



November 29, 2013

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Washington, D.C. 20056
www.dcofc.org

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The Honorable Vincent C. Gray
Mayor's Correspondence Unit
Attention: Open Government Recommendations
Wilson Building — 1350 Pennsylvania Ave., N.W., Room 300
Washington, DC 20004

Dear Mayor Gray:

The D.C. Open Government Coalition is pleased to submit comments in response to the request published in the D.C. Register, #4609942, Vol. 60, No. 46, pp. 015091-92 (October 25, 2013).

The Open Government Coalition was established in 2009 to advocate for the greatest possible transparency of government, including access to records and data and also to meetings of public bodies. The District of Columbia has a robust legal framework covering these areas, and the Coalition works in a variety of ways to support and improve upon it.

We have encouraged agency compliance with the Freedom of Information Act (FOIA) and the Open Meetings Act by publishing findings on compliance (e.g., studies of FOIA rejections and of Open Meetings Act compliance). We have expanded access by litigation where barriers could not otherwise be surmounted (for example, we won access to Council Members' e-mails transacting official business which were sent from personal e-mail accounts, access already assured in the executive due to your leadership). In legislative proposals and testimony, we have encouraged the Council to strengthen open government laws. And through community forums, our website and our publications, we work to educate the public to use the District's access laws to enhance active participation in democratic self-government.

We welcomed your initial open government statement almost three years ago. Memorandum 2011-1 issued January 7, 2011 (D.C. Register, #673973, Vol. 58, No. 1, pp. 000187-188). We applaud the efforts that your Administration has undertaken to improve government transparency in the District. One important aspect of that has been standing up the Open Government Office. But there is still much more to be done, and we are encouraged by your new call for ideas and a plan for an Open Government Directive.

Below, we share three recommendations for you as your Administration endeavors to enhance transparency, participation and collaboration to promote an open and transparent government: (1) provide the Open Government Office with necessary resources to fulfill its statutory mandate; (2) release budgets and spending documents promptly and in full and understandable formats; and (3) strengthen

open records and open meetings laws in a variety of ways. We are pleased to submit these recommendations and we look forward to working in partnership with the District government as you establish and implement an Open Government Directive.

1. Provide the Open Government Office with the necessary resources to fulfill its statutory mandate.

The Open Government Office (OGO) was created via the 2010 amendments of the Open Meetings Act, and established within the Board of Ethics and Government Accountability in 2012. Its mandate includes oversight and compliance of the Open Meetings Act, including training all District agencies, employees, the Council and the more than 170 boards and commissions in all aspects of the open meetings law. The Office also works across the District government to improve FOIA.

However, the OGO was not actually operational until April 2013 and it currently operates with a staff of one: its inaugural Executive Director. That is simply not enough given the significant amount of work required to implement the requirements of this Office. The OGO was intended to be a strong and independent agency; it is currently unable to fulfill its expansive mandate in present form.

The District should ensure the OGO receives the necessary resources to allow the Office to promote openness in a meaningful way. This becomes even more important should you act on our recommendation in Section 3, below, that the OGO be given greater oversight with regard to the D.C. FOIA law as well.

2. Budgets and spending documents should be released promptly, in full and in understandable formats.

The District manages billions of taxpayer dollars each year, making decisions on behalf of its citizens. The D.C. Code includes requirements for open budget information.¹ Yet that information is not always publicly available in a timely manner. Budget decisions should be openly debated so that government resources are spent in the most effective and efficient ways.

For example, there is immense interest in the District's education spending, particularly when looking at options and tradeoffs for achieving both equity and excellence. However, the published budget materials are incomplete and omit, for example, some sources of funds and some large areas of expense even though this information is expressly intended to be public under the D.C. Code.²

¹ The D.C. Freedom of Information Act provides in D.C. Code § 2-536 that some types of records should be automatically made available and lists many that "do not require a written request for information." See § 2-536 (6A), mentioning "[b]udget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions."

² D.C. Code §§ 38-103 and 38-2831 read together require a detailed DCPS budget be made public 21 days before the mayor's budget is submitted to the Council.

Community members who have tried to get a comprehensible, full education budget have been disappointed that neither statutory requirements nor requests under the D.C. FOIA have yielded the data in full or on time. Community testimony to Council oversight committees for the D.C. Public Schools and the Office of the Chief Financial Officer have shed light on the issue, but have not led to improvement. And when the full budget is eventually released, after lengthy struggle, it is not in a user-friendly format.

The executive should review best practices of how other cities make their full budgets available. It should use the results of its research to set specific goals for improvement, including providing information in an open-source format, ensuring that it is readily accessible and current. This process should involve the Chief Financial Officer, the Open Government Office and District agencies.

3. The District's open records and open meetings laws should be strengthened and enforced.

Both the D.C. FOIA and the D.C. Open Meetings Act fall short of the basic minimum required of such laws to ensure transparency in the D.C. Government.

A. Recommended Changes to the D.C. FOIA

The D.C. FOIA has not been updated since 2000 and is in need of enhancements in several areas. It also needs to be brought under the umbrella of the OGO, as intended, to ensure full efficacy. The Open Meetings Act should be expanded to cover Advisory Neighborhood Commissions (ANCs). Both statutes need legislative revisions and, to aid with oversight and enforcement, additional support must be provided to the OGO.

The FOIA needs several specific substantive updates. The most urgent is to establish OGO as the oversight body as originally intended. The OGO should have parallel authority over both FOIA and the Open Meetings Act, including provisions such as allowing FOIA requesters to seek advisory opinions on FOIA matters (as provided in D.C. Code § 2-593(c)). The law should also provide requesters with the right to request expedited treatment of FOIA requests, as allowed for in the federal FOIA, and to obtain attorney fees in cases where a request resulted in litigation and the agency materially changed its position. The entire fee structure should also be revisited.

Many of the procedural shortcomings of the FOIA — including delays, denials based on misapplication of the law and unnecessary litigation — can be addressed through the work of the OGO. That office is intended to provide training and support to District agencies to ensure proper understanding of the law's requirements, including the time allotted to process requests and the proper reasons for withholding information. Expressly placing FOIA oversight within the OGO will improve agency FOIA performance and should also lead to cost savings as existing resources are leveraged across agencies and as costly and time-consuming litigation may be avoided. Of course, as we note above, the OGO's resources must be increased to allow for this to happen.

B. Recommended Changes to the D.C. Open Meetings Act

The Coalition independently reviewed agency compliance with the law finding that many are not complying with the most basic requirements of the law. The Coalition's study reviewed the information provided on the websites of 25 District of Columbia "public bodies" seeking access to public notice of meetings, agendas published in advance and records of meetings available for public inspection. The results showed that the Open Meetings Act is inconsistently administered:

- Five public bodies (of the 25 reviewed) posted no meeting information;
- The remaining 20 posted notices, but 10 of the 20 posted no meeting agendas;
- Records of meetings are limited and not easy to access — the recording or transcript required by the law is available online for only half the meetings and only at seven public bodies, and the public must visit the agencies' offices to see the records at another seven bodies; and
- Bodies may provide minutes if recording is not feasible; 10 bodies do so, but upon review, none of the minutes were detailed enough to substitute effectively for the recordings.

The Open Meetings Act needs a legislative amendment to expand its authority to cover ANCs and their meetings. Additional resources for the OGO will also allow for meaningful oversight and enforcement of the existing provisions of the law as well as training to ensure compliance with the law.

The task of transforming government to be more open, accountable and participatory looms large. But it can be accomplished. Fortunately, there are amazing resources available to assist D.C. government. These include the expertise of the federal government and its Open Government efforts at the White House, such as the federal Open Government Directive and agency Open Government Plans. The federal Office of Government Information Services was established by Congress to serve a very similar role as the OGO and can be a great resource to the OGO. Our own Coalition brings together a range of stakeholders including requesters, advocates, open government professionals and regular neighborhood residents who want to know what's happening on their blocks. The D.C. government should take advantage of these resources and draw on the expertise of individuals already working to accomplish these and similar efforts

Thank you for the opportunity to provide suggestions for a more open District government. We look forward to working with you and the Council to further these and other open government initiatives.

Sincerely,

Kathy Patterson
President, D.C. Open Government Coalition