



Supplemental Testimony of the
D.C. Open Government Coalition

By

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Before the Committee of the Whole and the Committee on Finance and Revenue
of the

Council of the District of Columbia

On Bill Number B21-828

Metrorail Safety Commission Interstate Compact Establishment Act of 2016

October 19, 2016

Chairman Mendelson, Chairman Evans and Members of the Committees:

This submission follows testimony delivered in writing and in person on behalf of the D.C. Open Government Coalition (“DCOGC”) at the October 4, 2016 hearing on the Metrorail Safety Commission Interstate Compact Establishment Act of 2016 (the “Act”). We recommended in that testimony that the Act clarify the process for appealing the denial of a request for records held by the Metrorail Safety Commission (“MSC”). Specifically, we suggested the possibility of direct appeal of a denial to federal court and the possibility of creating an independent review board to handle FOIA administrative appeals.

Several Council members requested more information on this issue. Councilmember Allen asked how other interstate compacts cited in our testimony address administrative appeals. Other Councilmembers asked about appeals under the federal FOIA and expressed interest in language that might create a direct right of appeal to federal courts. These questions are very

relevant in light of the committees' decision to make the MSC subject to the federal FOIA.

Under the statute, if a request is denied, the requester must file an administrative appeal within the agency before seeking judicial review. 5 U.S.C. § 552(a)(6)(a)(1).

After further consideration, we believe that the best solution would be to allow the requester to decide whether to go directly to federal court, or to file an administrative appeal. Whether the Council elects to retain the mandatory administrative appeal procedure in the FOIA, or a permissive administrative appeal procedure, we continue to believe that an independent body outside the MSC should adjudicate appeals. We least favor strict adherence to the federal FOIA requirement that a requester seek administrative review at a higher level of the MSC staff before filing a lawsuit in federal court.

Section 21 of the Act states:

The Commission shall adopt the Federal Freedom of Information Act, codified at 5 U.S.C. § 552(a)-(c), and Government in the Sunshine Act, codified at 5 U.S.C. 5552b, as both may be amended from time to time, as its freedom of information policy and open meeting policy, respectively, and shall not be subject to the comparable laws or policies of any Signatory.

We recognize that the cost of litigation is prohibitive for some requesters. Administrative appeal might be a requester's only means of challenging a denial, and the procedure under the D.C. FOIA demonstrates the efficacy of review by an independent body. FOIA requesters in the District of Columbia may file administrative appeals to the Mayor's office, regardless of the agency that processed the initial request, or may file suit in the Superior Court. The success rate

for administrative FOIA appeals in D.C. was 43 percent in Fiscal Year 2015.¹ Because administrative appeals would be less expensive and might be resolved more quickly, we recommend that requesters be given the option to obtain review by a truly independent body. If requesters perceive the administrative appeals process to be fair, they will be less likely to litigate. Participation in the appeals process may open lines of communication between the MSC and the requester, leading to production of records the requester's needs.

This can be accomplished via a few simple edits to Section 21. That section could be revised to read:

The Commission shall adopt the Federal Freedom of Information Act, codified at 5 U.S.C. § 552(a)-(c), and Government in the Sunshine Act, codified at 5 U.S.C. 5552b, as both may be amended from time to time, as its freedom of information policy and open meeting policy, respectively, and shall not be subject to the comparable laws or policies of any Signatory. However, any failure to comply with 5 U.S.C. § 552(a)-(c) shall be deemed a denial of the request, the person making such request shall be deemed to have exhausted all administrative remedies, and may file a complaint as permitted by Section 5 U.S.C. § 552(a)(4)(B)-(G). Should a requester choose to appeal the decision within the MSC, such appeal shall be governed by an independent body consisting of _____.

Whether the Council elects to establish a “permissive” or “mandatory” administrative appeal procedure,² we suggest that it follow the approach taken by the Metropolitan Washington

¹ <http://dcogc.org/file/2343/download?token=AWBEXizU>

² In the event that the Council prefers a mandatory administrative appeal to an independent body, Section 21 could be amended to read:

The Commission shall adopt the Federal Freedom of Information Act, codified at 5 U.S.C. § 552(a)-(c), and Government in the Sunshine Act, codified at 5 U.S.C. 5552b, as both may be amended from time to time,

Airports Authority (“MWAA”)³ or the Port Authority of New York and New Jersey (“Port Authority”).⁴

The MWAA Freedom of Information Policy creates a two-step procedure: a permissive appeal to the Chairman of the Legal Committee of the MWAA Board of Directors, the result of which may be appealed to a Freedom of Information Review panel comprised of three retired judges selected by the Chairman of the Legal Committee and the MWAA General Counsel. We propose that the Council implement Step 2 only — an appeal to a panel of three retired judges.⁵

The Port Authority’s “Access to Port Authority Public Records” policy vests appeals with a “FOIA Appeal Office.” It is unclear whether that office exists at all times or is brought together on an as-needed basis. The policy says the Appeal Office will be “directed by such officer or officers as appointed by the Executive Director, or his successor in office or duties, from time to time; provided that neither the Secretary of the Port Authority nor any member of the Office of the Secretary may be so appointed.”⁶

as its freedom of information policy and open meeting policy, respectively, and shall not be subject to the comparable laws or policies of any Signatory. Section 5 U.S.C. § 552(a)(4)(B)-(G). All appeals shall be governed by an independent body consisting of _____.

³ http://www.mwaa.com/sites/default/files/freedom_of_information_policy.pdf

⁴ <http://corpinfo.panynj.gov/documents/Access-to-Port-Authority-Public-Records/>

⁵ It is also important to note that decisions made by the MWAA FOI panel are not appealable to federal court. We disagree with this aspect of the MWAA Freedom of Information Policy.

⁶ The Office of the Secretary is responsible for responding in the first instance to requests pursuant to the Public Records policy.

The least-preferred option would be to maintain the requirement under federal FOIA that a requester exhaust all administrative appeals before filing a lawsuit. This would be similar to the mandatory administrative appeal requirement in Article IX, Section A of the Delaware River Port Authority's "Right to Know/Open Records Policy: "There is hereby established a Records Review Committee. The Committee shall consist of the Authority Chief Administrative Officer or his/her designee, the Authority General Counsel or his/her designee and Authority Chief Financial Officer)."7

Allowing a requester to choose between appeal to an independent appeals board and directly to federal court is the most requester-friendly option and will maximize the already-strong right of transparency created in the revised Act

We are happy to continue to work with you in crafting the necessary language for either approach.

Thank you.

⁷ http://drpa.org/pdfs/Policy_OpenRecords.pdf. Note that neither the Bi-State Development Agency (aka "Metro Transit" between Missouri and Illinois) nor the Delaware River and Bay Authority (between Delaware and New Jersey) address appeal at all.