of the proposed amendment ("Public records may include information stored in an electronic format and on a personal device") could hold the answer: It transforms an objective, inclusive, and mandatory provision (public records always include electronic format) into a totally vague one (public records may include electronic format). In fact, one of the primary goals of the FOIA amendments enacted in 2000 was to make it clear that the statute applies to electronic records in the same way it applies to paper records. Bill 13-829, Freedom of Information Amendment Act of 2000, Committee Rept. 1 (Oct. 31, 2000). It says the bill

> expands the law to cover electronic records, and requires public bodies to make reasonable efforts to provide documents in the form or format requested. These changes are consistent with the 1996 Electronic Freedom of Information Act Amendments to federal law ("E-FOIA") and court decisions.

Can there be any explanation of this proposed change beyond a desire to introduce discretion into any decision whether to release the records? Clarification? Certainly not.

(4) "Reasonably describing"

This amendment would truly put requesters in a Catch-22 position: Persons seeking records about a specific subject have no way of knowing the dates, authors, or recipients of communications or other documents until the records are produced. But under this proposal, the records wouldn't be produced unless the requester provides the information in advance – an impossible requirement.

If the District required every public body to maintain a searchable public index of all records, emails, reports, correspondence, maps, and so forth – it might be acceptable to require requesters to describe "with particularity" the records requested, including "names of the sender and recipient, a timeframe for the search, and a description of the subject matter." In the absence of such a comprehensive finding aid, requiring that level of "particularity" can only be seen as one more obstacle to citizen and media access to public information.

Since 1974 the Federal Freedom of Information Act has required that agencies make records available promptly in response to requests that "reasonably describes such records." That language was the model for the District of Columbia, as well as scores of other jurisdictions, and has been the subject of judicial interpretation. To abandon it and set off on a course into the unchartered territory of "particularity" is to create confusion and, more important, to erect insurmountable barriers to access, because it is the government, not the public, that knows what records are kept where, when they were created, and by whom.

The definition of "reasonably describing" would also be subject to the requirement that the particularity of the description should "allow a public body to conduct a search and review within the time prescribed" (15 work days). The volume of records to be searched and the specificity of the requester's description are not the only variables that affect a public body's ability to meet the 15-day FOIA deadline. Other major factors include the availability of resources and personnel at the public body; the sophistication of the public body's records management; the availability of technology for searching; the complexity and sensitivity of the information requested; and whether third-party (privacy or commercial) interests may be implicated. This amendment would introduce a completely subjective standard into the determination of whether a request reasonably describes the records sought – a standard to be applied at the whim of the agency employee handling the request.

In the end, the "problem" this provision is supposed to address does not exist. An increase in FOIA requests to the Council does not demonstrate a need to cut back public access to Council records; it attests that the law is working. More residents, organizations, and media representatives are interested in obtaining more information about what is going on in the Council, and their requests are being handled. An uptick in FOIA requests to the Council would not come as a surprise to D.C. residents. It is the inevitable response to reports about Councilmembers who may have been involved in questionable activities.

To the extent that an increase in FOIA requests demonstrates a problem, the cause is a lack of adequate resources to process those requests. The right response is proactive measures to push information out to the public rather than waiting to react to FOIA requests, thus increasing rather than decreasing the flow of information to District residents.

Finally, these amendments, purportedly prompted by strain on Council FOIA resources, are especially troubling because the D.C. Open Government Coalition has since 2011 advocated for amendments that would increase the government's ability to recover the cost of compliance and reduce strain on other resources. Comprehensive amendments that have been introduced to improve the FOIA process never received hearings. This misguided attempt to "fix" a phantom problem through a back-door amendment that would curtail public access to government information is appalling.

Conclusion

The D.C. Open Government Coalition is a community nonprofit organization established a decade ago to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Our members and allies understand the value of access to government information in informing the electorate, ensuring government accountability, and maintaining a check on official corruption. The proposed amendments would undermine the D.C. FOIA and constitute a step backward from the Council's often-voiced commitment to transparency.

For the reasons set out in this letter, the D.C. Open Government Coalition reiterates our objection to consideration of the proposed FOIA amendments in the context of the Budget Support Act and requests a full and open airing of any proposed changes to the FOIA. The Council needs to allow ample time for review and analysis by community organizations, the media, the business community, academics, and District residents who may use that act to learn more about how their government operates and how their government officials conduct themselves.

Yours truly,

Thomas M. Susman

CC: Members of the Council