



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF THE NATION'S CAPITAL

1400 20TH STREET, N.W., SUITE 119 • WASHINGTON, DC 20036-5920
T: 202-457-0800 EXT. 114 F: 202-452-1868 E: FMULHAUSER@AOL.COM

STAFF ATTORNEY
FRITZ MULHAUSER

October 28, 2009

By electronic mail

The Honorable
Mary Cheh, Chairperson
Committee on Government Operations and the Environment
Council of the District of Columbia
Washington, DC 20004

Re: Oversight Roundtable on "Improving Transparency: Open Government in the District"

Dear Chairperson Cheh:

The American Civil Liberties Union of the Nation's Capital is pleased to submit views on how to make government information more accessible to the public, enhance opportunities for citizens to monitor activities of the District government and scrutinize how District tax dollars are being spent. We suggest in this brief statement four topics for consideration as the committee selects areas of focus in this large domain. We would be happy to provide details in other forums and formats to assist the committee's work on specific topics.

In general, of course, arguing for more open government is nothing new. In 1822, James Madison observed that "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹ At this point in the history of the District, we think four areas deserve priority attention: open meetings, the D.C. Freedom of Information Act, budget transparency and rulemaking.

Revise the open meetings statute

The District of Columbia's existing open meetings law, D.C. Code § 1-207.42, was enacted many years ago (as § 742 in the 1973 home rule statute, Pub. L. 93-198) with the best of intentions, but the ACLU believes it has become largely toothless because of drafting loopholes and cramped interpretations. A renewed effort to improve public access to official decision-making can build on an important but incomplete legislative effort three years ago. In Council Member Kathy Patterson's

¹ James Madison, letter to W.T. Barry, August 4, 1822, in 9 *Writings of James Madison* 103 (Gaillard Hunt ed. 1910) (reprinted in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 174 (1993)).

last term (2006) she led a major effort to reform the open meetings law. There is a rich record from the testimony of several dozen witnesses, including the ACLU, at a hearing in June 2006. Deputy Mayor and City Administrator Robert Bobb conveyed the support of the executive branch, calling the improvements "overdue." Bill 16-747 was reported to the full Council but did not pass.

As Lucy Dalglish of the Reporters Committee for Freedom of the Press told the committee in 2006, the District "has the most outdated, ineffective open meetings statute in the country. It's time for D.C. to catch up with the rest of the country." Nothing has happened since then to change that assessment and the ACLU encourages the committee to sponsor legislation again to improve the present statute.

Review and update the Freedom of Information Act and strengthen agency implementation

As the D.C. Freedom of Information Act (FOIA), D.C. Code § 2-531-540, is modeled on the federal version, the committee should review the present statute and evaluate for incorporation the updates to federal FOIA passed as the OPEN Government Act of 2007, Pub. L. No. 110-175. Congress concluded they "should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the 'need to know' but upon the fundamental 'right to know.'" 5 U.S.C. § 552 Note. The Council should do no less with regard to our own statute.

The OPEN Government Act made important revisions to the federal statute affecting requestors, for example, clarifying that members of new forms of journalism may qualify as media requestors and also defining "prevailing party" for purposes of attorneys' fees. The Act also included revisions affecting agencies including time limits, tracking of responses, provision of assistance in disputes, and more. All should be reviewed for incorporation into D.C. FOIA.

Separately, the committee should evaluate District agencies' adherence to the law and consider any statutory changes needed to remedy problems found. In our own work, ACLU requests under the statute often meet delays (a full year in one recent instance), mistaken denials through misunderstanding of the law, and ineffective administrative schemes for handling requests. Early discussions among many FOIA requestors in the new D.C. Open Government Coalition have exploded with tales of frustration, so we gather our experience is not unique. The committee should also review the effectiveness of the Office of the Attorney General in training agency staff and overseeing agency compliance with the law.

Increase budget transparency

A major part of government is raising revenue and spending it and the budget reflects the outcome of political controversies over both. Parts of the D.C. budget fail utterly to educate citizens and decision-makers about the choices reflected in tax and spending plans, and we suggest the committee tackle budget transparency as one priority.

Budget experts have commented on the difficulty of using budget documents, particularly from the D.C. Public Schools (DCPS). Under the new chancellor, major policy changes in the last two years have generated great interest in the community regarding how plans are reflected in spending decisions. Showing the appetite for such details, last year citizens even sued the executive branch demanding more budget information. This year, reviewing the current budget, Ed Lazere of the D.C. Fiscal Policy Institute expressed frustration that individual line items are not defined clearly even for a highly experienced budget analyst; line items change from year to year without explanation; and performance data are not provided.² In a blog entry, Lazere's Institute said simply, the schools' budget is "opaque." The Institute has been working on the issue for years and could jump-start the committee's work with its own well-informed recommendations.³ But as every municipality must adopt a budget, and faces the same challenges of making arcane numbers part of public education and democratic deliberation, there must be cutting-edge experience elsewhere with effective budget presentation that D.C. can draw on as well. The committee thus could provide leadership in establishing standards for the Mayor's budget so that the legislature and the public can understand and reflect on key choices.

Improved rulemaking

As every legislator recognizes, government agencies must write rules to implement the law—rules that define terms, fill in gaps and clarify procedures, all steps that can reignite debate over legislative intent and the wisdom of the new implementation proposals every bit as strong as those during legislative action. Part of open government is to assure that the rulemaking step of administering the law is transparent, and D.C. has a general procedure for rulemaking (found in the Administrative Procedure Act (APA), D.C. Code § 2-505) that requires a notice to the public of a proposed rule and an opportunity for comment. Where the implementation of the APA falls short and requires improved statutory direction is at the next stage where an agency takes final action after the comment period. D.C. agencies now give no explanation of final rules or the treatment of comments received.

When federal agencies engage in this process, known as "notice-and-comment rulemaking," they respond in a written analysis published in the Federal Register, reviewing the comments received and explaining why significant suggestions or criticisms made by the public have been accepted or rejected. Regulations, with the force of law, regularly evoke conflict that reaches the courts and for adjudication it is important that the court be able to understand what the agency did and why. Thus, in opinions concerning disputes over federal regulations, the courts have made clear they need agencies to develop regulations in a clear way, including responding with reasoned analysis "to those [comments] that raise significant problems," because unless an "agency has provided a reasoned explanation for its rule," a court cannot perform its duty under the federal Administrative Procedure Act of determining whether a rule is "arbitrary, capricious, [or] an abuse of discretion." *Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (internal quotations omitted).

² See October 16 testimony of DCFPI Director, Ed Lazere, available at <http://dcfpi.org/?p=976>.

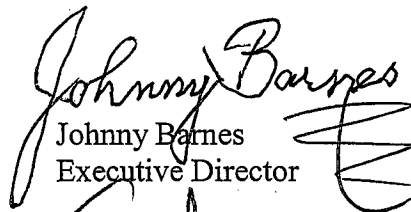
³ See their paper of helpful suggestions: Jenny Reed and Lindsay Clark, *Ten Ways to Improve the Transparency of the DC Budget* (DCFPI, February 2009). Available at <http://dcfpi.org/?p=285>.

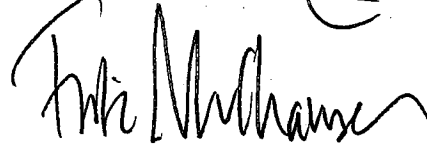
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We believe that the District APA, which also directs the courts to set aside rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," D.C. Code § 2-510(a)(3)(A), should require agencies engaging in notice-and-comment rulemaking to respond in this manner to comments that raise significant issues, describing the substance and explaining the agency's decision to accept or reject them. We encourage the committee to review the rulemaking process and strengthen it by further amendment in this way and in others that may be needed.

Thank you for considering our four recommendations for priorities as you plan next steps of detailed work to improve government transparency. We look forward to working with you on any of them and on the rest of the agenda you will be setting in this important area.

Sincerely,


Johnny Barnes
Executive Director



Fritz Mulhauser
Staff Attorney