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May 13, 2019

Hon. Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: "TITLE COW-D—FREEDOM OF INFORMATION CLARIFICATION AMENDMENT" in FY 2020 Budget Report

Dear Chairman Mendelson,

Public Employees for Environmental Responsibility ("PEER") is alarmed by the proposed Freedom of Information Clarification Amendment Act of 2019 (the "Amendment") included in the 2020 Budget Support Act. We write to ask that you remove the proposed amendment from the Budget Support Act that the Council will be voting on this week. While the Amendment is described as a simple technical fix to clarify the D.C. Freedom of Information Act ("FOIA"), the changes it proposes are radical and will have a number of severe effects. Specifically, the Amendment will:

1. upend decades of clear and settled law concerning public access to records;
2. close the public's open relationship with its government because of inconvenience;
3. functionally repeal FOIA by restricting its application to only those records which a requester already has knowledge of; and
4. set a new precedent for restriction of press freedoms in Washington by surpassing even the Trump Administration's efforts to conceal public records.

The committee reasoning claims that the Amendment is necessary to "emphasize electronic records are subject to this Act," but there is no confusion regarding this issue. PEER is concerned that this "clarification" only serves as camouflage for the substantive elimination of the public's rights under FOIA. We also share the concerns expressed by the American Civil Liberties Union of the District of Columbia in their letter of May 7, 2019,[1] and particularly "that

[1] Available at https://www.acludc.org/sites/default/files/letter_to_chmnmendelson_re_foia_changes_in_2019_bsa.pdf

the Council would propose to materially amend a statute that is meant to increase government transparency through such an opaque and truncated process, without official notice to the public and no scheduled opportunity for public input."

THE PROPOSED DEFINITION OF "PUBLIC RECORD" ADDS NEW AMBIGUITIES AND CONSTRAINTS ON MATERIALS SUBJECT TO FOIA

The FOIA clearly states that "Any person has a right to inspect, and at his or her discretion, to copy any public record of a public body" which "shall make reasonable efforts to search for the records in electronic form or format, except when the efforts would significantly interfere with the operation of the public body's automated information system." D.C. Code § 2–532(a–a-2). Electronic records are thus already explicitly covered by the statute. The current definition of "public record" which the Amendment would replace is incorporated from the D.C. Administrative Procedure Act. D.C. Code § 2-502(18). That definition "includes all books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format." The "clarification" offered by the Amendment adds three new restrictions:

> "Public record" includes all books, documents, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body **and related to the conduct of public business**. Public records include information stored in an electronic format **and on a personal device**.

1. "[I]nformation stored in an electronic format" is changed to "information stored in an electronic format *and on a personal device*." The use of "personal device" adds more terms to define and even the innocent-seeming conjunction "and" causes exceptionally problematic ambiguity.
2. The insertion of the clause "and related to the conduct of public business" is impossible to evaluate until reviewed by a court, and will only amplify the time and effort required by D.C. agencies to respond to public records requests when they have to determine which of their records meet that standard.

First, the limitation to information "on a personal device" excludes a wide array of electronically stored information. A "'personal device' includes computers, tablets, cellular phones, *personal email addresses*, and similar devices *owned by an employee* of a public body when those devices are used to store records created pursuant to an employee's government employment." The definition of "personal device" is limited to devices owned by employees and does not include devices owned by the government itself. It also excludes cloud storage, or information on servers which is remotely accessible but not stored on a device's local hard drive. Finally, the catchall "and similar devices" is rendered meaningless by the inclusion of "personal email address" as a "device," because it is so dissimilar to the list of actual devices preceding it. It is unclear that this definition is even necessary, because the text of the "public record"

definition states that public records "include" information on such devices. The construction "information stored in an electronic format **and** on a personal device" raises the possibility that a document is *only* a public record *if* it is a) in electronic format, *and* b) on a personal device. That "personal device" merited a separate definition suggests that it is of legal significance based on the statutory canon against surplusage: that statutes should be read such that no parts of it are wasted. This may seem needlessly recursive, but for an amendment ostensibly intended to clarify the scope of FOIA, any new ambiguity is a fatal flaw, and many are baked into the new proposed definitions.

Second, "related to the conduct of public business" is an inherently problematic standard. Our southern neighbor, Virginia, similarly limits "public records" to those "in the transaction of public business," and likewise never conclusively defined it. The very first advisory opinion issued by the Virginia Freedom of Information Advisory Council addressed this lack of a definition,[2] and it regularly appears in public records disputes there. For example, the Advisory Council determined in 2010 that a report "commissioned by and presented to Congress" from a public university was not related to "public business" because "it appears to be the transaction of the public business of Congress, not of the University."[3] The public business requirement would only undermine the Council's professed desire to "clarify" FOIA, and should be stricken from the amended definition.

NEW REQUIREMENTS FOR HOW REQUESTS MUST "REASONABLY DESCRIBE" RECORDS SOUGHT WILL ELIMINATE VIRTUALLY ALL OF FOIA'S UTILITY TO THE PUBLIC OUT OF SPITE FOR THE COURTS AND THE METROPOLITAN POLICE UNION

The FOIA requires that "a public body, upon request **reasonably describing** any public record, shall [. . .] either make the requested public record accessible or notify the person making such request of its determination not to make the requested public record or any part thereof accessible and the reasons therefor." Currently, the words "reasonably describing" are not defined by statute, but by regulation, at CDCR 1-402.4, which states "[a] request shall reasonably describe the desired record(s). Where possible, specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information shall be supplied." The new definition would limit "reasonable" to mean only requests which include "**the names of the sender and recipient, a timeframe for the search, and a description of the subject matter of the public record**." The phrase "reasonably describe" has also been examined at length by D.C. courts, which is where the Council's justifications fall apart.

1. The Amendment Misreads the Holdings of the D.C. Court of Appeals in Bad Faith

The Council explicitly cites the D.C. Court of Appeals holding in *Fraternal Order of Police, Metropolitan Police Labor Committee v. District of Columbia*, 139 A.3d 853 (D.C. App. 2016), as grounds for the amendment. That ruling, the Council claims, "has rendered District agencies powerless to negotiate narrowing the scope of requests or to require specificity in

[2] See Freedom of Information Advisory Opinion 1 (2000)(regarding the definition of in the transaction of public business) http://foiacouncil.dls.virginia.gov/ops/00/AO_1.htm.
[3] Freedom of Information Act Advisory Opinion AO-04-10 (2010), http://foiacouncil.dls.virginia.gov/ops/10/AO_04_10.htm.

describing requested documents, thereby resulting in the inefficient use of resources." This is a gross misinterpretation of that opinion, the court's eighth published opinion in five years resolving FOIA disputes between the District and the Fraternal Order of Police ("FOP"). In that opinion the court stated that litigation "is not meant to be the inevitable path. And yet FOP and the District appear to have tacitly chosen a course of pitched warfare in the courts." *Id*. at 869. While each opinion resolved specific disputes, "the constant is an apparent inability or unwillingness by both parties to communicate effectively to achieve the objectives animating FOIA. **Both parties seem to have forgotten what FOIA is all about**."

While the FOP was admonished for the intentional ambiguities of its FOIA requests, the District "fares no better" in the court's opinion. *Id*. The District's interactions with the FOP were inherently confrontational. FOP was told "without basis" that its requests would not be processed. The District also repeatedly delayed responding to FOP's FOIA requests by lying to the FOP that agencies with no actual interest in the request had substantial interests which would necessitate delay. *See id.* at 869-70. Ultimately, the public records were produced "in a manner apparently designed to ensure defects in production." *Id*. at 870. It promised 1,400 pages of responsive records and turned over under 1,000 in one production, and then delivered a second production of 16,000 pages in the least convenient manner possible. These 16,000 pages

> inexplicably took paper form, even though all responsive documents were electronic and could have been produced in that form (as they ultimately were). MPD then divided these hard copies—some 16,000 pages of documents—into "25 to 35 envelopes," which it mailed to FOP without advance notice, tracking, delivery confirmation, or proof of mailing. Actions like these suggest that the District, like FOP, is more interested in gamesmanship than in FOIA compliance.

The District has thus chosen to inflict upon all of us a punishment for the sins of the FOP and in defiance of the ruling of its Court of Appeals. The court entered an order requiring that the District and the FOP engage in mediation before resuming litigation. This undercuts the justification that "District agencies [are] powerless to negotiate narrowing the scope of requests or to require specificity." Negotiation is exactly the remedy the court provided. The court also addressed the District's professed concern with vague and voluminous requests, which are both addressed under current law, excerpted at length in the following section.

2. Safeguards Already Exist Under FOIA to Resolve Disputes in the Spirit of the Statute

Requesters are invited, "[w]here possible," to provide "specific information regarding names, places, events, subjects, dates, files, titles, file designation, or other identifying information." 1 DCMR § 402.4. "FOIA wasn't intended for fishing expeditions," Chairman Mendelson said. "Government is having to devote increasing resources to dealing with very broad and unspecific FOIA requests, some of which have no relation to official business. And that was not the intent of FOIA."[4] This is a misreading of the statute's purpose.

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[4] *See* Peter Jamison, *FOIA restrictions would shield D.C. officials who use email for personal business*, WASHINGTON POST (May 8, 2019), https://www.washingtonpost.com/local/dc-politics/foia-restrictions-would-shield-dc-officials-who-use-email-for-personal-business/2019/05/08/f8290df8-70e5-11e9-8be0-ca575670e91c_story.html?utm_term=.dd1926035ad2&noredirect=on

FOIA was passed in 1976. In its report on the bill, the Committee on the Judiciary and Criminal Law *specifically noted* Congress's concern that, under the earlier version of the federal FOIA, federal agencies had "used the lack of identification as a general excuse for withholding records." Report on Bill No. 1-119, at 7. This was an evil to be prevented under the District's version of FOIA.

Accordingly, the Committee explained that its draft legislation adopted the federal "reasonably describe" language to clarify "the nature of a sufficient request" under FOIA. *Id*. And in its section-by-section analysis of the bill, the Committee stated that a "request would be sufficient if it contained the general subject matter involved and reference to the official or to an office within an agency which was either the source or office responsible for keeping the record." Id. at 12. Chairman Mendelson's Amendment explicitly undermines that original purpose.

Further, the current law accounts for the clarity concerns presented. When an agency has difficulty understanding a request, the regulations provide that such difficulty operates as a tolling mechanism. Pursuant to 1 DCMR § 405.6, which falls under a section of the regulations addressing "Time Limitations," the clock for production does not start until the request is received "in compliance with [D.C. FOIA and its regulations]." More particularly, if a FOIA officer, "pursuant to § 402.5, [has] contact[ed] the requester for additional information, then the request is deemed received when the Freedom of Information Officer receives the additional information." *Id*. As a result, the time the agency has to comply is extended for as long as it takes to receive a coherent explanation of the request, and that extension is based on a decision within the agency's sole discretion.

Particularly long requests are also accounted for under FOIA's current construction. When a FOIA request requires gathering and examining "a voluminous amount of separate and distinct records," D.C. Code § 2-532 (d)(1) affords the District additional time to produce responsive documents. The burden of fulfilling a request may also be considered by the trial court in evaluating the reasonableness of the District's efforts to search for and produce documents responsive to a request.

FOIA provides these safety valves; but there is nothing in the statute that allows a prospective determination of undue burden to void a FOIA request. This unchecked power is what the Amendment grants to agencies, eliminating the power of FOIA to request documents which a requester does not already have intimate knowledge of. The requirement that a request must include "the names of the sender and recipient, a timeframe for the search, and a description of the subject matter of the public record" essentially precludes all requests that seek to uncover hidden wrongdoing.

In March, for example, the Washington Post reported that D.C. Council Member Jack Evans had repeatedly sent business proposals to potential employers in which he offered his connections and influence as the city's longest-serving lawmaker and chairman of the

Washington Metropolitan Area Transit Authority.[5] Evans made those pitches using his government email account, and journalists obtained them through the District's FOIA law. Because those pitches were made in secret due to their improper and illegal nature, the emails' content was presumably not known to the Post reporters when the request was made. Ignorance, the Amendment reasons, is enough to deny a request. If you don't know already, you don't deserve to find out.

The Amendment thus tortures FOIA's original intent. It attempts to legislatively eliminate the requirement that an agency perform an adequate search, or any search at all, for public documents. What makes it worse is that the Amendment does so implicitly, by changing or adding definitions instead of saying so explicitly, further undermining government transparency. Its own terms also undermine the efficiency interest: while the justification complains of steep compliance costs and wasted resources, the Amendment report claims that it will have **no fiscal impact**.

The District has thus far defied the Trump Administration's unreasonable demands to accommodate the President's whimsy or totalitarian tendencies, but this Amendment is far more extreme than any press restriction the White House has sought to impose. Because the Amendment is inconsistent with the spirit of FOIA, the public interest, and the will of the people of the District of Columbia, it should be rejected by the D.C. Council.

Cordially,

Kevin Bell
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cc:
Councilmember Charles Allen
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Councilmember Elissa Silverman,
Councilmember Brandon T. Todd
Councilmember Robert White, Jr.,
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[5] *See* Jamison, *supra* n. 4; Martin Austermuhle, *Why Proposed Changes To D.C. Open Records Laws Worry Open-Government Advocates*, WAMU (May 6, 2019), https://wamu.org/story/19/05/06/why-proposed-changes-to-d-c-open-records-laws-worry-open-government-advocates/.