

**Testimony of the**  
**American Civil Liberties Union of the Nation's Capital**

by

Fritz Mulhauser  
Senior Staff Attorney

At the

Public Symposium on Government Ethics and Transparency Best Practices

of the

D.C. Board of Ethics and Government Accountability

October 3, 2013

---

Thank you for the opportunity to suggest ways to improve government transparency.

The American Civil Liberties Union of the Nation's Capital is the local affiliate of the American Civil Liberties Union, a nationwide, non-profit membership organization with more than half a million members that, from its founding in 1920, has been devoted to protecting and defending civil liberties and civil rights. With a local membership of 4,000, our office works to defend and expand these liberties in the District.

In the course of our work in many specific areas of D.C. government, we need data and other information about what's going on and why. That helps us to thoughtfully suggest remedies for infringements of fundamental rights that come to our attention. But too often we must file suit just to get basic facts (through the powerful tools of discovery, backed by the court not access statutes).

Because litigation should be a last resort, we are keen advocates for increased transparency, first because it helps everyone deliberate fully and pass better laws at the outset, and later it helps everyone to know how laws are being carried out and with what effect.

Tonight, we have four suggestions for improved transparency:

- government agency budgets (with the example of education),
- government agency policies (with the examples of police high tech privacy invasion and forced removal of vulnerable adults) and
- general agency records access (improvement in D.C. FOIA).
- And lastly, we also commend to the Board the task of improving openness of D.C. government data as well as records. This is the open government frontier of the 21<sup>st</sup> Century.

## **1. Education budgets should be released promptly, in full and in understandable format.**

Intense interest in education in the District leads to concern for how money is being spent, especially options and tradeoffs for achieving both equity and excellence. Democratic participation in decisions on spending almost a billion dollars a year depends on full information timely available. D.C. Code includes requirements for open budget information -- concerning both budgets generally<sup>1</sup> and education budget information in particular<sup>2</sup> -- and even so, the published budget materials are not fully revealing, omitting, for example, some sources of funds and some large areas of expense.

In response to community requests the ACLU has spent considerable effort over two years to get the DCPS budget in full and on time. It's not available for the asking, so we made FOIA requests. But the results have taken months and required appeals of DCPS and OCFO stonewalling and delay. See our testimony (attached) to the Chancellor's 2013 budget hearing last fall recounting the 191 days it took us to get the full budget for 2012. This year, 62 days were needed, and again an appeal to the mayor was needed as agencies passed the buck and proffered unlawful excuses.

And when the full budget is released, after lengthy struggle, it's still in unhelpful format. This is not rocket science; many larger school districts do better.

## **2. Policies for police and agency staff in other key areas should be published.**

How police are to treat citizens is a classic subject of public interest, determined by the Constitution, laws, regulations and internal guidance, augmented by training and supervision. The first three are easy to find, the last two impossible. But internal written guidance on police practice is both significant and often secret in police agencies, including until recently here in the District.

It took a bruising three-year court battle finally to produce the public release of dozens of previously concealed MPD policies known as "general orders." The court-ordered release was accompanied by a whopping six-figure award of attorneys' fees along with stiff comments from the

---

<sup>1</sup> The D.C. Freedom of Information Act provides in D.C. Code § 2-536 that some kinds 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." This provision adds emphasis to the need for DCPS and OCFO to improve access to the schools' budget.

<sup>2</sup> 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.

court criticizing the practice of the District in defending agency intransigence.<sup>3</sup> Most recently MPD refused to show the ACLU its policy about when and how (especially with what reasons) they track people using carriers' cell phone data, so we have proposed legislation to set out the rules for gathering this kind of revealing details of individual movement.<sup>4</sup>

For a second example, we recently encountered the problem of District social workers considering involuntary removal of a senior from a cluttered and possibly dangerous house. The incident ACLU staff were investigating raised serious questions of due process yet we found no published policies on how Adult Protective Services (within D.C. Department of Human Services) goes about it, and the standard of evidence needed. Again we had to request these policies by FOIA and even then we got only a few pages, not the full text. Such an unfortunate circumstance should be handled in a manner that can be publicly articulated, open to public review and shown in the light of day to be fair and humane, not hidden behind redacted pages, months of delay and lawyers' arguments.

In general, agency guidance to their staff should be transparent to the greatest degree possible, with procedures assured for public comment and challenge. District-wide guidance on the openness of such material is needed and BEGA can lead the way.

### **3. The District's public records law should be revised and enforced.**

The D.C. Freedom of Information Act (FOIA) has not been updated in years and even in its present form is not enforced. Both need attention.

Requests are too often delayed (only 63 per cent on time in 2012, the worst performance ever) and (in our experience) are frequently denied based on misunderstandings of the law. Requesters must appeal to the mayor or even take the District to court to get errors corrected—a waste of resources and a sure way to generate cynicism about government.

The record shows the weak FOIA performance of DC agencies. Of the 85 appeals last year, the mayor found for the agency in only 38 per cent; almost half of appeals are sent back with an explicit decision against the agency and many dislodge agency action before an opinion. Those who sue D.C.

---

<sup>3</sup> The court in its final opinion and orders added criticism of the government approach to FOIA repeatedly from the bench. The court had to adjudicate a large number of claims of exemption of entire documents, many voluminous, based on affidavits sworn by MPD officials that the entire contents were exempt as disclosure of any fraction would be harmful. Ruling from the bench, the court said the MPD statements were "transparently false" (since many policies were old, contained only common sense information not trade secrets, or even had been released already) and government attorneys' reliance on such false documents "undermine[d] every argument" to the court. The court was frustrated at the large amount of judicial time necessary to review stacks of records (which resulted from the attorney for the District accepting the agency statements), saying "let the word go out that no D.C. attorney is to do what you did in this case." Counsel from the D.C. Office of Attorney General acknowledged that "my filings advocating the department's positions have brought shame on my office." *Partnership for Civil Justice Fund v. District of Columbia*, No. 09-CA-748 (oral ruling from the bench, March 9, 2012, at transcript pages 7, 8, 18 and 30). Available at: <http://www2.justiceonline.org/site/R?i=mW45uD-xSlYrC5ZUEngYyQ> (last visited 10/1/13).

<sup>4</sup> Detail on the technology, the problems of unregulated police access and parameters for legislation are in ACLU testimony at the 2012 Council oversight hearing on the Metropolitan Police Department. Available at <http://aclu-nca.org/news/police-secrecy-surrounding-high-tech-data-sources-focus-of-aclu-testimony>.

agencies over FOIA denials win at even higher rate: the District lost 80 percent of FOIA cases last year.<sup>5</sup>

The Open Government Office (OGO) needs staff and resources (for technology, trainers and consulting experts) to thoughtfully review this management muddle, to recommend new technology and improved practice and to spread the word of ways to effectively accomplish the tasks of public records access. Central processing and tracking is a great experiment. Other needs include:

- improved job descriptions so the work of information specialist is professionalized not left to confused clerks puzzling over arcane laws,
- a help-line for agency staff to get immediate guidance on FOIA matters (with the need reduced over time by written manuals and practice guidance reinforced by training),
- coordinated effort with the Office of Attorney General to develop District-wide FOIA processing rules and to advise agencies based on current law what practices (such as use of exemptions) the District's lawyers will and will not defend in court,
- coordinated effort with D.C. records management officials to encourage more rapid movement towards paperless government, especially ways to reduce the burden of large requests.

And the Office should use its knowledge of FOIA and its statutory authority to recommend FOIA amendments to reflect developments in the years since 2000, the last significant revisions. For example, items for study and consideration include:

- if delay is inevitable, requesters need the opportunity to argue for expedited treatment (available under federal FOIA for years),
- greater incentives for D.C. government agencies and officials to comply with the law including giving up fees in cases of delay (as adopted by Congress in 2007) or even disallowing agency privilege exemptions as a sanction for delay,
- mandatory waiver of fees smaller than the cost of billing and collection, such as the invoice we got from a D.C. agency for \$2.50 (prohibited in federal FOIA) and authority to appeal fee waiver denials (the mayor now declines to review such matters),
- allowance of attorney's fees in FOIA litigation where an agency voluntarily releases denied records after suit is filed but before judgment, but as result of the challenge (the "catalyst theory" that D.C. government rejects but is now in federal FOIA law),
- directing expedited court treatment of FOIA litigation (as in some other states' statutes and court rules),

#### **4. The executive should re-start a broad government-wide transparency effort, along lines promised in 2011 but never completed.**

Mayor Vincent Gray's Memorandum 2011-01 on "Transparency and Government Policy" (attached), one of his first acts on January 3, 2011, promised a new day. Quoting President Obama's similar statement of open government principles early in his term, the mayor explained the benefits of open government and, among other steps, charged the City Administrator with taking action. The mayor told the administrator to develop department and agency recommendations to improve

---

<sup>5</sup> The data are compiled from the annual reports on FOIA processing and litigation published by the mayor and attorney general. See a summary of the 2012 reports with historical comparisons available at "DC FOIA delays, denials, attorney fee awards jump in 2012," <http://www.dcofc.org/node/1633>.

transparency and other open government principles and then by May 3, 2011, to issue a directive on specific actions to “implement the principles” in the memo.

As far as we know the agencies didn’t develop recommendations and May 3 came and went without a plan from the City Administrator. The project sank without a trace, but -- in a time when not just open records, but open data, are what the public wants -- the Open Government Office and the rest of the executive should seize the opportunity and bring the notion of a citywide transparency initiative back to life.

The potential of creating meaning from open data is illustrated by an ACLU project that created powerful web graphics locating marijuana arrests on a map of the District. MPD data on thousands of arrests from endless spreadsheets were transformed by an ACLU consultant into a vivid portrayal of racial and geographic disparities that has played a part in the growing movement (including pending legislation) for reform of marijuana laws.<sup>6</sup>

The moment is propitious, with amazing resources in our city for the task of assisting D.C. government, including expertise of the federal government and its Office of Government Information Services, established by Congress to help requesters and generally improve federal FOIA, the Sunlight Foundation that recently hosted 500 people here from 25 countries and 33 states for “Transparency Camp” and open data work and the World Bank that after only two years of its Open Data Initiative now fields a thousand requests a month.<sup>7</sup> Locally, hundreds of D.C. tech-savvy residents assembled in June for a “D.C. Hack for Change” event, a local part of the 40-city National Day of Civic Hacking sponsored by federal and state governments, Google and others. The invitation promised “a creative gathering of problem-solvers, working in collaboration with publicly-released data, code and other technology, to find new ways to understand our communities and make them better” – a goal worthy of BEGA itself.

\* \* \*

Thank you for considering our views. We will be happy to answer questions or to assist the Board and the Open Government Office in future in any way we can.

Attachments (ACLU testimony and Mayor’s Memo)

---

<sup>6</sup> The graphics can be seen at <http://aclu-nca.org/billions-of-dollars-wasted-on-racially-biased-arrests-behind-dc-numbers>. The ACLU is grateful to Andrew D. Michael and his firm, LuckyProof, for their help in the project.

<sup>7</sup> Details of the Bank effort are at <http://blogs.worldbank.org/opendata/your-top-5-questions-about-world-bank-open-data>.

**Testimony [revised] of the  
American Civil Liberties Union of the Nation's Capital**

by

Fritz Mulhauser  
Senior Staff Attorney

Before the

FY 2014 Budget Hearing

of the

District of Columbia Public Schools

December 19, 2012

---

Thank you for the opportunity to comment on one key point as staff of the D.C. Public Schools (DCPS) begin to assemble the budget for Fiscal Year 2014.

We recommend DCPS and the Office of the Chief Financial Officer (OCFO) make the full budget (showing all revenues and all expenses) available to the public at several points in the cycle. It is required by law to be, yet has not been and should be.

\* \* \*

The American Civil Liberties Union of the Nation's Capital is the local affiliate of the American Civil Liberties Union, a nationwide, non-profit membership organization with more than half a million members that, from its founding in 1920, has been devoted to protecting and defending civil liberties and civil rights. With a local membership of 4,000, our office works to defend and expand these liberties in the District.

Education is a top public policy concern in the District of Columbia, both for the scale of the expense (over \$800 million) and for its link to diverse hopes and dreams for individual and community progress. The budget crystallizes debate at a point in time and incorporates a vast number of decisions about spending scarce resources. Since we can't do everything, what counts as a need and which needs are most important? The budget answers such questions by iteration--first as the Mayor proposes a plan and then as the Council completes the process with decisions.

The public can take meaningful part in democratic discussion and decisions on the budget only when it has full information at appropriate times. At present, it is almost impossible for a member of the public to have timely access to the full DCPS budget.

Our experience earlier this year is instructive.

- We asked February 28 for the full DCPS budget, addressing both DCPS and OCFO. A detailed education budget is required by law to be made available 21 days before the Mayor's budget, due to the Council this past spring on March 23. We requested under the D.C. Freedom of Information Act the full budget so the public could be prepared for the second education budget hearing set for March 8. We sent the request in advance in hopes agency officials could make the budget available on the day of release.<sup>1</sup>
- Both agencies responded that the budget was available on web sites. Since the available materials were not the full budget (lacking revenue information and lacking key areas of expenditure such as central administration), we appealed to the Mayor who on April 18 reversed DCPS and directed further search since the original was "inadequate on its face."
- After almost two more months, DCPS told us again in mid-June that our request would be met by consulting on-line sources (of the OCFO) that were the Mayor's budget book and appendices. This was incorrect, as neither provided the full budget. We asked the DCPS General Counsel to review the situation; further staff reply in July showed only that DCPS was attempting to get OCFO to reply. The OCFO responded twice with on-line citation to the budget book, though we explained its gaps and omissions in detail.
- In late August, still without the full budget we requested six months earlier, we informed the OCFO we planned by September 4 to begin litigation asking the court to direct the release of the full budget. (We also asked for work to begin on corrective action to avoid a repeat in the FY '14 cycle as well.) After we provided further technical details to the OCFO, we received the budget on September 6 -- 191 days after our request.

Budget information at various levels, for example, individual school spending plans and various kinds of summaries, is available during the process.

But evaluation of key choices requires seeing the big picture. The ability of the community to take part from that informed perspective was entirely frustrated this year. And it's worrisome that we got no reply to our request for plans to avoid a repeat. We hope we don't have to litigate, as frustrated citizens did four years ago, but we will not be so slow to ask for court intervention this coming year.<sup>2</sup> We hope that will not be necessary and that we can work together with the agencies to improve timely and transparent financial information flow.

---

<sup>1</sup> Because of the burden even of having to make such a request as this, the D.C. Freedom of Information Act provides in D.C. Code § 2-536 that some kinds 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." This provision adds emphasis to the need for DCPS and OCFO to improve access to the schools' budget.

<sup>2</sup> At the close of the final hearing on a citizen lawsuit for budget transparency, the Court (Retchin, J.), though finding current law didn't provide what plaintiffs had requested, remarked even so, "What you're working for, ma'am, is the most important thing you can be working for. So don't give up. It's very important we have involved citizens." *Borbely v. Rhee*, No. 2008-CA-1150 (D.C. Superior Court). Transcript February 15, 2008, at 36.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

---

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Memorandum 2011-01  
January 3, 2011

TO: All Deputy Mayors, Department, Agency, Office Heads and FOIA Officers

ORIGINATOR: Office of the Mayor

SUBJECT: TRANSPARENCY AND OPEN GOVERNMENT POLICY



My Administration is committed to creating a transparent and open government that extends to all departments, agencies, boards, commissions and offices of the District government. The District government has made great strides in achieving this goal, but we can do more, and this Memorandum outlines the approach to achieving increased openness by requiring agency transparency plans, increasing public participation in the activities of government, and improving collaboration both within and outside of government. This approach is not only consistent with commitments made during my Mayoral campaign, but is similar to that taken by the federal government in its efforts to strengthen democratic principles and increase citizen participation in government.<sup>(1)</sup>

*Improving government transparency.* Transparency encourages accountability, informs residents of the operations of government, and increases the confidence of the public in the integrity of their government. The District of Columbia Freedom of Information Act states that it is the public policy of the District of Columbia "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."<sup>(2)</sup> To that end, the policy is that the law be construed with the view toward "expansion of public access and the minimization of costs and time delays to persons requesting information." My Administration will ensure that information is disclosed, consistent with law and policy, promptly and in a manner or medium that is useful to the public. Responsible officials must actively encourage that records exempt from mandatory disclosure be made available as a matter of discretion when disclosure is not prohibited by law or harmful to the public interest. Moreover, the government must continue to proactively provide information to citizens, thereby reducing the need for information requests, and continue its efforts to modernize and streamline document production processes through electronic means and in a manner designed to increase efficiency, accountability and reduce time and cost.

*Increasing participation of the public in government decisions.* Our government model is built upon public participation, including public hearings, public meetings, and public comments during the formulation of rules and legislation. Open government is based upon the theory that in a democracy, the more people that are involved the better the result. To implement this policy, department and

---

<sup>(1)</sup>See, Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government." January 21, 2009, available at <http://edocket.access.gpo.gov/2009/pdf/E9-1777.pdf>

<sup>(2)</sup>D.C. Official Code § 2-531.

agency heads should solicit public input on how the participation and engagement of the public in government decisions can be increased. Methods of solicitation should include the use of appropriate technology designed to elicit responses. If the government is to be responsive and accountable to its citizens, it must be participatory and promote democracy in its governing processes.

*Increasing collaboration to improve government decisions.* Collaboration, like participation, increases the number of voices, experience and expertise at the table, and encourages cooperation among the coordinate branches of government, executive and independent government agencies, and with nonprofit organizations, businesses, and individuals in the private sector. Executive agencies should solicit input from the public on how to increase and improve opportunities for cooperation and collaboration in government.

I direct that the City Administrator, in coordination with the Chief Technology Officer coordinate the development of executive department and agency head recommendations on improving transparency, participation and collaboration in governmental actions. Within 120 days of the date of this Memorandum, the City Administrator shall issue a directive instructing executive departments and agencies on specific actions to be taken to implement the principles outlined in this Memorandum.

This Memorandum is not intended to, and does not create, any right or benefit, enforceable at law or in equity by a party against the District government, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This Memorandum shall be published in the District of Columbia Register.

