D.C. Open Government Coalition

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November 24, 2014

Traci Hughes
Director of the Office of Open Government
Board of Ethics and Government Accountability
One Judiciary Square
441 4th Street N.W., 830 South
Washington, DC 20001

Dear Director Hughes:

The D.C. Open Government Coalition is pleased to submit comments in response to the Notice of Proposed Rulemaking establishing procedures for enforcing the Open Meetings Act ("Proposed Rules") published in the D.C. Register, #5155858, Vol. 61, No. 45, pp. 011483-011489 (October 31, 2014).

The D.C. Open Government Coalition was established in 2009 to advocate for the greatest possible transparency in District government including access to the records and meetings of public bodies. The Open Meetings Act (the "Act") is a critical component of the District's legal framework furthering this goal. As such, we applaud the Office of Open Government ("OOG") decision to publish these Proposed Rules in an effort to implement the important transparency protections set forth in the Act.

While the Coalition wholeheartedly supports the impetus and spirit behind the Proposed Rules, as described in more detail below we believe that certain aspects of the Proposed Rules could have the effect of placing barriers on those seeking redress for violations of the Act, diminishing transparency in open meetings enforcement, and limiting the discretion of the Director in fulfilling your role as the sole public official statutorily empowered to enforce compliance with the Act.

Accordingly, we offer the following comments and recommendations for the Proposed Rules in support of the OOG's commendable efforts to implement the Act and improve government transparency in the District. We believe these refinements will strengthen the Proposed Rules, preserving your full statutory authority to enforce the Act while maintaining effective procedures for resolving complaints and requests for advisory opinions.

The D.C. Open Government Coalition's Comments on the Proposed Rules

1. **Remove Section 10406.4 because it unnecessarily restricts the Director's discretion to file suit under the Act.**

The Coalition recommends removal of Section 10406.4 in its entirety.

Section 10406.4 of the Proposed Rules provides that the Director shall bring suit in the Superior Court to enforce the Act only if "it is determined after investigation that a public body has *willfully disregarded* the provisions of the Act or the requirements of this chapter" (emphasis added).

The "willfully disregarded" standard imposes an unnecessarily high bar before the Director can file suit to enforce the Act. As you know, there is currently no private right of action available for citizens to seek redress for violations of the Act. As the only entity with standing to file suit under the Act, it is critical that the Director preserve the OOG's full discretion to wield this powerful tool of compliance as necessary to ensure that public bodies comply with the Act.

Section 10406.4 needlessly limits the OOG's authority by erecting a high threshold (*i.e.*, a deliberate or intentional violation of the Act by a public body), before the OOG may file suit. This goes beyond what is required by the Act, which does not place any restrictions on when the OOG may sue to enforce the Act. The result of creating this threshold by regulation is to diminish the OOG's ability to uphold the important substantive goals of the Act.

More generally, we believe the Proposed Rules, which are primarily focused on complaints and advisory opinions, are ill-suited to house guidelines regarding the OOG's ability to bring formal legal action. Section 10406.4 currently is included in the provision regarding advisory opinions. We note that the OOG's ability to bring suit is independent of the advisory opinion process and we are concerned that the placement of this rule within the advisory opinion provision implies that the OOG's ability to bring suit is tied to the advisory opinion process. Under the Act, the OOG's authority to bring legal action is separate and distinct from its power to issue advisory opinions, and should be respected as such in the Proposed Rules. *Compare* D.C. Code § 2-593 (b) and (c). We are concerned that this implied relationship between the advisory opinion process and the provision governing enforcement authority would unduly limit the OOG's discretion in enforcing the Act. As the sole regulator charged with enforcement of the Act — and the only entity with the ability to challenge its application — the OOG may investigate public bodies and bring an enforcement action at any time – independent of the advisory opinion or complaint process. For this reason, we believe that formal rules governing the OOG's ability to sue are best reserved for a separate subsequent rulemaking or at the very least a distinct provision within the Proposed Rules.

In sum, the current Section 10406.4 unduly limits the Director's discretion in filing lawsuits to enforce the Act, is at odds with the Act's purpose, and ultimately would impose a needless hurdle to the cause of transparency in the District. Accordingly, we recommend striking Section 10406.4 entirely.

2. Remove Section 10403.1, which requires investigation into the complainant rather than the complaint.

The Coalition recommends removal of Section 10403.1 in its entirety.

Section 10403.01 lists several factors that the Director "shall consider" when making findings and determinations under the Proposed Rules. We note that all of the factors listed in this Section focus on the form of the complaint or the status and history of the complainant rather than the *public body*. For example, as currently drafted, Section 10403.1(b) requires the Director to not only examine the content of the complaint itself but also any prior or contemporaneous complaints submitted by the complainant. We believe this improperly puts the focus on the complainant as an individual, rather than the objective merit (or lack of merit) of his or her complaint. Even if the complainant's history were somehow relevant in a particular case, it is unnecessarily self–limiting for the regulations to include this factor.

Section 10403.1(c) goes even further, requiring the Director to investigate any "other verbal and written communications to *any* public body or *any* official of a public body" in connection with the Director's evaluation of the merits of a complaint. We are concerned that this provision implies that a complainant's grievance might be considered less legitimate if that individual has contacted his or her local government prior to filing a complaint with the OOG.

All of the District's regulations, and particularly the rules proposed and enforced by the OOG, should encourage active involvement from the community in holding public bodies accountable for noncompliance. Investigations into the character and actions of complainants risks obscuring this focus and discouraging an active citizenry. The United States Court of Appeals for the D.C. Circuit has noted that "Congress granted the scholar and the scoundrel equal rights of access" under the Freedom of Information Act. *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986). The OOG should similarly recognize that legitimate complaints about noncompliance with the Act may arise from all corners of the District's diverse community. For these reasons, Section 10403.1 is unnecessarily restrictive, would chill citizen engagement, and should be removed from the Proposed Rules.

3. Revise Section 10400.1 to ensure that there are no unnecessary restrictions on who may file a complaint.

The Coalition urges the OOG to revise Section 10400.1 to read as follows: "Any person who ~~does not receive proper notice of any meeting and or records of meetings of a public body in accordance with the provisions of~~ **reasonably believes that** the Open Meetings Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code §§ 2-571 *et seq*. (2012 Repl. & 2014 Supp.)), **has been or is about to be violated,** may submit a complaint under the provisions of this chapter. ~~A public body shall be presumed to have given proper notice of any meeting, if a meeting is timely published and posted at set forth in the Open Meeting Act, effective March 31, 2011 (D.C. Law 18-350; D.C. Official Code §§ 2-571 *et seq*. (2012 Repl. & 2014 Supp.)).~~"

Section 10400.1 currently states that only a "person who does not receive proper notice of any meeting and or records of meetings of a public body" may file a complaint. As drafted, Section

10400.1 unnecessarily restricts who may file a complaint by imposing a requirement not unlike legal standing on would-be complainants. The language suggests that someone who cannot affirmatively prove that they lacked proper notice of a meeting cannot file a complaint. This is tantamount to requiring an individual to prove a negative.

In addition, the current language contemplates only complaints for "notice" and "records" violations. The Act, however, contains several other important procedural requirements that do not involve records or notice. For instance, the Act requires that public meetings be open to the news media and limits the reasons for which a meeting can be closed to the public. D.C. Code §§ 2-575(a)(2) & (b). As currently written, Section 10400.1 would preclude complaints seeking to uphold these critical procedural requirements of the Act, because these requirements would not fall within the "notice" or "records" provisions of the Act.

Section 10400.1 goes on to state that "[a] public body shall be presumed to have given proper notice of any meeting, if a meeting is timely published and posted as set forth in the Open Meetings Act." The presumption seems unnecessary as it merely restates the notice requirements of the Act. Moreover, the proposed presumption of proper notice when combined with the quasi-standing requirement for complaints places an initial burden of proof entirely on the complainant rather than public body. This seems contrary to the statutory purpose of the Act, which is to ensure that all meetings are open to the public absent some compelling government reason for confidentiality. D.C. Code § 2-575(a) (stating that, except in a limited set of circumstances, the meetings of public bodies "*shall* be open to the public") (emphasis added).

In sum, Section 10400.1 overly restricts the ability of complainants to file complaints against noncompliant public bodies. The purpose of the Act is to ensure robust public oversight over governmental functions so that all persons have access to "full and complete information regarding the affairs of government and the actions of those who represent them." D.C. Code § 2-572. That purpose would be better served by the simpler, cleaner standard proposed above – namely, that any person who reasonably believes the Act has been or is about to be violated may file a complaint.

4. Revise Section 10408.3 so that advisory opinions requested by public bodies are disclosed absent a compelling government reason for redaction.

The Coalition recommends revising Section 10408.3 to read as follows: "The Director will issue a written advisory opinion and shall make the advisory opinion available to the public by posting on the Office of Open Government Website. Upon demonstration by the public body of a compelling reason therefor, the Director may make appropriate redactions to the advisory opinion to ensure confidentiality."

Section 10408.3 currently states that the Director "may *upon approval of the requesting public body*, post the advisory opinion with the appropriate redactions to ensure confidentiality" (emphasis added).

We cannot envision any scenario that would justify withholding an advisory opinion from disclosure entirely and thus do not believe the Proposed Rules should permit a public body to do

so. Although there may be legitimate reasons for redacting an advisory opinion in truly exceptional circumstances, we believe that disclosure, rather than nondisclosure, should be the default presumption under the Proposed Rules. One of the purposes of an advisory opinion is to teach or provide notice of the OOG's interpretation of the Act, not only to the requesting entity, but also to all public bodies and the public at large. Rather than requiring that the Director seek approval from a public body, which may have an interest keeping its potential noncompliance out of public view, before it can publish an advisory opinion, the public body should be required to affirmatively seek and justify its desire to redact or withhold advisory opinions from the public. This approach would be more faithful to the principle that governs not only the Act, but FOIA and other transparency statutes that contain a default presumption of disclosure unless a public body can establish a sufficient justification for non-disclosure. *See, e.g.*, D.C. Code §§ 2-531, 2-532(a).

For these reasons, we recommend rewording Section 10408.3 as set forth above, so that advisory opinions will be made available to the public in full unless the affected public body can demonstrate a compelling reason for appropriate redactions.

5. **Remove the statement from Section 10406.1 stating that advisory opinions are "binding."**

Section 10406.1 currently states that when the Director issues an advisory opinion, "[t]he advisory opinion is binding."

Advisory opinions by their very nature are intended to advise and provide information rather than to bind and impose legal imperatives. While the Act contemplates that the OOG will issue advisory opinions to provide information and guidance to the public and public bodies, it does not provide that advisory opinions are "binding." Among other reasons, we are concerned that this statement might discourage public bodies from coming forward with questions regarding interpretation of the Act. In addition, declaring advisory opinions "binding" could unintentionally convert them into final "orders" of a District agency subject to substantial administrative procedure requirements and even judicial review. *See* D.C. Code §§ 2-502, 2-510. We therefore recommend removing the sentence stating that advisory opinions are "binding."

6. **Alter Section 10404.2 to allow for a public record of conciliated complaints.**

Currently, Section 10404.2 states that "[t]he Director will not issue an advisory opinion on a complaint resolved through conciliation." We recommend deleting this statement or revising it to provide a mechanism for publicly disclosing information about conciliated complaints either via an advisory opinion or another comparable format.

Although the Coalition generally supports the conciliation mechanism in the Proposed Rules, we are concerned that the Proposed Rules do not provide sufficient transparency into the results of conciliations. Publishing the resolution of complaints, whether through conciliation or other means, provides an important means of educating public bodies and the District's citizens about compliance with the Act and how it will apply in the future. In addition, we believe that publishing the resolution of complaints will promote consistency in the Act's application and

have a deterrent effect on potential "bad actors," thereby encouraging compliance with the Act's requirements.

Accordingly, we recommend removing this language from the Proposed Rules and inserting language that provides either for the OOG to issue advisory opinions in connection with conciliated complaints or for some other comparable record that will build a body of guidance regarding the Act's application in practice.

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As noted above, the Coalition believes that the Proposed Rules represent a significant positive step forward in improving Open Meetings Act compliance and enthusiastically supports the Director's efforts in this regard. We thank you for the opportunity to provide comments on the Proposed Rules, and we hope the suggestions we have offered will highlight ways to make them stronger. The Coalition looks forward to our continuing partnership with the OOG as we work together to strengthen government transparency and accountability within the District.

Sincerely,

Kevin Goldberg
President, D.C. Open Government Coalition