

**Statement for the Record
on behalf of the**

American Civil Liberties Union of the Nation's Capital

by

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For the use of the

Committee on Public Safety and the Judiciary

of the

Council of the District of Columbia

in connection with

Oversight of the Metropolitan Police Department (MPD) in 2009-2010

March 19, 2010

Thank you for the opportunity to present information on the performance of the MPD. We wish to comment on three areas in which improvements are needed:

- the Department's handling of requests under the D.C. Freedom of Information Act (FOIA);
- the Department's public information at district stations about how to make a complaint; and
- the Department's treatment of court papers to be served on sworn officers.

In addition, we present again our recommendation that the committee move forward with Bill 18-130, the "Police Monitoring Enhancement Amendment Act of 2009." We testified last October 26 on the bill and again we urge its passage as a necessary improvement of police oversight.

FOIA responses have been incorrect and delayed

The MPD response to FOIA requests needs both greater openness and greater efficiency. The agency routinely rejects requests. In fact, MPD denied in their entirety 527 of 880 requests last year, a 60% rejection record that made MPD the most closed agency in D.C. government. The MPD received 16% of the total D.C. FOIA requests last year, but made 80% of the denials.¹

¹ Data from the FY 2009 FOIA report of the Secretary of the District of Columbia to the Council (January 29, 2010). Available at: http://os.dc.gov/os/frames.asp?doc=/os/lib/os/info/freedom/fy09_foia_report.pdf.

Denials are of even greater concern where they are wrong, where MPD officials deny a request through ignorance of the law or mistaken application of its exemptions. Since we got five incorrect denials in the last year, we brought five appeals seeking reversal by the Mayor (the next step in the law). The Mayor's office has so far found errors in every one they reviewed, though not all have been resolved (the Mayor's office sometimes sends flawed denials back to allow the agency to try again to come up with a lawful rationale). In three cases, the Mayor reversed the decision, pointing out the MPD errors such as misunderstanding of legal concepts of privacy and privilege. In two others, further MPD review spurred by our appeals uncovered the misunderstandings and errors and led to reversal of the initial denials. Having to get all our requests reviewed twice this way added months to our wait for public records.

MPD increases the risk of error by the way it manages FOIA requests. Like the federal FOIA statute, the D.C. statute includes many vague terms that can only be applied properly by law-trained specialists interpreting a body of federal and D.C. case law. But instead of gathering records and having them reviewed by attorneys before finally responding, MPD in the last year decentralized FOIA responses, passing on each request to multiple bureaus for uncoordinated direct response by untrained generalists. Requesters receive no notice of how many replies to expect so we never know when our request is considered fully processed by MPD, which makes for needless guesswork when to begin an appeal. Some bureaus simply telephoned to announce we should expect nothing, unaware of the requirement in law that denials be accompanied by explanation with legal citation. Worse, the bureaus' written responses were incompetent in every respect: ignorant of the law, incomplete by definition, misdirected owing to incorrect addressing, and sometimes even illiterate.

Delay is common. In the worst case of ours, a request from July 2008 received no response despite repeated inquiries by telephone and letter in October and December of 2008 and March 2009. After ten months, in May 2009, we received a reply that cited not a scintilla of law (the only proper basis justifying the denial of a FOIA request). In another case, we waited months and got a single sheet of paper from one office of many that had responsive documents, a patently insufficient response. Again we had to initiate an appeal to get attention to the unlawful handling.²

Further, requests go wrong in other ways:

- when the wrong person is shown on the MPD Web site as the MPD FOIA Officer (the person who formally receives all requests) and MPD says mail was misdirected as a result;
- when requests are just lost, leading to delays that end only when we check in and the problem finally comes to light;
- when requests by counsel are delayed as officials demand privacy releases from clients that have no basis in statute;
- when officials release illegible documents, requiring time-consuming requests for better copies.

Every office has isolated bad days—our own included. But the problems in processing FOIA requests at MPD are so frequent and significant as to suggest systematic negligence well

² It's spring and there are signs of a warming trend. A new MPD official in the FOIA office recognized from our appeal the poor processing we had experienced, called to apologize and arranged for a full and correct response that took us only a few more phone calls to finally receive.

beyond accident . We have begun in our appeals to notify the Mayor of the pervasive deficiencies and to ask for a higher level review of the MPD capacity to respond.

We ask that the Council require the Department to develop and submit for Council review a plan of corrective action to improve quality and efficiency in FOIA processing.

The Department provides inadequate information at stations about complaints

ACLU staff found a very mixed picture last year when we checked complaint information in visits to seven MPD stations and three substations.³ Sound public information is challenging to provide, as complaints may be made either to the MPD for internal investigation or to the Office of Police Complaints (OPC) that the ACLU helped establish to conduct independent investigation and adjudication.⁴

We found seven of ten locations with desk officers who were pleasant enough, and nine had one of two brochures⁵ detailing the complaint process. Beyond that we found great variation and much missing or inaccurate information. Only six had the required informational poster. Barely half had the right forms -- six with the MPD form (PD-99) and five with the OPC form (OPC-1). Only one station had a complaint form in any language other than English.

Of greater concern, desk officers' actual knowledge of proper complaint procedure was vague and general. Despite our direct questions:

- most did not clearly distinguish the two different procedures—MPD and OPC;
- most either did not know that complaints could be filed anonymously or actively discouraged anonymous filing.

In the worst case of discouragement we encountered, the desk officer at the Second District was completely wrong, refusing to provide a complaint form on the wholly imaginary grounds that an officer needed to review and approve a proposed complaint before it could be filed.

Thus barebones information is there – brochures on filing a complaint in nine of ten stations and the poster in six. But the public encounters two major barriers since few knowledgeable MPD officials are available and non-English speaking complainants may see little initial help available via forms or desk staff (even if Language Line or other interpretation were available if needed, which we did not test). Officer attitude and knowledge varied greatly—from warm and helpful to nonverbal, intimidating and misleading. Complainants in District 6 would stand the best chance of filing an accurate complaint. Those filing in District 1 stand the worst chance; the officer's attitude

³ ACLU staff visited all ten locations in person and spoke with MPD employees at the front desk using a standard script and questions as well as an observational checklist to assess both their compliance with proper complaint procedure in MPD policy as well as their general approach. Details of the ACLU data-gathering visits are in Appendix A.

⁴ In addition, the two complaint procedures differ in kinds of complaints accepted, the forms required, timelines and remedies available. For example, the OPC reviews only certain kinds of misconduct of sworn officers on duty (such as harassment, discrimination and unnecessary force) while MPD will take complaints concerning any staff misconduct any time or anywhere. MPD may impose discipline but OPC may only adjudicate complaints and pass its conclusions to MPD for action. OPC has a deadline for complaints; MPD does not.

⁵ Stations either had a “FAQ” brochure or a brochure entitled “Filing Citizen Complaints Against Metropolitan Police Officers, and the Complaint Review Process.” Both explain the dual procedures, so we considered either to be sufficient.

was acceptable but the supply of information and forms was minimal—no OPC-1 form, no PD-99 form and no informational poster.

The Council should direct the MPD to provide for Council review a plan of corrective action especially including better training so that more MPD members can meet the public with proper information (brochures are not enough). Improved consistency of helpful “customer service” seems essential, along with more consistent supply of printed materials. A potential complainant ought to be met by knowledgeable, helpful MPD employees with a supply of both OPC-1 and PD-99 forms in relevant languages. The hit-or-miss combination of information and attitude we encountered is unacceptable.

Service of process on MPD members is still too difficult

Our latest experience trying to serve lawsuit papers on MPD members shows the conditions continue that led the Council to enact remedial legislation years ago, legislation clearly still not implemented.⁶ Our latest bad experience was in summer and fall of 2009 when we initiated a civil rights lawsuit in federal court naming 34 MPD members as defendants. It took a great deal of frustrating effort to accomplish what should be a routine task of serving the initial papers.

No D.C. government official will formally accept service for police officer employees (including MPD staff and counsel at the Office of the Attorney General). So we had to do ourselves every step of finding and serving them. Locating dozens of people in person in a large agency with scattered work sites and a 24/7 schedule of shifts is daunting enough without the further problems we found just getting information. When serving certain officers went well, it was due to an occasional helpful MPD staffer that was a vivid exception rather than to the smooth functioning of an organized system. It took us months. Problems included the following:

- **Ineffective central records.** We asked the MPD Personnel Division to tell us where each defendant officer works. Their response was timely but inaccurate since the Division seems not to have the most up-to-date unit assignments, for example when officers are transferred or detailed. Calling the officer’s duty station would often yield only a curt reply, “doesn’t work here.” Only by chance would we happen on someone who knew where the absent officer had moved. It took ACLU staff hundreds of calls to find 34 officers.
- **Misinformation from station staff.** Even when we learned an officer’s current assignment, staff in MPD units gave incorrect details of their shifts, the times for roll call, or other key access details. As a result our staff made a number of inefficient trips when the officer was absent on leave for a day, in training, or inaccessible until hours after the shift change we were told about.

⁶ See D.C. Code § 5-105.09 (a 2006 statute directing MPD to issue regulations providing for the “designation of one or more offices, at the command level or the department’s general counsel, where service shall be accepted on behalf of the sworn member”). The MPD published proposed rules twice, at 54 D.C. Register 8816 (September 7, 2007) and at 55 D.C. Register 8894 (August 15, 2008). ACLU commented both times the rules didn’t do what the law required, instead leaving to officers whether to accept substituted service. MPD told us in summer 2009 that a third draft was in process but it has never been published. The 2008 rule proposed that the Court Liaison Division arrange for optional service, but in our 2009 case the head of that office told our staff no such method of service of summons and complaint is in effect.

- **Hostility to the rule of law.** Too many times during calls and station visits MPD staff were rude and abrupt, conveying the unmistakable feeling that we were inconveniencing them.

We found a welcome exception at the MPD Special Operations Division where, once we tracked a number of our defendants to that unit, an acting assistant chief accepted service. And the MPD Office of General Counsel was helpful when we had a few exceptionally evasive officers. But the kindness of strangers is no substitute for a workable everyday system.

A professional process server testified to the Council while the 2006 statute was under consideration, on the better practices she encounters elsewhere and the unique difficulties of service in the District. D.C. would not be unusual in establishing a scheme of substituted service as used in many other areas of legal practice, and as found, for example, in the police department of Fairfax County, Virginia.

The ordeal we went through serves no important value and wastes time of many staff on both sides of litigation. We recommend that the Council enact new legislation removing discretion for MPD to define the procedure and instead simply directing that MPD accept service of process on members, as MPD already does for subpoenas requiring court appearance by officers. MPD officials have asserted that a procedure lacking personal service would not provide a full measure of due process (assuring a defendant has personally received a legal paper), but we are fully prepared to litigate that issue if the Council enacts such a law, and we are confident that a statute on substituted will be upheld.

MPD and Housing police complaint review should be monitored by OPC

Finally, we recommend that Bill 18-130 be passed as soon as possible to expand the ability of the Office of Police Complaints to report on handling of all complaints of misconduct by MPD and the D.C. Housing Authority police.

The Office has statutory authority to receive and adjudicate complaints against officers in both forces, but each agency may also handle complaints on its own. The Office also is charged with reporting to the Mayor, Council and MPD Chief on policy matters affecting the complaint process and police management generally. We believe the OPC has published valuable data and made significant recommendations in its policy reports over the years, for example on disturbing trends in arrests for disorderly conduct. In that second connection, it is important that the OPC have access to complaints of all kinds, both those submitted to OPC and those to MPD, and the bill would make that possible.

The bill would also broaden the OPC responsibility with respect to operations of the Housing Authority police beyond complaint processing, to add a duty parallel to that of OPC concerning MPD, to address policy matters affecting the complaint process and police management generally.

The bill has specific provisions essential to the success of this expanded OPC monitoring authority. First, the bill would require that MPD and the Housing Authority police provide OPC information about “proposed discipline as well as the actual discipline imposed in connection with

citizen complaints sustained” by both police departments.⁷ Second, the bill requires both departments to give OPC “unfettered access to all information and supporting documentation of the covered law enforcement agencies related to the Board’s monitoring activities.”⁸ This provision allows review of the investigation and adjudication process so that OPC can assure that complaints are handled in an equivalent manner District-wide.

Our previous testimony explained the bill’s advantages. It embodies the best practice of comprehensive police oversight agencies nationwide. Also, it is cost-effective since data from monitoring a broader set of complaints can be used even more effectively we hope, to drive improved police practice that in turn can reduce the risk of municipal liability and the cost of litigation.

We urge that these provisions be retained and that the bill move forward.

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Thank you for the opportunity to provide this information for the hearing record. The ACLU would be pleased to respond to any questions the committee may have on these or other aspects of our experience with the police department.

⁷ Bill 18-130, § 2(a).

⁸ *Ibid.*

Outline of standard protocol for ACLU visits to MPD stations

We drew questions and observation goals for our visits to all ten MPD stations and substations from requirements we found in a new 2009 MPD general order directing how staff should handle complaints.⁹ We especially aimed to check on three standards in the new policy:

- The MPD form PD-99, the Office of Police Complaints form OPC-1 and an informational brochure should be stocked at stations and substations and “on display.”¹⁰
- The MPD employee at the front desk, when asked about the process for filing a citizen complaint, should be able to “explain the complaint process.”¹¹
- An informational poster on “Citizen Complaints Against Metropolitan Police Officers” should also be posted at the District or Unit “in an area accessible and frequented by the public.”¹²

For a fourth standard, we looked for assistance, as required by D.C. and federal law, for those with complaints and with limited or no English speaking or reading skills.¹³

Finally, based on common decency, we expected each MPD employee to be helpful and to respond to our questions reasonably and without hostility or intimidation.

At each station or substation, two ACLU staff (white male and white female) went to the public counter during the day shift and explained they knew a woman who wanted to file a complaint about an MPD officer (a true statement). They did not specify the nature of the complaint. They said that she spoke mainly Spanish and so we were asking on her behalf about what would be involved if she were to complain. After getting a sense of the officer’s general knowledge of complaint procedure, the ACLU staff asked more specific questions to probe the officer’s knowledge of the two different procedures (review by MPD and by OPC).

⁹ GO-PER-120.25, *Processing Citizen Complaints* (February 19, 2009). Available at <http://www.mpd.org/GO/GO/GO-PER-120.25.pdf>.

¹⁰ The new general order specifies the brochure “Filing Citizen Complaints Against Metropolitan Police Officers, and the Complaint Review Process,” *Processing Citizen Complaints*, at 5. We commonly found a second brochure on frequently asked complaint questions and it seemed comprehensive, so we counted it for compliance as well. The display requirement is at 17.

¹¹ *Id.* at 5.

¹² *Id.*

¹³ As a recipient of federal funds the MPD is subject to Title VI of the Civil Rights Act of 1964 which prohibits national origin discrimination affecting limited English proficient persons. The MPD must also comply with the D.C. Language Access Act of 2004, D.C. Code §§ 2-1931-37. The requirements in each statute and the status of MPD compliance have been reviewed at least four times in recent years. The Office for Civil Rights, part of the Office of Justice Programs in the U.S. Department of Justice, did an on-site inspection in May 2007 and sent MPD Chief Cathy Lanier on October 14, 2008, its Compliance Review Report, 07-OCR-0118, available at D.C. Language Access Coalition, www.dclanguageaccess.org/cm. The Office of Police Complaints reviewed the same landscape in its report *MPD Provision of Police Service to Persons With Limited English Proficiency (LEP)*, issued July 16, 2009. The D.C. Office of Human Rights (OHR) reviews all DC agencies’ compliance with language access and issues an annual report. And in response to a specific complaint, the OHR in December 2008 also found the MPD violated the Language Access Act in its treatment of an arrested person. See information at <http://www.apalrc.org/dp/node/15>.

The questions asked at most stations¹⁴ were as follows:

- Is complaint investigation independent of MPD available?¹⁵
- May a complaint be filed by someone who was not a victim but witnessed misconduct?¹⁶
- Must a complainant come to that station and file in person?¹⁷
- Will the complainant be asked about his or her immigration status?¹⁸
- Are the forms available in other languages?¹⁹

We observed the front desk area in each station to note whether forms, brochure and the mandatory “Citizen Complaints Against Metropolitan Police Officers” poster were in plain view. Finally, the two ACLU staff took notes on the knowledge and helpfulness of the desk officers at each of the ten stations visited.²⁰

¹⁴ Not all questions could be covered in all MPD locations; ACLU staff ended their visits when they began to feel unwelcome or MPD staff actually rushed them out.

¹⁵ Right answer: Yes. Complaint investigation and adjudication independent of MPD are the purposes of the OPC.

¹⁶ Right answer: Yes. Both MPD and OPC take complaints from witnesses with first-hand knowledge of misconduct..

¹⁷ Right answer: No. Both MPD and OPC allow initial filing in various ways (in person, by mail, fax or e-mail).

¹⁸ OPC states in its brochure that a complainant need not be a resident or citizen to file a complaint and that the OPC “does not inquire about, and is not required to report, any person’s immigration status.” We haven’t seen any formal policy on the subject in MPD so we don’t know whether to credit officers who told us they also don’t inquire.

¹⁹ See note 13 above on the statutory treatment of government obligations to non-English-speakers. We treat details of compliance standards for availability of oral and written language assistance briefly as we found almost no language assistance of any kind.

²⁰ The General Order requires that an MPD employee “**NOT** require the citizen to speak with a supervisor prior to providing the information” and “**NOT** discourage any person from making a complaint.” GO-PER-120.25 at 5. (Emphases in original). The Order makes no other demands on an MPD employee’s mood. Still, ACLU staff felt it important to assess the manner or tone with which MPD staff treats potential complainants.