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Margaret B. Kwoka

Melissa Davenport

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GOOD BUT NOT GREAT: IMPROVING ACCESS TO PUBLIC RECORDS UNDER THE D.C. FREEDOM OF INFORMATION ACT

Melissa Davenport* and Margaret B. Kwoka**

[The people] have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers. Rulers are no more than the attorneys, agents, and trustees, for the people.¹

INTRODUCTION

Only two years after the citizens of the District of Columbia were granted the right to govern themselves under home rule,² the District of Columbia Council passed the Freedom of Information Act of 1976 (“D.C. FOIA”), a law intended to ensure access to public records of the District government.³ The law was modeled after the federal Freedom of Information Act.⁴ It provided a similar framework mandating disclosure of all public records, subject to enumerated exemptions. Like the federal FOIA, the law’s original purposes were to “make public officials accountable to the public, to encourage citizen participation in governance, and to enhance public confidence in government.”⁵

* Executive Director, D.C. Open Government Coalition. A.B. 1999 Georgetown University; J.D. 2008, Georgetown University Law Center.

** Equal Justice Works Fellow, Public Citizen Litigation Group; Adjunct Professor of Law, George Washington University Law School. A.B. 2002, Brown University; J.D. 2007, Northeastern University School of Law. The authors would like to thank Will McLain, Thomas M. Susman, and Pete Weitzel for helpful comments on earlier drafts.

1 John Adams, *Dissertation on the Canon and Feudal Law*, Boston Gazette (1756), reprinted in GEORGE W. CAREY, *THE POLITICAL WRITINGS OF JOHN ADAMS* 13 (2000).

2 D.C. CODE § 1-201.02(a) (2001) specifically states:

Subject to the retention by Congress of the ultimate legislative authority over the nation’s capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

Id.

3 Codified at D.C. CODE §§ 2-531-540 (2001).

4 5 U.S.C. § 552 (2006).

5 *Freedom of Information Amendment Act of 2000: Hearing on Bill No. 13-829 Before the Comm. on Government Operations*, 13th Per. 1 (D.C. 2000) [hereinafter *Council Hearing*] (testimony of Paul McMasters, Freedom Forum, First Amendment Ombudsman); see *Forsham v. Harris*, 445 U.S. 169, 188 (1980) (“FOIA is a broad enactment meant to open the processes of Government to public

The United States has a long history of citizen engagement in the conduct of government, and the specific protections provided by the Freedom of Information Act (and its state counterparts) are designed to secure the ability of citizens to actively participate in their democracy – to know how their tax money is being spent, ensure honest and even-handed treatment by public officials wielding the authority of the state, hold government actors accountable, and preserve the freedom from tyranny that would result from the administration of secret laws. As described by President Lyndon Johnson in a statement as he signed the federal FOIA into law in 1966:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.⁶

As the United States has continued to refine and enhance the public's right to access government information, countries around the world have adopted right-to-know laws in recognition of how critical such protections are to a vibrant democracy.⁷ The District of Columbia's FOIA is part of an international trend toward ensuring freedom of information that has gathered momentum over the past 40 years.

Despite its lofty intentions, numerous problems plague the District's FOIA implementation and diminish the law's effectiveness in securing public access to government information. This Article will describe the current state of public records access in the District of Columbia, including the historical context of the statute and amendments, the D.C. FOIA's current provisions, and its implementation. In particular, this Article will describe some of the difficulties faced by the public and the media when seeking records from the government.

The authors then propose a number of reforms that would improve the functioning of the District government's records access apparatus and increase the accessibility of government information to the public. These reforms include the establishment of an independent agency with D.C. FOIA oversight authority, which would serve as a mediator and advisor on matters of information access. Another proposed reform would enhance the culture of disclosure throughout

inspection. It reflects a finding that if left to themselves agencies would operate in near secrecy. FOIA was, therefore, enacted to provide access to information to enable an informed electorate, so vital to the proper operation of a democracy, to govern itself." (internal citations and quotations omitted) (Brennan, J. dissenting)).

⁶ Statement by the President Upon Signing the "Freedom of Information Act" (Jul. 4, 1966), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=27700>.

⁷ See, e.g., Dan Metcalfe, *A Freedom of Information Story: Secrecy Gives Way to Transparency*, Access Reports, Vol. 35, No. 14, at 3-6 (Jul. 8, 2009).

the District government by formalizing the executive's commitment to transparency, promoting pride and professionalism among the District's FOIA officers, and enhancing training for employees in the position to implement the law.

In addition, this Article will discuss a number of reforms that would streamline and expedite the D.C. FOIA process, including providing a mechanism for expedited processing of certain time-sensitive requests and the imposition of penalties on a government agency that misses a D.C. FOIA deadline. This Article also recommends ways to encourage the public to utilize the law, including strengthening the attorneys' fees provision. And finally, while the law currently provides for a number of categories of records to be proactively disclosed without a D.C. FOIA request, this Article proposes requiring the consolidation of those records online and broadening the scope of the records included to make this provision more comprehensive and enhance the public's access to government information.

I. FREEDOM OF INFORMATION IN D.C.

A. History

The D.C. Council ("Council") enacted the D.C. FOIA in 1976 to "divest government officials of broad discretion in determining what, if any, government records should be made available to the public upon receipt of a request for information."⁸ The District's Freedom of Information Act of 1976 was modeled on the federal FOIA, which had been in place for ten years, and had been strengthened in 1974 in response to the law's manifest weaknesses in fulfilling its objectives, which were magnified by the secretive and troubling conduct of the Nixon administration.⁹

During the next twenty-five years the federal FOIA underwent several rounds of changes.¹⁰ Most important were the 1996 amendments to the federal law that

⁸ Office of the Sec'y, District of Columbia Freedom of Information Act, http://app.os.dc.gov/info/information_act.shtm (last visited December 31, 2009).

⁹ See FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, available at http://www.loc.gov/rr/frd/Military_Law/pdf/FOIA-1974.pdf.

This bipartisan legislation, overwhelmingly approved in both the House and Senate after more than 3 years of oversight and legislative hearings, will help restore the confidence of the American public in their Federal Government by providing greater access to Government records. As we have dramatically witnessed during the Watergate tragedy, unnecessary secrecy and an almost paranoiac desire to hide the business of Government from the people and their elected representatives brought about the most grave constitutional crisis in our Nation in more than 100 years.

Id. at 399 (statement of Representative William S. Moorhead).

¹⁰ NAT'L SEC. ARCHIVE, FOIA LEGISLATIVE HISTORY, <http://www.gwu.edu/~nsarchiv/nsa/foi-aleghistory/legistfoia.htm> (last visited Dec. 31, 2009) (providing materials related to federal FOIA amendments in 1976, 1986, 1996, and 2002).

accommodated the era of electronic recordkeeping and access.¹¹ The 1996 amendments required federal agencies to establish electronic reading rooms and enumerated several categories of records that must be made available in this forum; in addition, the definition of “record” was amended to ensure that records maintained in electronic format are subject to FOIA.¹²

In 2000, legislation was introduced in the District of Columbia to update its FOIA to reflect changes in the federal statute, as well as to address problems that had arisen since the law’s enactment.¹³ The Committee on Government Operations held a hearing on the proposed legislation that elicited complaints and comments about the functioning of the law and the proposed reforms.¹⁴ A practical issues panel reported problems with procuring government records from private contractors, despite the important government functions some contractors performed. Other panelists testified about record requests that were completely ignored.¹⁵ Lastly, another panel of media representatives testified as to the District government’s poor record of compliance with the law.¹⁶

The District’s Freedom of Information Act Amendments of 2000 passed in the Council, and took effect April 27, 2001, incorporating language to include electronic records within the law’s scope, extend coverage to the D.C. Council and contractors performing government functions, and add training requirements for newly appointed FOIA officers within each agency, among other provisions.¹⁷ Since that time the Council has adopted only minor changes to the law.¹⁸

11 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

12 Congress Enacts FOIA Amendments, *available at* http://www.justice.gov/oip/foia_updates/Vol_XVII_4/page1.htm.

13 Bill 13-829, 13th Per. (D.C. 2000). The bill expanded the law to cover electronic records in a manner similar to the 1996 amendments to federal FOIA; extended the scope of the D.C. FOIA to the D.C. Council (from its previous application only to the executive branch); extended coverage to contractors performing government functions as a recognition of the growing use of outsourcing by the public sector; provided for penalties for arbitrary and capricious violations of the law; required the appointment of Freedom of Information Officers for each agency and set a minimum training requirement for these officers; and clarified that certain records must be proactively posted online by each agency. *Id.*

14 D.C. COUNCIL COMM. ON GOV’T OPERATIONS, REPORT ON BILL 13-829, THE “FREEDOM OF INFORMATION AMENDMENT ACT OF 2000,” 6-13 (2000).

15 *Id.* at 8-9.

16 *Id.* at 9-11.

17 D.C. Law 13-283; 48 D.C.R. 1917 (2004).

18 See Freedom of Information Legislative Records Clarification Amendment Act of 2004, L15-256 (D.C. 2004); National Capital Revitalization Corporation and Anacostia Waterfront Corporation Freedom of Information Emergency Amendment Act of 2007, A17-0029 (D.C. 2007).

B. *Current D.C. FOIA*

The D.C. FOIA sets forth a policy favoring maximum disclosure of public records that do not fall squarely within one of the enumerated exemptions. The Act begins with a statement of intent: “[A]ll 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.”¹⁹ In interpreting the Act, the courts have noted this statement of policy²⁰ and have concluded that the exemptions “are to be construed narrowly, with ambiguities resolved in favor of disclosure.”²¹

The statute provides that public records of public bodies shall be made available for inspection and copying upon request.²² Certain records must be made available by the public body online.²³ Public records include “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body,” including those stored in electronic format.²⁴ The public bodies covered by the law include “the Mayor, an agency, or the Council of the District of Columbia.”²⁵ The government body has fifteen business days to respond to the request by either providing the record or notifying the requester of the reason for a full or partial denial of the request,²⁶ and must conduct a reasonable search for all responsive records.²⁷ Under certain circumstances a ten-day extension is available to the agency.²⁸

19 D.C. CODE §2-531 (2001).

20 See *Donahue v. Thomas*, 618 A.2d 601, 602 n.2 (D.C. 1992); *Wash. Post v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521 (D.C. 1989); *Newspapers, Inc. v. Metro. Police Dep’t*, 546 A.2d 990, 993 (D.C. 1988); *Barry v. Wash. Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

21 *Wash. Post*, 560 A.2d 517, at 521.

22 D.C. CODE § 2-532(a) (2001).

23 *Id.* at § 2-536.

24 *Id.* at § 2-502(18).

25 *Id.* at § 2-502(18A). Note also that the term “agency” includes subordinate and independent agencies:

(4) The term “subordinate agency” means any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Mayor or the Council, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law.

(5) The term “independent agency” means any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this subchapter, to establish administrative procedures, but does not include the several courts of the District and the Tax Division of the Superior Court.

D.C. CODE § 2-502(4)-(5) (2001).

26 D.C. CODE § 2-532(c) (2001).

27 *Id.* at § 2-532(a-2).

28 *Id.* at § 2-532(d) (providing that an extension may be requested when the search requires reviewing a voluminous amount of records or consulting another government agency).

The public body may impose fees for the search, duplication, and review of records, although the charges must be “reasonable” and only reflect the direct costs involved.²⁹ Certain fees may be waived if the requester is not using the records for a commercial purpose, or for the news media or an educational entity using the records for research, or if the public body determines that providing the records will primarily benefit the public.³⁰

The exemptions enumerated in the D.C. FOIA for the most part parallel those found in the federal version of the law.³¹ The D.C. FOIA includes exemptions for confidential trade or business information; personal information the disclosure of which would constitute an invasion of privacy; investigatory records compiled for law-enforcement purposes to the extent that their release would compromise the conducting or fairness of judicial proceedings or the safety of law enforcement sources or officers; inter- or intra-agency memoranda and letters, including those covered by the deliberative process privilege, the attorney-client privilege and the attorney-work product privilege; and information shielded from disclosure by other statutes.³² If specific information falls within an exemption but the remainder of the requested record does not, the public body is required to furnish the record or records with the exempted portions redacted and the relevant exemptions cited.³³

The D.C. FOIA provides that when a records request has been denied, or a denial has been constructively rendered through the running of the statutory time limit, the requester may pursue an administrative appeal.³⁴ All appeals are directed to the Office of the Mayor,³⁵ and a response to an appeal is required within ten days (not including weekends and holidays).³⁶ In the event that an

²⁹ *Id.* at § 2-532(b)-(b-1).

³⁰ *Id.* at § 2-532(b)-(b-1).

³¹ REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN THE 50 STATES AND D.C. DC-4 (5th ed. 2006), available at <http://www.rcfp.org/ogg/index.php>.

³² D.C. CODE §§ 2-534(a) & (e) (2001).

³³ *Id.* at § 2-534(b).

³⁴ *Id.* at § 2-537(a). In the event of a constructive denial through the non-responsiveness of an agency within the statutory time limits, the requester will be deemed to have exhausted his or her administrative remedies, and need not pursue an administrative appeal but may turn directly to the courts for relief. *Id.* at 2-537(a)(1), referring to 2-532(e); 1 D.C. MUN. REGS. § 412.1. Note that a requester need not submit an administrative appeal to the Mayor when records have been withheld by the D.C. Council; in such case, the requester has the right to immediately sue in court. D.C. CODE § 2-537(a-1) (2001).

³⁵ The Office of the Mayor has delegated the responsibility of handling appeals to the General Counsel of the Executive Office of the Mayor. Mayor’s Order 2004-205, enlarged and confirmed by Mayor’s Order 2005-98, Mayor’s Order 2005-190, and Mayor’s Order 2007-62. See also 1 D.C. MUN. REGS. § 412.2.

³⁶ D.C. CODE § 2-537(a) (2001). The mayor has delegated the authority to review and render decisions regarding D.C. FOIA appeals to the Secretary of the District of Columbia. REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND

appeal is denied or an agency continues to withhold records that the Office of the Mayor has ordered released, or if the requester has otherwise exhausted his or her administrative remedies, the requester may institute proceedings for relief in the District of Columbia Superior Court.³⁷ If the requester prevails in whole or in part in the suit, reasonable attorneys' fees and costs may be awarded.³⁸ If it is determined that a public official has committed an arbitrary or capricious violation of the law, a civil penalty of not more than \$100 may be imposed.³⁹ There are very few reported court decisions interpreting the D.C. FOIA, but D.C. courts typically construe the D.C. FOIA's provisions consistent with the federal Freedom of Information Act.⁴⁰

The 2000 amendment created a reporting requirement for District agencies that report to the Mayor with respect to their activities under the D.C. FOIA each year.⁴¹ These annual reports indicate that between 4,000 and 6,000 FOIA requests are submitted to these agencies cumulatively each year.⁴²

Media outlets in the District of Columbia take advantage of the D.C. FOIA to gather information while reporting on government performance and the deeds and misdeeds of government officials.⁴³ Watchdog groups and other non-profit

MEETINGS IN THE 50 STATES AND D.C. DC-9 (5th ed. 2006), available at <http://www.rcfp.org/ogg/index.php>.

37 D.C. CODE § 2-537(a)(1)-(2) (2001).

38 *Id.* at § 2-537(c).

39 *Id.* at § 2-537(d).

40 *Barry v. Wash. Post Co.*, 529 A.2d 319 (D.C. 1987). Other cases that have interpreted the D.C. FOIA include: *Donahue v. Thomas*, 618 A.2d 601 (D.C. 1992); *McReady v. Dep't of Consumer & Regulatory Affairs*, 618 A.2d 609 (D.C. 1992); *Hines v. Bd of Parole*, 567 A.2d 909 (D.C. 1989); *Wash. Post*, 560 A.2d at 517; *Wolf v. Regardie*, 553 A.2d 1213 (D.C. 1989); *Newspapers Inc. v. Metro. Police Dep't*, 546 A.2d 990 (D.C. 1988); and *Dunhill v. Dir., D.C. Dep't of Transp.*, 416 A.2d 244 (D.C. 1980). See REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN THE 50 STATES AND D.C. DC-2 (5th ed. 2006), available at <http://www.rcfp.org/ogg/index.php>.

41 D.C. CODE § 2-538(a) (2001).

42 GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2009 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT 1; GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2008 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT 1; GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2007 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT 1; GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2006 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT 1; GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2005 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT 1. [hereinafter "D.C. FOIA REPORTS"]

43 See, e.g., Jeffrey Anderson, *D.C. Contractor Repairs Council Chair's Home*, WASH. TIMES, Nov. 18, 2009, available at <http://www.washingtontimes.com/news/2009/nov/18/dc-contractor-repaired-grays-home/>; ASSOCIATED PRESS, *\$50k Medical Bill for Alleged Holocaust Museum Shooter*, WASH. POST, Nov. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/27/AR2009112701947.html>; Henri E. Cauvin, *D.C. Waited 2 Years Before Acting on Group Homes, Letter Says*, WASH. POST, Oct. 31, 2009, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/30/AR2009103001956.html>; and Bill Myers, *D.C. Hands Out \$15M in Bonuses Despite Recession, Budget Gaps*, WASH. EXAMINER, Dec. 14, 2009, available at <http://www.washingtonexam->

organizations have used the records request process to assist clients, monitor government activities and highlight areas needing reform.⁴⁴ The general public's degree of success in utilizing D.C. FOIA requests to obtain information has not been well-documented. Statistics from the annual D.C. FOIA reports, which compile data on agency D.C. FOIA processing as reported by the agencies, indicate that between sixty and seventy percent of total requests are granted in full, and roughly the same proportion are processed within the fifteen-day statutory deadline.⁴⁵ These statistics suggest that although many requesters are satisfactorily receiving records within the statutory time limit, perhaps as many as a fourth are not.

C. Problems

In assessing the current state of D.C. FOIA law, comparison of the District's FOIA to the evolution of the federal FOIA proves instructive. Although the laws are not identical,⁴⁶ the D.C. Council has taken action to keep the D.C. FOIA in conformance with the federal law as it has evolved. However, the Council has not yet considered legislation that would mirror the most recent reforms to the federal FOIA: the Openness Promotes Effectiveness in our National ("OPEN") Government Act of 2007.⁴⁷

A lack of formal parity with the federal FOIA is not necessarily problematic. More important are the significant shortcomings of the current DC law exhibited by those differences. In practice, the D.C. FOIA does not fulfill its lofty principles of supporting maximum disclosure. From the reported aggregate statistics in the yearly D.C. FOIA reports it is difficult to ascertain the degree of noncompli-

iner.com/local/D_C_-hands-out-_15M-in-bonuses-despite-recession_-budget-gaps-8651125-79169767.html.

44 See, e.g., DAVID B. MUHLHAUSEN, DON SOIFER & DAN LIPS, HERITAGE FOUND. & LEXINGTON INST., *SCHOOL SAFETY IN WASHINGTON, D.C.: NEW DATA FOR THE 2007-2008 SCHOOL YEAR* (2009); UNIV. LEGAL SERV., *OUT OF STATE, OUT OF MIND: THE HIDDEN LIVES OF D.C. YOUTH IN RESIDENTIAL TREATMENT CENTERS* (2009); Jason Cherkis, *Police Shooting of Trey Joyner Produces Divergent Stories*, WASH. CITY PAPER, Jun. 9, 2009, available at <http://www.washingtoncitypaper.com/blogs/citydesk/2009/06/09/police-shooting-of-linwood-haggins-produces-divergent-stories/> (last visited Jan. 8, 2010) (reporting that the Partnership for Civil Justice Fund filed FOIA requests with the D.C. police and mayor's office in an effort to learn more details about a police shooting).

45 Author's calculations using data from D.C. FOIA REPORTS, *supra* note 42, at 1.

46 For example, the public body's deadlines for responding to a FOIA request are different in the two jurisdictions. 5 U.S.C. § 552(a)(6)(A)(i) (2000) and D.C. CODE § 2-532(c) (2001). In addition, some D.C. FOIA exemptions are not found in the federal law, and vice versa. For a complete discussion of the D.C. FOIA exemptions and interpretation, including comparisons to the federal statute, see REPORTERS COMM. FOR FREEDOM OF THE PRESS, *OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN THE 50 STATES AND D.C.* DC-4-DC-6 (5th ed. 2006), available at <http://www.rcfp.org/ogg/index.php>.

47 Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

ance with the D.C. FOIA, but the statistics do provide some evidence that the process is not smooth for a substantial portion of requesters. Some agencies have particularly low rates of granting record requests.⁴⁸ More than ten percent of all requests are not processed within the first twenty-five days.⁴⁹ Anecdotally, there are manifest examples of resistance, delay, and public bodies making public records access a low priority. Moreover, there have been anti-disclosure interpretations from the executive branch that are difficult if not impossible to counter; and there is a lack of clear or accessible enforcement tools to resolve apparent violations of the law.

In many states, open government audits have been pivotal in uncovering widespread ignorance or abuse of the public's right to government records.⁵⁰ In the District, an informal audit undertaken by then-D.C. Councilmember Kathy Patterson in 2000, prior to the public hearing on the D.C. FOIA amendments legislation, found that only two of the six agencies that received records requests from a Council staff member produced the requested records.⁵¹ The results demonstrated a lack of understanding of the law's requirements among front-line personnel.⁵²

In addition, the D.C. FOIA includes a provision specifically requiring that certain government records be made available online as of November 2001.⁵³ The provision's parameters are clear; nonetheless, many agencies in the District have not made the requisite records available online. A nonprofit organization, the Partnership for Civil Justice Fund, filed a complaint in D.C. Superior Court under this provision, alleging that the District's Metropolitan Police Department (MPD) had failed to post its general orders on its website. After the city's motion to have the claim dismissed was rejected, the MPD released an electronic index

48 Authors' calculations using data from D.C. FOIA REPORTS, *supra* note 42, at 1. For example, in fiscal year 2009, the Metropolitan Police Department granted in full less than twenty-five percent of the 880 requests for information it received. D.C. FOIA REPORTS, *supra* note 42, at 1

49 D.C. FOIA REPORTS, *supra* note 42, at 1

50 For a comprehensive review of other state and local records access audits, see Nat'l Freedom of Info. Coal., Freedom of Information Center: Audits & Open Records Surveys, <http://www.nfoic.org/audits-and-open-records-surveys> (last visited Jan. 9, 2010).

51 D.C. COUNCIL COMM. ON GOV'T OPERATIONS, REPORT ON BILL 13-829, THE "FREEDOM OF INFORMATION AMENDMENT ACT OF 2000," 3-4 (2000).

52 *Id.* at 4.

53 D.C. CODE § 2-536 (2001).

of general orders it considered public.⁵⁴ Other agencies are similarly not in compliance with the provision's requirements.⁵⁵

The MPD in particular has been a lightning rod for controversy about FOIA compliance:

Reporters say the department's media office . . . gives delayed responses to basic requests for public information. Sometimes, they say, it obstructs reporting out of a concern over how the story might appear. Washington City Paper reporter Jason Cherk is said that when he went to a precinct to request a copy of a police report in a recent triple homicide, he was told that the case was "too fresh." He refused to leave without the public document and got a copy.⁵⁶

The Fraternal Order of Police (FOP) has been engaged in litigation with the MPD on the issue of the agency's responsiveness to D.C. FOIA requests, and at least two court orders have awarded attorneys' fees to the FOP after it prevailed in the suits.⁵⁷

The MPD's approach appears to be illustrative of an anti-disclosure trend that may also exist in other agencies: the tendency to require a formal D.C. FOIA request as a stalling tactic that results in less information accessibility rather than more. The District's chief of police has commented that "in some instances, 'if we need more time to respond on something, then we're going to tell you to file a FOIA.'"⁵⁸ When a District of Columbia deputy fire chief took a full-time job in Florida but was allowed to remain a District employee in order to maximize his

54 Press Release, P'ship for Civil Justice Fund, PCJF Forces D.C. Police to Disclose General and Special Orders (Oct. 28, 2009), available at <http://www.justiceonline.org/site/News2?page=NewsArticle&id=5401>. Resistance to disclosure of these orders was so fierce, however, that the administration proposed a bill to the Council in 2007 that would generally exempt these orders from disclosure. See D.C. Council Bill 17-355. Darrell Darnell, then director of D.C.'s Homeland Security and Emergency Management Agency, testified in a 2008 hearing on the bill, in which he urged not only passage of the bill, but also an expansion of the bill to include an exemption for "homeland security purposes." See Testimony of Darrell Darnell, Public Hearing on "Freedom of Information Homeland Security Amendment Act of 2007," Monday, Jul. 14, 2008. To date these amendments have not been enacted.

55 The D.C. Open Government Coalition is currently undertaking an audit of the District government's compliance with § 2-536. Early indications are that in many cases the required records are not posted, and in others they are all but impossible to find.

56 Theola Labbé-DeBose, *Police Working With PR Firm in Shift Toward More Communication*, WASH. POST, Apr. 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/22/AR2009042203740.html>.

57 See, e.g., *Fraternal Order of Police v. D.C.*, No. 05-CA-007011 (D.C. Sup. Ct. 2009) (order granting attorney fees); *Fraternal Order of Police Metro. Labor Comm. v. D.C.*, No. 05-CA-1244 (D.C. Sup. Ct. 2006) (order granting attorney fees).

58 Labbé-DeBose, *supra* note 56. See also Theola Labbé-DeBose, *Mother of Struck Son Confronted D.C. Police*, WASH. POST (Dec. 15, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/14/AR2009121403551.html> (describing the lack of information provided after a police cruiser struck a District teenager and left the scene. "Gwendolyn Crump, a D.C. police

retirement benefits, the D.C. Department of Human Resources would not answer questions from the public but rather directed reporters to file a FOIA request.⁵⁹

The sense that has developed for many information requesters in the District is that at times, and especially regarding politically sensitive information, the executive branch is effectively able to slow or even completely prevent the disclosure of information.⁶⁰ By using the D.C. FOIA as a shield to prevent prompt and full disclosure rather than promote it, and by failing to respond or aggressively redacting information from politically sensitive records, the executive branch underscores the flaws in the law's ability to protect the public's right to know.

The D.C. FOIA process provides little incentive for an agency to comply with the law's time limits or its broad disclosure requirements; employees who arbitrarily and capriciously violate the law may be fined no more than \$100,⁶¹ a penalty that has not been imposed in at least the past five years, if ever.⁶² The appeals process for agency non-responsiveness or an agency determination to withhold records is directed to the Mayor's office, a venue that may be subject to political pressure to withhold sensitive records in the first place.

The only real enforcement mechanism is the requester's right to file suit in D.C. Superior Court, an option that is slow and costly; for one or both of these reasons, that option is not utilized often.⁶³ The high costs and time delays that invariably accompany litigation discourage many requesters — media, individu-

spokeswoman, requested that questions about the incident be submitted in writing . . . Crump said additional questions would be handled through a Freedom of Information request.”)

59 David C. Lipscomb, *Fire Deputy Takes Florida Job, Keeps D.C. Pension*, WASH. TIMES, Dec. 14, 2009, at A1.

Human Resources Department officials confirmed that Chief Ellerbe has been on leave without pay but would not say when that status began. Human resources legislative analyst Andrew Gerst directed The Washington Times to file a Freedom of Information Act request for further information about Chief Ellerbe's status, including who approved of the arrangement.

Id.

60 See Labbé-DeBose, *supra* note 56 (“When obtaining information is difficult, [reporter Mark] Segraves attributes that to heavy-handed involvement from the mayor's office.”); Brendan Smith, *Failure to Report*, WASH. CITY PAPER, Apr. 11, 2008, available at <http://www.washingtoncitypaper.com/articles/34890/failure-to-report/page1> (describing a ten-month FOIA battle to obtain internal-affairs reports on the suicides of two inmates in the D.C. Jail).

61 D.C. CODE § 2-537(d) (2001).

62 See D.C. FOIA REPORTS, *supra* note 43, at 2 (2009); 12 (2008); at 2 (2007), at 2 (2006), at 3 (2005). Reports before 2005 are not available.

63 “The dearth of reported cases in the District and anecdotes from reporters suggest that most disputed requests are settled through the Mayor's (now the Office of the Secretary's) FOIA officer.” REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN THE 50 STATES AND D.C., DC § V(D)(12) (5th ed. 2006), available at <http://www.rcfp.org/ogg/index.php> (follow “D.C.” hyperlink; then follow “Settlement, pros and cons” hyperlink).

als, and small organizations alike — from pursuing this avenue.⁶⁴ In addition, there may be concern that the quality of decisions from the bench in this particular area suffer from the judges' lack of subject-matter expertise, because judges confront D.C. FOIA cases infrequently and may overly rely on agency characterizations of the records at issue in making their determinations.⁶⁵ As an analysis of the federal FOIA concluded, relying exclusively on judicial intervention for the resolution of disputes over access to government records "limits the practical availability of neutral intervention to those parties who can afford the cost and delay inherent in that process,"⁶⁶ creating a barrier to the enforcement of the law that significantly undermines its effectiveness and diminishes the practical ability of the public to obtain the information necessary to act as a check on their elected officials.

The D.C. FOIA's shortcomings are not without precedent: the U.S. Congress has reexamined the federal FOIA periodically in an attempt to address statutory weaknesses or provide incentives for the federal bureaucracy to improve implementation, and each of the fifty states has struggled to identify the models that will best promote the appropriate disclosure of government information.⁶⁷ The D.C. FOIA should be continually examined for reforms that might strengthen its requirements and ensure that its provisions are being executed in accordance with its spirit. The following discussion introduces policy options that have been considered and in many cases used successfully in other jurisdictions, as well as an analysis of applicability in the District of Columbia.

64 *Id.*; Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 2 (1988).

65 See Forrest M. Landon, *Freedom of Information: Virginia Needs an Ombudsman*, <http://www.via.vt.edu/fall99/ombudsman.html>. Note, however, that at the federal court level, and in particular in the District of Columbia Circuit Court of Appeals, a number of judicial decisions demonstrate the courts' attempts to counter the advantage held by government agencies in freedom of information litigation due to their control of and greater familiarity with the records at issue. The courts have made use of *in camera* inspection of documents, and required agencies to explain the nature of documents and the application of exemptions. These and other forms of judicial power are limited, however; "the courts are not able to perform like an administrative oversight agency." Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 191-92 (1984).

66 Grunewald, *supra* note 64, at 56.

67 Some useful sources for comparing various states open records laws include the Reporter's Committee for Freedom of the Press Open Government Guide, available at <http://www.rcfp.org/ogg/index.php>, the Marion Brechner Citizen Access Project, housed at the University of Florida, which provides a searchable database of state law information, available at <http://www.citizenaccess.org/>, and the National Freedom of Information Coalition, which provides a listing of organizations in each state that provide information about that states' access laws, available at <http://www.nfoic.org/>.

II. ESTABLISH ARBITER TO IMPROVE DISPUTE RESOLUTION

The District of Columbia should create a new, independent position or office (hereinafter a “FOIA ombudsman”) to provide FOIA dispute resolution and serve as a central resource for education, advice, interpretation, and identification of systemic problems relating to the D.C. FOIA. In one form or another, such an independent authority has been adopted by numerous U.S. states,⁶⁸ and recently, the federal government.⁶⁹ Many other countries similarly have established a FOIA ombudsman to help navigate the disputes that arise under open government laws and educate the public about the right to government information.⁷⁰

Two of the oldest and most analyzed examples of an independent FOIA oversight body are Connecticut’s Freedom of Information Commission and New York’s Committee on Open Government. In Connecticut, and certain other states,⁷¹ the FOIA ombudsman offices have formal resolution power; their decisions have binding authority over the parties. In New York and the majority of states with such entities, they exercise only informal, persuasive power, although this can develop into compelling authority when exercised responsibly over time.

68 Harry Hammitt, *Mediation Without Litigation*, THE FOI REPORTS VOL. 2, No. 3 (Nat’l Freedom of Info. Coal., Columbia, MO), 2007, available at http://www.nfoic.org/uploads/foi_pdfs/hammitt_mediation_without_litigation.pdf.

69 The Honest Leadership and Open Government Act, Pub. L. No. 110-175, 121 Stat. 135 (2007).

70 Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 966 (2007) (citing DAVID BANISAR, THE FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION & ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 6 (2004), available at http://www.freedominfo.org/documents/global_survey_2004.pdf (noting that such bodies exist in Belgium, Canada, Estonia, France, Hungary, Ireland, Latvia, Mexico, Portugal, Slovenia, Thailand, the United Kingdom, and on the regional level in Canada and Germany)). See also *OGIS Hearings*, *supra* note 78, at 3-4 (statement of Thomas Blanton, Executive Dir., Nat’l Sec. Archive).

71 New Jersey has established an independent entity within the executive branch with adjudicatory powers modeled after Connecticut’s Freedom of Information Commission. Hammitt, *supra* note 68, at 4. Massachusetts provides for a similar appeal mechanism to be conducted by the office of the state’s records supervisor; however, that office is not required to hear an appeal, and the office’s opinions are not binding. *Id.* at 11-12. Pennsylvania’s new Right-to-Know Law, effective January 1, 2009, established the Office of Open Records, whose decisions are binding. PA. FREEDOM OF INFO. COAL., A QUICK GUIDE TO PENNSYLVANIA’S NEW OPEN RECORDS LAW 3 (Feb. 2009), available at http://www.openrecordspa.org/rtk_assets/RTKQuickGuide.pdf. The office may conduct hearings but has expressed a desire to reach most decisions using the information provided. *Id.* See also Aimee Edmondson, *FOI Reform Efforts: Rewriting Your State’s Laws?*, NAT’L FREEDOM OF INFO. COAL., http://www.nfoic.org/page.cfm?pageId=216&2008_summit_foi-reform-efforts?s=training&PF=Y (last visited Dec. 29, 2009) (describing the context for the passage of Pennsylvania’s law). In Iowa, legislation that would have created an independent body with the strongest enforcement powers in the country failed to gain passage. *Id.*

Several states have vested authority in the attorney general to issue opinions, advisory or binding, on freedom of information issues.⁷²

It is important to ensure the political independence of the FOIA ombudsman as well as its leadership's commitment to open government. In Robert Vaughn's analysis of the Connecticut and New York models,⁷³ he observed that each of the two entities had successfully retained its independence and its commitment to greater access to government records.⁷⁴ Vaughn attributed the success to several factors, including the autonomous nature of each body, the varied backgrounds and politically protected status of appointees, the low pay and part-time nature of the appointed commission or board members and the influence wielded by staff as a result, and the strong and powerful watchdog role played by the media in each instance.⁷⁵ The resulting political independence can enhance the FOIA ombudsman's reputation and lead to greater persuasiveness of its opinions and more frequent and trusting use by the public of its services.⁷⁶

72 Hammitt, *supra* note 68, at 13-17. Note, however, that this cannot be considered the creation of an "independent" agency, as the attorney general is typically the entity that defends state agencies in the event of a legal dispute. See, e.g., Landon, *supra* note 61 ("The attorney general's office generally tries to be apolitical in interpreting Virginia's FOIA, but it represents state agencies on all FOIA matters and thus cannot fully avoid an appearance of conflict."); Helen Gunnarsson, *New Open Government Legislation: A Bill Awaiting the Governor's Signature Would Make the Promise of Open Records Real for More People, Supporters Say*, ILL. BAR J. 334 (Jul. 2009) ("[Attorney John] Brechin is concerned about conflicts on the part of the public access counselor, an employee of the attorney general – who, after all, is charged with representing many of the public bodies to whom the FOIA and Open Meetings Act apply."); JOINT SUBCOMM. TO STUDY THE VA. FREEDOM OF INFO. ACT, HJR 501 (Jun. 2, 1999), <http://dls.state.va.us/pubs/legisrec/1999/HJR501A.htm> (last visited Dec. 30, 2009) ("By consensus, the joint subcommittee agreed that if a sunshine office were to be established in Virginia it would be preferable to create such an office as an independent agency, which would not be subject to direct political pressure as it serves Virginia's citizens and state and local public bodies. Although four of the ten state sunshine office models reviewed were affiliated with that state's Attorney General's office, this model was not favored by the joint subcommittee because of the perception of a conflict of interest. In Virginia, the Office of the Attorney General is responsible for the representation of state agencies but may be required, if assigned a sunshine office role, to rule against those same state agencies in FOIA disputes. It was made clear that the issues weighing against placement of a sunshine office in the Office of the Attorney General were of a structural nature and not an operational one."). However, the experiences in Texas and Kentucky have demonstrated that situating the ombudsman in the attorney general's office does not necessarily signal its undoing: "the leading states that rely on the attorney general as mediator have shown that such an office can perform well." Hammitt, *supra* note 68, at 19.

73 Vaughn, *supra* note 65, at 198-9, 207-8.

74 *Id.*

75 *Id.*

76 *Implementation of the Office of Government Information Services Before the Subcomm. on Information Policy, Census and National Archives of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 4 (2008) [hereinafter *OGIS Hearings*] (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records) ("This component of independence is critical in ensuring that the system isn't stacked in favor of government agencies, and more importantly so that the public knows and

At the federal level, a FOIA ombudsman position was created by the OPEN Government Act of 2007 in the form of the Office of Government Information Services (OGIS), which received its first funding in 2009.⁷⁷ The office hews closely to the New York model, providing mediation services and issuing advisory opinions, among other responsibilities.⁷⁸ Even at the federal level, politics threatened the ombudsman model. Although the authorizing legislation established OGIS within the National Archives and Records Administration (NARA), a subsequent budgeting maneuver by the Office of Management and Budget at the President's initiation threatened to relocate the office to the Department of Justice – a move that access advocates feared would reduce its autonomy and effectiveness.⁷⁹ Clarifying 2009 budget language established its funding within NARA, thereby ensuring its neutrality.⁸⁰

In addition to dispute resolution, certain other responsibilities are commonly within the scope of a FOIA ombudsman, and can have a pronounced impact on the effectiveness of an open records law. Perhaps most important, and complementary to the goal of reducing litigation, is the role some FOIA ombudsman offices play in collecting and disseminating information about the law. Some must make available all opinions issued by their offices, providing a trove of rulings or advisories for requesters and government officials to review prior to pursuing alternative dispute resolution or litigation.⁸¹

In testimony regarding the establishment of OGIS, Terry Mutchler, a former public access counselor for the state of Illinois and current Executive Director of the Pennsylvania Office of Open Records, recommended that OGIS create a

believes that it has an independent referee when battling bureaucracy to obtain records of government.”).

77 CONG. RESEARCH SERV., FREEDOM OF INFORMATION ACT (FOIA): ISSUES FOR THE 111TH CONGRESS 9-11 (2009).

78 *Id.* See *OGIS Hearings*, *supra* note 76, at 4 (statement of Thomas Blanton, Executive Dir., Nat'l Sec. Archive).

79 CONG. RESEARCH SERV., *supra* note 77 at 10.

80 CONG. RESEARCH SERV., *supra* note 77, at 11. At a House subcommittee hearing, one witness warned that “if the OGIS is established in a way that does not permit autonomy of its decisions, the federal FOIA system will continue to experience more of the same – delaying, dodging and denying access to records of government.” *OGIS Hearings*, *supra* note 76, at 4 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records).

81 *See, e.g., OGIS Hearings*, *supra* note 76, at 4 (statement of Thomas Blanton, Executive Dir., Nat'l Sec. Archive) (“The New York Office has created a body of administrative opinions available online for requesters and officials to consult, thus heading off disputes before they can fester or lead to litigation.”); Vaughn, *supra* note 65, at 197 (“[Connecticut’s] commission’s obligation to make available at cost printed reports of its decisions and related materials allows the commission to inform the public of its views and to convey its policies toward freedom of information.”); State of Hawaii Office of Info. Practices, Opinions, <http://www.state.hi.us/oip/opinions.html> (last visited Dec. 30, 2009).

database to track FOIA requests, status and disposition.⁸² Mutchler noted that such a database would assist the office with keeping the mediation process running smoothly, as well as with obtaining statistics and identifying problem areas to make recommendations to improve the law or policies within agencies.⁸³

By playing the role of records access dispute clearinghouse, the FOIA ombudsman is well-positioned to recommend short- and long-term legislative changes.⁸⁴ In some states, such as New York and Hawaii, the FOIA ombudsman has explicit authorization to investigate agency policies and procedures concerning access to public records and to recommend improvements.⁸⁵ In addition, ombudsmen are well-situated to coordinate—if not provide—public and government training on the use of the freedom of information law.⁸⁶

Finally, several of the FOIA ombudsman offices are authorized to impose penalties on government officials deemed to be in violation of the state's open records law. In Connecticut, the Freedom of Information Commission may impose civil penalties of up to \$1,000 for violations without reasonable grounds.⁸⁷ In Indiana, where the state's public access counselor lacks the authority to penalize public officials, a survey conducted on behalf of the Indiana Coalition for Open Government found that 90.8 percent of the people who had used the counselor's services felt the office should "be able to levy fines or issue enforcement actions of some sort against those who do not comply with open meeting or public record laws."⁸⁸

Leadership of an independent FOIA ombudsman office is crucial. The individual selected to lead a new agency with FOI oversight responsibilities should ideally have a "keen appreciation of government processes combined with the

82 *OGIS Hearings*, *supra* note 76, at 4 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records).

83 *Id.* at 5.

84 For example, in New York, "[b]ecause the requests for opinions identify areas of difficulty in the administration of the law, the Committee possesses a unique ability to understand and evaluate developments." Vaughn, *supra* note 65 at 205-6. See N.Y. PUB. OFF. LAW §89(1)(b)(5) (2008). See also IND. CODE § 5-14-4-10(7) (2008); HAW. REV. STAT. § 92F-42(7) (West 2009).

85 N.Y. PUB. OFF. LAW § 89(1)(b)(v) (2008); HAW. REV. STAT. §92F-42 (West 2009).

86 See Landon, *supra* note 67 (noting that "FOI training should not be a one-time, once-a-decade occurrence . . . An FOI office could remedy that."). Certain states have written such a requirement into the law: for example, Connecticut's commission is obligated under the statute to provide such training for members of public agencies. CONN. GEN. STAT. § 1-205(e) (2007). In Indiana the public access counselor is required to establish trainings for public officials and to educate the public about the law. IND. CODE § 5-14-4-10(1) (2008). Pennsylvania's new Right-to-Know Law requires the Office of Open Records to conduct trainings for state and local government employees. 65 PA. CONS. STAT. § 67.1310(a)(3)-(4) (2008).

87 CONN. GEN. STAT. § 1-206(b)(2) (2007).

88 YUNJUAN LUO & ANTHONY L. FARGO, MEASURING ATTITUDES ABOUT THE INDIANA PUBLIC ACCESS COUNSELOR'S OFFICE: AN EMPIRICAL STUDY 11 (2008).

motivation and commitment to open government.”⁸⁹ And experts advise that the commitment to open government will be more effectively manifest throughout the agency staff if it is articulated in a clear and prominent mission statement.⁹⁰

The District of Columbia should establish a FOIA ombudsman that is politically independent, authorized to provide dispute resolution services, and also tasked with performing educational and diagnostic services related to the District’s FOIA. A FOIA ombudsman would likely increase the expeditious resolution of complaints by reducing the necessity for requesters to litigate.⁹¹

This would likely be the case even if the entity’s decisions were only advisory:

Legitimacy and effectiveness in FOI dispute resolution do not depend on having binding legal power, but rather increase over time when the office demonstrates leadership, expertise, and transparency in its own process, and when it produces constructive solutions that help both requesters and the government to improve the FOI process on both sides of the exchange.⁹²

In addition, the advisory model may have a better chance to be adopted, as it is less likely to encounter governmental resistance,⁹³ and may make the office less

89 *OGIS Hearings*, *supra* note 76, at 5 (statement of Thomas Blanton, Executive Dir., Nat’l Sec. Archive). See Hammitt, *supra* note 68, at 19 (“Beyond political support, however, these offices are most effective when their employees believe deeply in the right of access . . . when individuals look at the job as little more than a job or, even worse, as a political appointment, the likelihood that they will operate in an even-handed manner, where the presumption of disclosure is the starting point for interpretation, is diminished.”). See also *OGIS Hearings*, *supra* note 76, at 3 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records). (“You must ensure that the Director of this new office is committed to open government.”).

90 See *OGIS Hearings*, *supra* note 76, at 3 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records) (advising OGIS to adopt a mission to enforce the FOI law, to serve as a resource for citizens, agencies and members of the media in obtaining information about their government); SUNSHINE IN GOV’T INITIATIVE, OGIS: “OH, GET IT SOLVED” 1-2 (2008), available at http://www.sunshineingovernment.org/foia/OGIS_startup.pdf (“to be effective, it is important for this new office to clearly identify its mission, principles and goals. The office should be guided by both the presumption of openness embodied in the law and the fair implementation of the law in the spirit and letter in which it was intended.”).

91 As Vaughn found in his analysis of Connecticut and New York. Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 208 (1984).

92 *OGIS Hearings*, *supra* note 76, at 4-5 (statement of Thomas Blanton, Executive Dir., Nat’l Sec. Archive). See also Landon, *supra* note 65 (noting that a proposed Virginia freedom of information commission would issue advisory opinions, but observing that “as has happened elsewhere, a judge in most cases likely would defer to interpretations by the FOIA office, acknowledged or not.”); and *OGIS Hearings*, *supra* note 76, at 2, 6 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records) (noting that despite the fact that the Illinois public access counselor’s opinions are advisory, and no penalties exist for failure to comply, the system “worked in facilitating access The Public Access Counselor was able to negotiate release of public records which were initially denied by public officials,” and that even advisory opinions “would probably be given great deference by the Courts as they have in other states with agencies that issue advisory opinions”).

93 See, e.g., Aimee Edmondson, *FOI Reform Efforts: Rewriting Your State’s Laws?*, Nat’l Freedom of Info. Coal., http://www.nfoic.org/page.cfm?pageId=216&2008_summit_foi-reform-effort?s=

of a political target.⁹⁴ The informality of the office permits a smaller staff, lower operating costs, and may promote quicker resolutions.⁹⁵

Whatever the level of enforcement authority granted to the FOIA ombudsman, it seems likely that the very existence of such an entity will improve agency responsiveness and public utilization of the law. The agencies themselves may be influenced by the existence of a “prominent, credible administrative entity serving in an ‘inspector general’ capacity.”⁹⁶ The establishment of a FOIA ombudsman ensures that “the public knows and believes it has an independent referee when battling bureaucracy to obtain records of government.”⁹⁷

The District should ensure that the FOIA ombudsman is empowered to manage its caseload and avoid delay within the ombudsman office itself, a problem that would merely add another level of bureaucracy. Given the District’s small size, it would not be necessary to develop an elaborate screening process to accomplish this goal. However, the agency would still need to efficiently manage its review system, and to that end, the District should specifically dictate time limits for the FOIA ombudsman’s response,⁹⁸ and encourage a standardized intake process to assist in the streamlining of complaint review.⁹⁹

The District’s FOIA ombudsman should seek to assist requesters efficiently by maximizing the availability of interpretive information. By operating in a transparent fashion itself, and using the web to disseminate information, the FOIA ombudsman’s impact would be magnified beyond the tally of disputes that it actually processes, and its work will be reinforced by the agencies as they rely “on

training&PF=Y (last visited Dec. 29, 2009) (discussing how an Iowa bill that would have created the strongest FOI enforcement agency in the country failed to make it out of legislative committee. “The enforcement arm . . . scared a lot of people off.”).

94 “The Committee’s lack of enforcement or adjudicatory authority plainly reduces threats to its independence.” Vaughn, *supra* note 91, at 207.

95 See Hammitt, *supra* note 68, at 18; Landon, *supra* note 65 (noting that Connecticut’s model may be less attractive because it “would only delay access and would be way too costly if attempted in larger states.”); Aimee Edmondson, *Building the Perfect Ombudsman’s Office*, Nat’l Freedom of Info. Coal., http://www.nfoic.org/2008_summit_building-the-perfect-ombudsman?s=training (last visited Jan. 10, 2010) (“Since Virginia’s advisory council was created in July 2000, it has rendered more than 9,000 informal opinions and more than 180 written opinions applying and interpreting FOI. The Council has a \$150,000 annual budget and staffs two attorneys. ‘That’s pretty cheap. You get a lot of bang for the buck.’ [Virginia Freedom of information Advisory Council executive director Maria] Everett said.”).

96 Grunewald, *supra* note 64, at 20.

97 *OGIS Hearings*, *supra* note 76, at 4 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records).

98 See, e.g., CONN. GEN. STAT. § 1-206(b)(1) (1989).

99 See, e.g., *OGIS Hearings*, *supra* note 76, at 4 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records) (noting that the following components were used in both Illinois and Pennsylvania: a uniform FOIA request form, a uniform FOIA mediation request form, a FOIA database, mediation guidelines, a website, and a yearly report on the agency’s activities).

the office's analysis to construct their own best practices."¹⁰⁰ "The potential volume of efficient online assistance dwarfs the direct assistance that the office will be able to render."¹⁰¹ In addition, media attention to the ombudsman advisories would highlight FOIA policies and procedures that have long been cloaked in fuzzy statistics.

The FOIA ombudsman should also have the responsibility to coordinate or provide trainings for government officials, the public, and the media to proactively improve utilization and compliance, and to recommend legislative changes to ameliorate recurring or significant problems the agency has identified in the implementation of the D.C. FOIA. A District FOIA oversight agency performing these functions would have a tremendous impact system-wide on FOIA utilization and compliance.

Certain factors may limit the ability of the District to establish such a FOIA ombudsman, including the cost. Another potential hurdle is possible public skepticism that a new FOIA ombudsman could truly be independent and, therefore, any different from the current paradigm where appeals are directed to the Office of the Mayor. The District's history of self-governance has been rife with examples of nepotism, political patronage and favors to well-connected contractors and personal friends. Authorizing legislation would need to include strong checks to ensure that any newly created positions were not merely tools of the administration. Both Connecticut and New York have each apparently been successful at this, providing a potential model the District might follow when considering such a measure.

III. CHANGE THE CULTURE

The tone that has been set within the District government regarding FOIA implementation – whether it is a deliberate message to withhold information to the extent possible or simply an uncoordinated and neglected area of citizen service (the result is the same) – does not promote the law's purposes or serve the city's residents. The District should adopt executive policies focusing attention and energy on enhanced disclosure, and the law should be amended to promote the position of FOIA officer within each agency as a role of pride and citizen service. The law should also promote education on FOIA's requirements to the front-line employees who are often the gatekeepers of the District's information.

The District's implementation of the D.C. FOIA faces culture problems on several levels. System-wide, the government appears to use FOIA as "an excuse

¹⁰⁰ *OGIS Hearings, supra* note 76, at 6 (statement of Thomas Blanton, Executive Dir., Nat'l Sec. Archive).

¹⁰¹ *OGIS Hearings, supra* note 76, at 6 (observing that despite its prolific written and telephonic output, the largest audience for the work of New York's Committee on Open Government is online).

to delay or otherwise impede the free flow of what should be readily available public information.”¹⁰² On a case-by-case basis, requesters experience delays, inconsistent responses, and at times, no response at all.¹⁰³ These difficulties suggest that, whether for political or bureaucratic reasons, the culture within the District government places a low priority on responsive public access.

There is not a great deal of information available regarding the leadership on FOIA issues within the government, the perceived or actual stature of serving in the position of FOIA officer, or the training of those employees tasked with implementing the law. This information should be collected, analyzed and used to reform the law to strengthen the personal and professional commitment to information access among D.C. government employees at all levels of government.

A. *Communicate Commitment*

In the federal government, and in some state governments, administrations have taken the initiative to urge their staff to carry out records access laws in a robust manner. On the federal level, it has been the recent practice of new administrations to issue a memorandum clarifying or stating a shift in the new administration’s policy with respect to the implementation of the Freedom of Information Act at the outset of the administration.¹⁰⁴ After the issuance of such a memorandum by President William J. Clinton and a corresponding memorandum to government agencies by Attorney General Janet Reno in 1999, the Department of Justice’s FOIA Update reported:

In the most significant and far-reaching Freedom of Information Act development to occur in many years, President Clinton and Attorney General Janet Reno issued major statements of new FOIA policy on October 4. Directed to the heads of all federal departments and agencies . . . the two memoranda together establish a strong new spirit of openness in government and call for a presumption of disclosure in agency decisionmaking under the Freedom of Information Act.¹⁰⁵

102 *Council Hearing*, *supra* note 5, at 1 (statement of Kathryn Sinzinger, Ed. & Publisher, The Common Denominator).

103 *Council Hearing*, *supra* note 5, at 1 (statement of Nicholas Keenan).

104 *See, e.g.*, Memorandum on the Freedom of Information Act, 2 PUB. PAPERS 1685 (Oct. 4, 1993); MEMORANDUM FROM U.S. ATTORNEY GENERAL JOHN ASHCROFT TO HEADS OF ALL FEDERAL DEPARTMENTS & AGENCIES REGARDING THE FREEDOM OF INFORMATION ACT (Oct. 12, 2001), available at <http://www.doi.gov/foia/foia.pdf>; Memorandum on the Freedom of Information Act, DAILY COMP. PRES. DOC. 200900009 (Jan. 21, 2009).

105 *President and the Attorney General Issue New FOIA Policy Memoranda*, Vol. XIV, No. 3 FOIA UPDATE 1 (1993), available at http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page1.htm. Reno’s memorandum stated a new policy warning agencies that with respect to defending agencies in FOIA litigation, a presumption of disclosure would apply. *Attorney General Reno’s FOIA Memorandum*, Vol. XIV, No. 3 FOIA UPDATE 4 (1993) (rescinding a previous Department of Justice guideline stating that it would “defend an agency’s withholding of information merely because there is a ‘sub-

The cues received by the public and by federal employees when an administration signals a strong support for openness are vitally important. Access advocates have applauded President Barack Obama for the commitment to transparency he made in the early days of his administration, demonstrated through such actions as the issuance of an Open Government Directive,¹⁰⁶ Attorney General Eric Holder's FOIA Memorandum establishing a clear "presumption of openness,"¹⁰⁷ and the White House's release of its visitor logs, which had been an item of contention during the Presidency of George W. Bush.¹⁰⁸

At the state level, executive leadership can also set the tone, establishing expectations and facilitating the development of more transparency-friendly policies and practices. In Florida, Governor Charlie Crist made transparency part of his inaugural address, and his first executive order on his first day in office established an Office of Open Records in the governor's office.¹⁰⁹ The First Amendment Foundation, a watchdog group monitoring open government issues in the state, awarded Governor Crist its Pete Weitzel/Friends of the First Amendment

stantial legal basis' for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure."'). Nine years later, Attorney General John Ashcroft indicated a reversal of this position, noting the importance of confidentiality to national security. Memorandum from U.S. Attorney General John Ashcroft, *supra* note 99 (telling agency heads that when a decision is made to withhold records, "you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.'). Contemporaneous analysis by media outlets and commentators suggested that this signaled a significant decline in the openness of the federal government, although an audit performed by the National Security Archive concluded that there was little impact on FOIA implementation as a result of the Ashcroft memo. NAT'L SEC. ARCHIVE, THE ASHCROFT MEMO: "DRASTIC CHANGE" OR "MORE THUNDER THAN LIGHTENING?" (2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/FOIA%20Audit%20Report.pdf>.

106 MEMORANDUM FROM OFFICE OF MANAGEMENT & BUDGET DIRECTOR PETER ORZAG TO HEADS OF ALL FEDERAL DEPARTMENTS & AGENCIES REGARDING THE OPEN GOVERNMENT DIRECTIVE (Dec. 8, 2009), available at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

107 MEMORANDUM FROM U.S. ATTORNEY GENERAL ERIC HOLDER TO HEADS OF ALL FEDERAL DEPARTMENTS & AGENCIES REGARDING THE FREEDOM OF INFORMATION ACT (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

108 The White House Visitor Records, <http://www.whitehouse.gov/briefing-room/disclosures/visitor-records> (last visited Mar. 25, 2010). Since President Obama's inauguration, members of the transparency advocacy community have evaluated whether the good intentions have led to improved results. See, e.g., NAT'L SEC. ARCHIVE, SUNSHINE & SHADOWS: THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS (2010), available at <http://www.sunshineweek.org/portals/0/files2010/2010FOIAAudit.pdf>; CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, ANALYSIS OF THE OBAMA ADMINISTRATION'S RESPONSE TO CREW'S FOIA REQUESTS (2010) available at <http://www.citizensforethics.org/files/20100316%20-%20FOIAReport%20-%20Final.pdf>; BRENNAN CTR. FOR JUSTICE, TRANSPARENCY IN THE FIRST 100 DAYS: A REPORT CARD (2009), available at http://www.brennancenter.org/content/resource/report_card_table.

109 Fla. Exec. Order No. 07-01 § 3 (Jan. 3, 2007), <http://www.flgov.com/pdfs/orders/07-01-outline.pdf>.

award in 2007 for making a significant contribution to the fostering of open government in Florida.¹¹⁰

In Illinois, Governor Pat Quinn issued a memorandum to state agencies directing that they construe freedom of information requests as valid unless the law clearly requires withholding the information. Under the previous administration of Rod Blagojevich, the government had frequently failed to respond to FOIA requests or had denied release with no explanation.¹¹¹

That's exactly what we wanted [Governor Quinn] to do," said Attorney General Lisa Madigan . . . "It has to come from the top, and under the former governor the directive was clearly: 'Don't provide information even if the law says you have to turn it over.'¹¹²

In August 2009, Governor Quinn signed into law a series of reforms to strengthen the state's open records law. The Governor's statement at the time of signing affirmed a commitment to more transparent and accountable government.¹¹³

A study of Florida's law enforcement records custodians – the gatekeepers of law enforcement information – discovered that they thought little about the philosophical underpinnings of the records access law, and were more likely to align their behaviors with those to whom they felt accountable.¹¹⁴ Therefore, having those in charge communicate and embody the message that the public access laws are meaningful and should be complied with can be a powerful tool in increasing information disclosure among the rank and file.

In the District of Columbia, then-Mayor Anthony Williams issued a memorandum in 2000 reminding agency heads and FOIA officers of the importance of public access to information and placed a priority on augmenting the District

110 Pete Weitzel/Friend of the First Amendment Award, First Amendment Watch, http://www.floridafaf.org/index.php?option=com_content&view=article&id=83&Itemid=67 (last visited Jan. 2, 2010).

111 *Quinn: Government Information Must Be Released*, ASSOC. PRESS (Feb. 25, 2009), available at <http://www.chicagobreakingnews.com/2009/02/quinn-freedom-of-information.html>.

112 Deanna Bellandi, *New Ill. Gov. Promises Openness*, CHICAGO DEFENDER ONLINE (March 16, 2009), available at <http://www.chicagodefender.com/article-3502-new-ill-governor-promises-government-openness.html>.

113 Press Release, Office of Gov. Pat Quinn, Governor Quinn Signs Major Legislation to Increase Transparency in State Government (Aug. 17, 2009), http://www.illinoisattorneygeneral.gov/pressroom/2009_08/20090817.pdf.

114 Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313, 353 (2003) ("It would be beneficial for the leadership in law enforcement agencies to educate themselves in the public records laws in their states because once law enforcement leaders understood that access laws are in place to benefit the citizenry, leaders could communicate to their employees that access to government information is a lawful undertaking that encourages an informed citizenry.").

government's use of new technologies to disseminate information.¹¹⁵ Since that time, however, there is little public evidence of any internal guidance to government employees regarding the priority that should be placed on prompt and appropriate records disclosure. The administration of Mayor Adrian Fenty, from his campaign in 2005 through his first three years, has been marked by conflicting messages about the value of transparency.¹¹⁶

Each administration in the District of Columbia, at the beginning of its tenure and throughout, should publicly and formally commit itself to promoting the greatest possible access to public information and should remind employees of the importance of rigorous compliance with the requirements of the District's FOIA.

B. *Enhance Professionalism and Training*

In addition to the message that is formally or informally transmitted from the highest levels of government, the day-to-day implementation of FOIA will be affected by the degree to which those who oversee and process requests embrace their role and understand the law's requirements. The District of Columbia should ensure that from the chief FOIA officers to the front line employees, each public servant tasked with implementing the D.C. FOIA receives adequate recognition and training related to this vital role. The District should also review its current personnel policies and the satisfaction and level of understanding of employees related to obligations under the D.C. FOIA, and institute standardized training.

115 Affirmative Information Dissemination Policy, Mayor's Memorandum 2000-5 (2000). See also D.C. COUNCIL COMM. ON GOV'T OPERATIONS, REPORT ON BILL 13-829, THE "FREEDOM OF INFORMATION AMENDMENT ACT OF 2000," at Attachment C (2000).

116 See, e.g., Mayor Adrian M. Fenty, Action Plan: 100 Days and Beyond (Jan. 11, 2007), available at <http://www.dccwatch.com/mayor/070111.htm#100%20Days> (one of six highlighted areas of emphasis was to make "our government responsive, accountable, transparent and efficient"); Mark Segraves, *Mayor Fenty takes another "secret" trip*, WTOP News (Mar. 26, 2009), <http://www.wtopnews.com/?sid=1633846&nid=695> (last visited Jan. 10, 2010); Jeffrey Anderson, *Auditor Wants Contempt Ruling Against Mayor*, WASH. TIMES (Oct. 22, 2009), available at <http://www.washingtontimes.com/news/2009/oct/22/auditor-wants-contempt-ruling-against-mayor/> (D.C. Auditor Deborah K. Nichols "asked a Superior Court judge to hold Mayor Adrian M. Fenty in contempt for refusing to comply with a court order for documents detailing real estate deals conducted by a pair of defunct city-run development corporations."); Mike DeBonis, *Fast Company: Is Speed an Excuse for Fenty's Crony Contracts?*, WASH. CITY PAPER (Nov. 4, 2009), available at <http://www.washingtoncitypaper.com/display.php?id=38061> ("Each of these easily avoidable screw-ups contradicts the image that Fenty shaped during his 2006 campaign—that Adrian Fenty was the transparent, accountable, pragmatic, get-it-done populist."); Nikita Stewart & Paul Schwartzman, *D.C. Mayor's Blunt Style an Asset, Liability*, WASH. POST (Nov. 29, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112802460.html>.

C. Professionalize FOIA Officers

In the District of Columbia, the FOIA request process is overseen by a designated “FOIA Officer” within each agency. The FOIA oversight role may be just one of several roles the officer holds; they often are also public affairs officers or members of an agency’s legal staff.¹¹⁷ FOIA Officers are required by law to receive eight hours of training on FOIA at the beginning of their tenure.¹¹⁸

With respect to these FOIA Officers, there has been little documented attention paid to the job satisfaction and commitment to the role, or to the career track that such officers may expect. Although there are significant differences in the scale and administration of the federal versus the D.C. FOIA, it is useful to review the resources deployed by the federal government on this point to discover potential problem areas and ways to enhance the professional pride and effectiveness of these officials.

The OPEN Government Act of 2007 required that the Office of Personnel Management (OPM) conduct a review of personnel policies relating to FOIA employees to determine whether any reforms might be suggested that would enhance the stature of such a role and encourage employees to fulfill their duties under the Act.¹¹⁹ OPM reported to the Congress on its findings in December 2008, concluding that no changes were necessary, and that most personnel matters could be handled sufficiently at the agency level.¹²⁰

This finding met with resistance from access professionals and the access advocacy community, which urged OPM to reconsider its position.¹²¹ A letter from the American Society of Access Professionals, Inc., noted that “by relegating to individual government agencies key personnel issues . . . OPM . . . lost an important opportunity to establish policies that would” properly implement the commitment to transparency expressed by the President and underlying the passage of the 2007 amendments.¹²² These access professionals and other open govern-

117 For example, in the District Dept. of Transportation, the FOIA Officer also serves as the Litigation & Claims Manager. District Dep’t of Transportation, Freedom of Info. Requests, <http://ddot.dc.gov/ddot/cwp/view,a,1419,q,645375,ddotNavGID,1586,ddotNav,%7C32399%7C,.asp> (last visited Jan. 10, 2010). The FOIA Officer for the D.C. Public Library is the agency’s general counsel as well. D.C. Public Library, <http://dc.gov/agencies/detail.asp?id=19> (last visited Jan. 10, 2010).

118 D.C. CODE § 2-538(d) (2001).

119 The Honest Leadership and Open Gov’t. Act of 2007 §11; 5 U.S.C. § 552 (2007).

120 Letter from Michael W. Hager, Acting Dir., U.S. Office of Pers. Mgmt., to Richard Cheney, President of the Senate (Dec. 16, 2008), <http://www.openthegovernment.org/otg/DMS%2015028%20Final.pdf> (last visited Jan. 10, 2010).

121 Letter from Claire Shanley, Exec. Dir., Am. Soc’y of Access Prof’ls, to John Berry, Dir., U.S. Office of Pers. Mgmt. (Apr. 27, 2009), available at <http://www.openthegovernment.org/otg/ASAP%20Response%20to%20OPM-%20Final%2027%20Apr%202009%20doc.pdf>.

122 *Id.* See also NAT’L SEC. ARCHIVE, REVISED OPM REPORT TO DIRECT CHANGES IN PERSONNEL POLICIES FOR FOIA PROFESSIONALS, <http://opengov.ideascale.com/a/dtd/3401-4049> (last visited Jan. 11, 2010).

ment advocates believe that personnel policies including “enhanced stature, higher salaries and a career-enhancement track” would be appropriate to recognize and compensate FOIA professionals for their valuable role in overseeing this important government commitment.¹²³

In the District, the personnel policies are less labyrinthine, and the FOIA request process is less complex and burdensome than at the federal level. The role played by District FOIA officers is correspondingly lower profile. Nonetheless, a formalized access professional career track at the District level would boost professionalism and foster a greater commitment to the role, although budget difficulties would make any salary enhancement difficult to introduce in the District at this time. Nonetheless, there are other steps the District might take to improve the job quality and performance of the individuals in this role.

First, the District should undertake a study, similar to that commissioned by the 2007 federal amendments, of the government’s personnel policies affecting this group of employees. A report highlighting the varied agencies’ approaches to the position and seeking information from the FOIA officers themselves and their supervisors about job satisfaction and commitment to the role would be useful in evaluating potential improvements.

In addition, enhancing the stature of the access professional would not necessarily require great costs. Such enhancement could be done by creating additional training and networking opportunities, encouraging participation in access-related professional societies, and increasing governmental recognition of the importance of this role to citizen-centered service.¹²⁴ The District could formally recognize valuable service in this area and more closely monitor and announce problem areas. In the District, as in the federal government, recruiting and retaining committed and qualified personnel serving as chief FOIA officers is a crucial step to the full implementation of the law.

The report fails to recommend any meaningful action by OPM, but rather suggests a continuation of the status quo, with individual agencies having responsibility for FOIA personnel policies. But OPM CAN take action to raise the caliber of the FOIA workforce, attract and maintain trained individuals in FOIA positions, and compel other federal employees to consider information disclosure as part of their job description.

Id.

123 Hager, *supra* note 120 (“Realization of [the promises of greater transparency and accountability] depends on qualified, committed [FOIA] personnel.”).

124 The most recent U.S. Attorney General memorandum on FOIA, issued by Attorney General Eric Holder in May 2009, specifically emphasized the role of the FOIA professionals in each agency who directly interact with requesters and are responsible for the day-to-day implementation of the FOIA. “Those professionals deserve the full support of the agency’s Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests.” Memorandum for the Heads of Departments and Agencies, <http://www.justice.gov/ag/foia-memo-march2009.pdf> (last visited Jan. 3, 2009).

D. *Institute Formal FOIA Training*

The District of Columbia should adopt more regular and formal training requirements for government employees who process government records to ensure that they are aware of the legal principles of the Act, their obligations to disclose information, and the resources available to them if they encounter difficult requests.

As in many states, the District government delegates the responsibility of administering the public records law to records custodians, who become “the gatekeepers to government information.”¹²⁵ For these employees, processing records requests is often an extra responsibility.¹²⁶ The “mini” audit of several District agencies’ compliance with D.C. FOIA requirements, undertaken by the D.C. Council’s Committee on Government Operations in 2000, led Committee Chair Kathy Patterson to conclude “that too often front line workers simply aren’t aware that the public has a clear right to public documents.”¹²⁷

In a qualitative research study, Michele Bush Kimball analyzed the decision-making behaviors of records custodians in Florida law enforcement agencies. She discovered that the custodians’ ranking and understanding of “the importance of their duties had nothing to do with granting access to government information as a societal benefit or as a way to help the citizenry maintain its sense of self-governance.”¹²⁸ The principle and purpose behind the public records access law had had little impact on their understanding of their roles.

The study also showed that as a result of not completely understanding the provisions of public records laws, the records custodians denied access to information that should have been available to the public.¹²⁹ The article observed that their responses might be due in part to their training, which focused “more on clerical duties than their interpretation of the public records law.”¹³⁰

125 Michele Bush Kimball, *Law Enforcement Records Custodians’ Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. L. & POL’Y 313, 314 (2003).

126 *Id.* at 314-15.

127 D.C. COUNCIL COMM. ON GOV’T OPERATIONS, REPORT ON BILL 13-829, THE “FREEDOM OF INFORMATION AMENDMENT ACT OF 2000,” app. F (2000) (statement of Kathy Patterson, Councilmember and Chair, Committee on Gov’t Operations, Council of the District of Columbia).

128 Kimball, *supra* note 125, at 329.

129 Kimball, *supra* note 125, at 351. The article observes:

Records custodians who are not well-versed in the law will resort to subjective behaviors when applying the law. They will either use acceptability heuristics in their decision-making processes or they will engage in other potentially biased behaviors, such as using sympathetic feelings to guide their decisions. . . . If the records custodians fully understood the provisions of the law, they might be less likely to allow subjectivity to cloud their decision-making processes because the custodians would understand that the law requires that the provisions should be applied consistently and equally to all.

Michele Bush Kimball, *Law Enforcement Records Custodians’ Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. L. & POL’Y 313, 314 (2003).

130 *Id.* at 330.

In fact, training employees in the substance of the law may be “the single most successful component of ensuring compliance with a Freedom of Information Act.”¹³¹ Most of the problems Kimball observed regarding compliance would be remedied by instituting standardized formal training.¹³² Kimball observed that formal training in the purpose and provisions of the law governing public access to records should help records custodians see their role as conduits to a better democracy and fuller access to public information instead of protectors of information from disclosure.¹³³

In addition to training employees in the substance of the law, providing them with, and alerting them to, interpretive resources can have a powerful effect on their responsiveness to public records requests. Kimball urged states to issue a clear directive to employees to take advantage of the legal staff within the agencies or administration without hesitation when confronting ambiguity in a records request.¹³⁴ As noted above, some freedom of information offices in various states are encouraged or required to make all of their opinions easily accessible on the web in order to promote self-help among agency staff in understanding the law.¹³⁵

In the District, the law requires that each FOIA Officer receives eight hours of training on the D.C. FOIA at the time of appointment.¹³⁶ It is unclear whether this requirement is met. Moreover, there is no requirement that employees serving as records custodians or others who are likely to receive and process records requests receive any relevant training on the principles and obligations associated with the D.C. FOIA. The District should amend the D.C. FOIA to require that employees who are likely to receive public requests for information receive specific training on the law’s requirements and its underlying principles and purposes. This requirement would ensure that those on the front lines have some familiarity with their obligation to disclose public information under the law, as well as a greater understanding of the resources available to them when facing nonroutine or more complex requests.

131 *OGIS Hearings*, *supra* note 76, at 6 (statement of Terry Mutchler, Executive Dir., Pa. Office of Open Records); *see also* Aimee Edmondson, *Building the Perfect Ombudsman’s Office*, NAT’L FREEDOM OF INFO. COALITION., http://www.nfoic.org/2008_summit_building-the-perfect-ombudsman?s=training (last visited Jan. 10, 2010) (“I can’t underscore enough the importance of training. It really is an ignorance issue. You need to get out there in the hinterlands and talk about what FOI actually requires,” quoting Maria Everett, executive director of Virginia’s Freedom of Information Advisory Council).

132 Kimball, *supra* note 125, at 351.

133 Kimball, *supra* note 125, at 353-54.

134 Kimball, *supra* note 125, at 354-57.

135 *See* CONG. RESEARCH SERV., *supra* note 77 and accompanying text.

136 D.C. CODE § 2-538(d) (2001).

IV. STREAMLINE AND EXPEDITE: IMPROVING FOIA PROCESSES

Information is often only as useful as it is timely. The U.S. Court of Appeals for the District of Columbia Circuit has stated: “in the FOIA context . . . the statutory goals—efficient, prompt, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request.”¹³⁷ First enacted in 1966, FOIA originally had no deadline for agency response to a FOIA request. Over time, Congress has amended the federal FOIA in an attempt to reign in agencies’ persistent delay and backlog problems. In 1974, Congress enacted a ten-business day deadline for agencies to process requests, and later in 1996, lengthened the period to twenty-business days, but mandated more reporting on compliance.¹³⁸ Then, in 2007, Congress implemented various incentives for agency deadline compliance, discussed in further detail below.

Despite the repeated efforts on the part of the federal government to reduce delay under FOIA, “[f]or most federal agencies, meeting the statutory 20 business day response time is an exception rather than a standard practice.”¹³⁹ Agencies routinely take months, if not years, to respond to some requests and serious backlogs in processing FOIA requests are no secret. As of 2006, the oldest pending FOIA request before federal agencies identified in a study by the National Security Archive was made in 1989 by a then-grad student researcher who has since become a tenured law professor.¹⁴⁰ Many of the other decades-old requests were made by journalists and media organizations,¹⁴¹ who ordinarily would seek

137 *Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (explaining that courts will not allow an agency to play a “game of cat and mouse” in litigation).

138 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 100 Stat. 3084 (codified as amended at 5 U.S.C. § 552(a)(6)(A)(i) (2006)). Although it seems counterintuitive that in response to agency delay, Congress would lengthen the deadline for agencies to respond to FOIA requests, the legislative history explains this action. Congress disapproved of the D.C. Circuit’s decision in *Open America v. Watergate Special Prosecution Force*, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), which allowed agencies to delay processing merely because they were behind. THE NAT’L. SECURITY ARCHIVE, GEO. WASH. UNIV., THE KNIGHT OPEN GOV’T. STUDY 7 (2007), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf As such, Congress hoped that lengthening the time period would help agencies to comply and reduce reliance on so-called *Open America* stays. *Id.*

139 THE NAT’L. SECURITY ARCHIVE, GEO. WASH. UNIV., THE KNIGHT OPEN GOV’T. STUDY 7 (2007), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf. Indeed, courts have frequently allowed agencies to routinely miss deadlines.

140 NAT’L SEC. ARCHIVE, GEO. WASH. UNIV., A REPORT ON FEDERAL AGENCY FOIA BACKLOG: OLDEST UNANSWERED FREEDOM OF INFORMATION ACT REQUESTS WERE FILED IN 1989 2 (2006).

141 See generally THE NAT’L SEC. ARCHIVE, GEO. WASH. UNIV., FREEDOM OF INFO. ACT AUDITS: THE TEN OLDEST PENDING FOIA REQUESTS (2003). Such requests included ones made by *The Nation*, the Lancaster, PA *Intelligencer Journal*, ABC News, and the Syracuse, NY, newspaper *The Post*. *Id.* at 1-5.

information of a time-sensitive nature. Although reporters have historically been frequent FOIA users, recent statistics suggest that reporters no longer turn to FOIA, precisely because it takes too long to obtain information.¹⁴² Indeed, one 2006 study by the Coalition of Journalists for Open Government revealed only six percent of requesters as members of the media, most of whom use FOIA now only for longer, investigative pieces rather than to gather newsworthy information.¹⁴³

The D.C. FOIA's preamble emphasizes the importance of timeliness in responding to FOIA requests in the District: "[P]rovisions of this subchapter shall be construed with the view toward . . . minimization of . . . time delays to persons requesting information."¹⁴⁴ Again, despite the law's emphasis on providing a quick response, District of Columbia agencies also routinely miss FOIA deadlines. The D.C. FOIA requires agencies to respond to a request within 15 business days.¹⁴⁵ A public body can request an extension of up to 10 additional days in "unusual" circumstances, which include a particularly voluminous request or a request that requires consultation with other agencies.¹⁴⁶ Despite the limited nature of the extension rule, in 2008, agencies in the District reported taking longer than fifteen days to respond to 25 percent of FOIA requests.¹⁴⁷ Even accounting for the possibility that in every instance agencies appropriately requested a ten day extension, for almost 15 percent of FOIA requests agencies took longer than the maximum twenty-five business days to respond.¹⁴⁸

A. Penalize Delay

The District should strengthen its disclosure law by increasing the consequences to agencies for missing the deadlines in the statute. Currently, the only consequence to the agency is more theoretical than actual: a government employee who commits an "arbitrary and capricious" violation of the D.C. FOIA can be prosecuted for a minor criminal infraction, potentially resulting in a small fine.¹⁴⁹ Criminal prosecutions for violations of the D.C. FOIA, however are rare,

142 Coal. of Journalists for Open Gov't, *Frequent Filers: Businesses Make FOIA Their Business* (July 3, 2006). In fact, between 40 percent and 60 percent of FOIA requesters are now businesses, and up to another third are private individuals with individual concerns. *Id.*

143 *Id.* at 1. Even this dismal number includes a spike prompted by journalist inquiries relating to Hurricane Katrina. *Id.* at 2. Non-profit groups constituted another 3 percent. *Id.* at 2-3.

144 D.C. CODE § 2-531 (2001).

145 *Id.* at § 2-532(c).

146 *Id.* at § 2-532(e) (2001).

147 GOVERNMENT OF THE DISTRICT OF COLUMBIA, *FY 2008 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT*, 2 (2008)

148 *Id.*

149 D.C. CODE § 2-537(d) (2001).

if not non-existent. In the last five years, not a single person has been convicted under this provision.¹⁵⁰

In any event, criminal penalties may not be the most effective or fair solutions to systemic FOIA backlogs. Often, FOIA backlogs are the result of the agency's failure to dedicate sufficient resources to FOIA—including staff time, training, and computer systems—and not willful employee action. Thus, consequences that impact the agency's interests as a whole, rather than an individual employee's interests, are more likely to persuade an agency to dedicate the necessary resources to FOIA.

Congress and state legislatures have debated and implemented various types of consequences for delays other than criminal punishment. This Article will discuss two of the most promising options that the District should consider to reduce agency backlog and missed deadlines. First, in instances of agency noncompliance with FOIA deadlines, the District should prevent agencies from charging fees to requesters for processing requests. Second, the District should also prevent the agencies from asserting the certain privileges to withhold records that are responsive to the request.

Under both the federal and the D.C. FOIAs, agencies are permitted to charge requesters certain fees, collectively referred to here as "processing fees," based upon the nature of the request and the requester.¹⁵¹ The categories for both the federal and District FOIAs are the same. Commercial requesters can be assessed fees to cover the agency's cost (including personnel time) of searching for records, duplicating records, and reviewing records for possible exempt material.¹⁵² Scientific research and educational institutions and representatives of the news media can be assessed only reasonable duplication fees.¹⁵³ All other requesters can be assessed the cost of duplication and search time, but not record review.¹⁵⁴ These processing fees, taken together, defray some of the agencies' cost in complying with the provisions of FOIA; in the 2008 fiscal year, D.C. agencies collected almost \$50,000 in FOIA fees.¹⁵⁵

150 D.C. FOIA REPORTS, *supra* note 42, at 2 (2009); 12 (2008); at 2 (2007); at 2 (2006); at 3 (2005).

151 Both the federal and D.C. FOIAs also contain a "fee-waiver" provision, which allows certain requesters' fees to be waived entirely. 5 U.S.C. §552(a)(4)(A)(iii) (2006); D.C. CODE §2-532(b) (2001). This fee-waiver provision, and ways to strengthen it, are discussed *infra* Section IV(a).

152 5 U.S.C. § 552(a)(4)(A)(ii)(I) (2006); D.C. CODE § 2-532(b-1)(1) (2001).

153 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2006); D.C. CODE § 2-532(b-1)(2) (2001).

154 5 U.S.C. § 552(a)(4)(A)(ii)(III) (2006); D.C. CODE § 2-532(b-1)(3) (2001).

155 GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2008 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT 2 (2008). These fees, however, certainly do not cover the full amount expended by the government in complying with FOIA. In 2008, the D.C. government reported spending \$344,394 on processing FOIA requests, and recouping only \$48,139 in fees, representing only a seventh of the cost. *Id.*

One approach to increasing agency deadline compliance is to prevent public bodies from charging requesters processing fees if they fail to meet the applicable deadline. Based on its findings that “[FOIA’s] use has been plagued by delays and backlogs” and that the “timeliness of agency response to FOIA requests is a significant and ongoing problem,” Congress adopted this approach in the 2007 OPEN Government Act.¹⁵⁶ Although it limited agencies’ ability to collect only some categories of fees, not all fees.¹⁵⁷ An agency faced with a choice of investing more resources in FOIA, thereby boosting its deadline compliance, or being unable to collect fees that help to defray FOIA costs will likely find that the investment in FOIA pays for itself.¹⁵⁸ A rational agency would be more likely, therefore, to dedicate the resources necessary to meet deadlines. This type of economic incentive would align the FOIA requesters’ and agencies’ interests in prompt disclosure of public records, in many, but not all cases. For agencies processing FOIA requests that are entitled to reduced fees or to a public interest fee waiver, the incentive to comply with deadlines would not be greatly increased.

To compliment the fee penalty, the District should adopt a second approach to penalizing agency delay by preventing agencies from withholding material under some (but not all) FOIA exemptions if they do not respond within the prescribed time period. Under both the D.C. and the federal FOIAs, agencies must release all requested records unless they fall under one of the listed exemptions in the statute.¹⁵⁹ Most exemptions under the D.C. statute are modeled after the federal

156 In addition to these penalties, Congress also incorporated more reporting and tracking requirements in an attempt to reduce backlogs and encourage agency compliance with deadlines. *Supra* note 112. While reporting and tracking requirements play an important role in the federal FOIA, the District’s current reporting requirements seem adequate. Particularly as the District’s government is much smaller – and the number of FOIA requests much fewer – than the federal government, heightening tracking and reporting requirements would not likely have the same motivating effect on agencies in the District.

157 Honest Leadership and Open Government Act, Pub. L. No. 110-175, 121 Stat. 135 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III) (2006)). Specifically, the new provision states that “[a]n agency shall not assess search fees (or in the case of a requester described under clause (ii)(II) [scientific, educational, or news media requester], duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if not unusual or exceptional circumstances . . . apply to the processing of the request.” 5 U.S.C. § 552(a)(4)(A)(vii) (2007). The original bill in the House would have eliminated agencies’ ability to collect any fees as a penalty for failure to comply with deadlines. *See* H.R. REP. NO. 110-45 (2007). The original Senate bill eliminated agencies’ ability to assert certain exemption claims for failure to comply with deadlines. *See* S. REP. NO. 110-59 (2007). The partial fee elimination was the result of compromise between the House and Senate bills. 153 CONG. REC. S15649-S15650 (daily ed. Dec. 14, 2007); 153 CONG. REC. H16788-H16792 (daily ed. Dec. 18, 2007). .

158 Although the fees go generally to the D.C. Treasurer, rather than to the specific agency collecting fees for FOIA processing, the fees are intended to cover the agencies’ costs in processing FOIA, and the agencies have an interest in collecting those fees.

159 *See* 5 U.S.C. § 552(b) (2007); D.C. CODE § 2-534 (2001).

exemptions,¹⁶⁰ but the D.C. statute contains some additional exemptions specific to the District's records.¹⁶¹ Like the federal FOIA exemptions, the District's FOIA exemptions are designed to protect a variety of specific interests, including personal privacy, commercial competition, effective law enforcement, national security, and the confidentiality of the agencies' own privileged material.¹⁶²

During the debates on the 2007 amendments to FOIA, one Senate proposal included a penalty to agencies for missing FOIA deadlines that would disallow all agency claims of exemption except in circumstances involving "endangerment to national security or disclosure of personal private information" unless the agency could demonstrate "good cause for failure to comply with the time limits."¹⁶³ Although this proposal had the potential to be effective, it was rejected,¹⁶⁴ in large part because of the failure to protect other vital interests, including law enforcement and commercial interests. As Senator Jon Kyl stated at the time, "[m]any of these disclosures would harm individuals who have no control whatsoever over the government's compliance with FOIA requests."¹⁶⁵

A better approach would be one where the only exemptions that agencies would no longer be allowed to invoke are ones where only the agency's own interests are at stake. The primary exemption that protects only the agencies' own interests under the D.C. FOIA is exemption four, which covers "inter-agency or intra-agency memorandums or letters . . . , which would not be available by law to a party . . . in litigation with the public body."¹⁶⁶ In essence, this exemption incorporates litigation privileges, including attorney-client, work-product,

160 See Wash. Post Co., 560 A.2d at 522.

161 See, e.g., D.C. CODE § 2-534(5) (2001) (test questions for license, employment, or academic examinations); *id.* § 2-534(10) (emergency preparedness and response plans); *id.* at § 2-534(12) (otherwise unknown whistleblowers' identities).

162 5 U.S.C. § 552(b)(1) (2006) (exempting records properly classified pursuant to executive order), *id.* at § 552(b)(4) (exemption records that would reveal trade secret and confidential commercial information), (b)(5) (exempting agency records that are privileged); *id.* at § 552 (b)(6) (exemption records the release of which would constitute a clearly unwarranted invasion of personal privacy); *id.* at § 552 (b)(7) (exempting records that would compromise law enforcement); D.C. CODE § 2-534(a)(1) (2009) (trade secrets); *id.* § 2-534(a)(2) (personal privacy); *id.* at § 552§ 2-534(a)(3) (law enforcement records); and 5 U.S.C. § 2-534(a)(4) (agency privileges), *id.* at § 2-534(a)(7) (national security).

163 S. REP. NO. 110-59, pt.3, at 6 (2007).

164 Honest Leadership and Open Government Act, Pub. L. No. 110-175, 121 Stat. 135 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III) (2006)) (adopting the House proposal, in part, to abolish the ability of agencies to assess certain processing fees when those agencies failed to meet FOIA deadlines).

165 S. REP. NO. 110-59, *supra* note 157, at 4 n3 (additional views of Sen. Jon Kyl).

166 D.C. CODE § 2-534(a)(4) (2001). The language of this exemption exactly mirrors the language in the federal FOIA, the interpretation of which is therefore instructive. See 5 U.S.C. § 552(b)(5) (2006) (FOIA does not apply to matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

and deliberative-process privileges.¹⁶⁷ In its 2008 annual FOIA report, the District's Office of the Secretary reported that D.C. agencies had invoked exemption four to withhold records one hundred times that year.¹⁶⁸

The deliberative-process privilege is by far the most commonly invoked exemption four privilege used to withhold records. It encompasses records that are both "predecisional,"¹⁶⁹ meaning that the records were created prior to a final agency decision on the topic, and "deliberative,"¹⁷⁰ meaning that the records reflect the give-and-take of a policy-making process, rather than purely factual matters. The purpose of this privilege is to protect the agency's decision-making process, including the encouragement of open and frank discussions among agency personnel.¹⁷¹ Agencies therefore have their own interests in mind when invoking the deliberative-process privilege under exemption four of the D.C. FOIA to withhold records.

As such, the District should adopt a modified version of the Senate's 2007 proposal: it should prevent agencies that fail to meet FOIA's deadlines from asserting certain agency privileges to withhold requested material, most notably the deliberative-process privilege. This approach would, again, align the agency's interests with the requester, because the agency would forego the opportunity to protect its own interests if it failed to meet FOIA's deadlines. While it provides meaningful incentives that are important to the agency, this approach does not necessarily need to prevent the agency from asserting other privileges, such as attorney-client privilege, the waiver of which may produce a harsher-than-intended result.¹⁷² And this penalty would not compromise the agency's ability - indeed, duty - to protect the interests of others, including privacy, commerce, or public safety.

167 The legislative history of the parallel federal FOIA exemption reveals this intent. See H.R. REP. NO. 89-1497, at 10 (1966); S. REP. NO. 89-813, at 29 (1965); S. REP. NO. 88-1219, at 6-7, 13-14 (1964). The Supreme Court has interpreted that exemption to incorporate both statutory and common-law privileges. See *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 25-28 (1983).

168 GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2008 DISTRICT OF COLUMBIA FREEDOM OF INFORMATION ACT REPORT, at 1 (2009).

169 *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151-53 (1975). The Court further explained the rationale that "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached. *Id.* at 151.

170 *EPA v. Mink*, 410 U.S. 73, 89 (1973) (explaining the difference between factual material, which must be released, and deliberative material, which may be withheld), superseded in part on other grounds).

171 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); see also *NLRB*, 421 U.S. at 151 ("The point, plainly made in the Senate Report, is that the 'frank discussions of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." (citing S. REP. NO. 813, at 9 (year))).

172 See *Coastal States Gas Corp.*, 617 F.2d at 862-64 (attorney-client privilege applies where the communications are necessary to obtain legal advice and have only been disclosed to those who are authorized to act for the agency).

In sum, the District should amend FOIA to include two penalties to agencies for failing to comply with FOIA's deadlines. These penalties should prevent agencies from charging processing fees and from asserting certain agency privileges under exemption four to withhold material from public view. These provisions would both incentivize agency compliance with deadlines and increase the timely access to public records to which FOIA aspires.

B. *Requests for Expedited Processing*

In considering how to make its FOIA laws more user-friendly for those seeking time-sensitive information, the District should adopt an analog to the federal FOIA's provision for expedited processing, but with substantial alterations to enhance the procedure's effectiveness. Under the federal FOIA, a requester is entitled to expedited processing when he or she demonstrates a "compelling need" for the requested records.¹⁷³ "Compelling need" can mean one of two things. First, a requester has a compelling need when "a failure to obtain the requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."¹⁷⁴ Second, a requester has a compelling need if he or she is "a person primarily engaged in disseminating information [and shows that there is] urgency to inform the public concerning actual or alleged Federal Government activity."¹⁷⁵ In addition, agencies were instructed to promulgate regulations for any additional types of requests that the agency determines should be entitled to expedited processing.¹⁷⁶

Expedited processing has proven particularly useful for media requesters. The D.C. Circuit adopted a three-part test used to determine if a request is entitled to expedited processing under the "urgency to inform the public" provision.¹⁷⁷ This test considers whether a request concerns a matter of current exigency to the American public, whether delaying a response would compromise a significant recognized interest, and whether the request concerns federal government activity.¹⁷⁸ Unfortunately, the D.C. Circuit's test is so stringent that hardly any requester has prevailed in court when challenging an agency's denial of his or her request for expedited processing. For instance, requests deemed by courts not entitled to expedited processing have included requests for intelligence information regarding the 1997 death of Princess Diana,¹⁷⁹ requests for information pertaining to the scandal involving former President Clinton and White House intern

173 5 U.S.C. § 552(a)(6)(E)(i)(I) (2006). The expedited processing provision was adopted as part of the E-FOIA Amendments to FOIA in 1996, Pub. L. No. 104-231, § 8(a), 110 Stat. 3048 (1996).

174 5 U.S.C. § 552(a)(6)(E)(v)(I) (year).

175 *Id.* at § 552(a)(6)(E)(v)(II).

176 *Id.* at § 552(a)(6)(E)(i)(II).

177 *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

178 *Id.*

179 *Id.*

Monica Lewinsky,¹⁸⁰ and requests for information concerning post-9/11 FBI questioning of men of Middle Eastern descent.¹⁸¹ Each of those matters was of great public interest and the subject of widespread media reporting, yet requests for time-sensitive information on those topics were denied expedited processing.

In contrast, requests deemed entitled to expedited processing have largely been decided outside the parameters of the D.C. Circuit's three-part test. The Department of Justice promulgated regulations under the expedited processing provision that allowed for expedited processing when the requester showed a "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."¹⁸² Using that standard, requests for information about a whistleblower's firing¹⁸³ and about the government's use of Section 215 of the PATRIOT Act¹⁸⁴ (which allows investigators access to bookstore, library, video rental and other records) have qualified for expedited processing. In another case, the D.C. District Court, without applying the three-part test, found that Natural Resources Defense Council was entitled to expedited processing of its request for records concerning President Bush's Energy Task Force.¹⁸⁵

Though the federal FOIA's expedited processing provision is designed to help the news media, it is insufficiently broad to serve its intended purpose. The District should adopt an expedited processing provision that encompasses requests for a wider array of time-sensitive newsworthy information concerning governmental activities. A standard like the one set forth in the Department of Justice regulations would permit news media to obtain records quickly when the public has an urgent interest in them.

In addition to improving the standard used to determine which FOIA requests qualify for expedited processing, the District, in adopting an expedited processing provision, should also improve the process itself over that used by the federal government. Under the federal FOIA, if a requester asks for expedited processing of his or her request, an agency must determine within ten business days whether the request qualifies for expedited processing.¹⁸⁶ Once an agency determines that a requester is entitled to expedited processing, however, the statute

180 *Tripp v. Dep't of Def.*, 193 F. Supp. 2d 229 (D.D.C. 2001).

181 *ACLU of N. Cal. v. Dep't of Def.*, No. C 04-4447, 2005 WL 588354 (N.D. Cal. Mar. 11, 2005).

182 28 C.F.R. § 16.5(d)(iv) (2008).

183 *Edmonds v. FBI*, No. 02-1294, 2002 WL 32539613 (D.D.C. Dec. 3, 2002).

184 *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004).

185 *Natural Res. Def. Council v. Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002) (concluding that the request concerned records of extraordinary public interest).

186 5 U.S.C. § 552(a)(6)(E)(ii)(I) (2006).

merely requires that the agency then process the request “as soon as practicable.”¹⁸⁷

Rather than require a response to the request for expedited processing and then a subsequent response to the FOIA request, the District should adopt a single deadline. If a request for expedited processing is denied, the requester will be notified of the denial by that deadline. If the request for expedited processing is granted, the response to the FOIA request itself will be provided by that deadline. Because the District’s normal response time is mandated within fifteen business days, and because the District government offices are smaller and hold fewer records than federal agencies, the District should adopt an expedited processing provision with a single response deadline of five business days after receipt of the FOIA request. Urgent FOIA requests needed to inform the public should be handled with priority and should be responded to within a week of receipt. If a requester’s expedited processing request is denied, the FOIA request will be processed in the normal fifteen business day period.

In addition to a firm deadline for a response to a FOIA request entitled to expedited processing, the District should include a firm deadline for a decision on an appeal from a denial of expedited processing. Again, this timeline should be no longer than five business days. Since the appeal goes to the Mayor’s office, however, the same person is not deciding on the expedited processing request as would process the FOIA request itself. Thus, after a successful appeal in which a requester obtained entitlement to expedited processing, the original agency should be given an additional two business days to process the request.

The addition of an expedited processing track for FOIA requests in the District would facilitate the use of FOIA by the press to inform the public about the District government’s activities. Modeling such a provision on the federal FOIA’s expedited process may be useful as a starting point, but a wider category of requests and firmer deadlines will ensure that a new expedited processing in the District will be maximally effective.

C. Accelerate Judicial Review

A final way of easing the burden of time delay for FOIA requesters is to accelerate the judicial review process. FOIA requesters may seek judicial review for a variety of reasons: they may sue to challenge the denial of a request (i.e. the withholding of records),¹⁸⁸ to challenge an agency’s claim that it has no responsive records,¹⁸⁹ to challenge process issues like expedited processing¹⁹⁰ (if such a

187 *Id.* at § 552(a)(6)(E)(iii) (This provision also provides for judicial review of a denial of or a failure to respond within 10 days as a constructive denial of a request for expedited processing).

188 *See, e.g., Wash. Post Co.*, 560 A.2d at 517 (challenging withholding of certain data on minority owned business).

189 *See, e.g., Doe v. Dist. of Columbia Metro. Police Dept.*, 948 A.2d 1210 (D.C. 2008) (challenging the adequacy of the agency’s search for records).

provision were adopted), and to request a waiver of processing fees (discussed in further detail *infra*, part IV(a)).¹⁹¹

Because of the importance of timely access to information, the federal FOIA has accelerated judicial review of FOIA cases. Under the Federal Rules of Civil Procedure, a defendant typically has twenty-one days to file an answer to a complaint.¹⁹² When the federal government is the defendant, however, it typically has sixty days to file an answer.¹⁹³ FOIA shortened the federal government's typical time to respond to a complaint to thirty days in an effort to speed up the judicial process and allow requesters with meritorious challenges to agency actions to get relief as quickly as possible.¹⁹⁴

The District has a similar basic scheme: typically, a nongovernment defendant has twenty days to file an answer to a complaint,¹⁹⁵ and the D.C. government has sixty days.¹⁹⁶ In FOIA cases, the District should shorten the government's time to file an answer to twenty days, like other defendants, so that access to information is not further delayed. Such a requirement would not pose an undue hardship on the government, as FOIA cases (and particularly the pleadings) tend to be more straightforward than others.

In addition, the District should adopt a provision that prioritizes FOIA cases on the D.C. courts' dockets. In the 1974 amendments to the federal FOIA, Congress added a provision that automatically gave FOIA cases precedence on the docket unless the court considered other cases of greater importance, and mandated that the litigation be "expedited in every way."¹⁹⁷ Although later repealed in a broader effort to improve the functioning of the federal courts, the Department of Justice continued to recognize the importance of faster FOIA litigation.¹⁹⁸ The District should amend FOIA to provide for expedited litigation and docket priority for FOIA cases.

Taken together, providing incentives to agencies to comply with existing deadlines, providing for expedited processing of time-sensitive requests, and accelerating the process of judicial review of agency decisions will substantially increase the speed with which the District's residents can access their government's files.

190 See *supra* Part III(B).

191 See *infra* Part IV(A).

192 FED. R. CIV. P. 12(a)(1)(A)(i).

193 *Id.* at 12(a)(2).

194 5 U.S.C. § 552(a)(4)(C) (2006).

195 D.C. R. CIV. P. 12(a)(2).

196 D.C. R. CIV. P. 12(a)(3)(A).

197 Pub. L. No. 93-502 (1974), codified at 5 U.S.C. § 552(a)(4)(D) (1974) (repealed by Section 402 of the Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, 98 Stat. 3335, 3357 (1984)).

198 Department of Justice, FOIA Update, Vol. VI, No. 2 (1985), available at http://www.justice.gov/oip/foia_updates/Vol_VI_2/page5.htm.

V. ENCOURAGE EXERCISING RIGHTS UNDER FOIA

In addition to improving agency compliance with FOIA deadlines, the District's FOIA could be substantially strengthened by providing incentives for members of the public to use FOIA and for requesters to challenge unlawful agency action under FOIA in court. These goals can be accomplished in two ways: first, the District should amend its provision for the waiver of processing fees under FOIA, both to make the waiver mandatory for those who meet the statutory standard and explicitly to allow a requester to challenge the denial of a fee waiver in court; second, the District should amend its FOIA attorneys fees provision to make clear that *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*¹⁹⁹ does not apply to narrow the availability of attorney fees for successful FOIA plaintiffs. These amendments would contribute toward increasing the use of FOIA by the public and the overall transparency of the District's government.

A. Public Interest Fee Waiver

The D.C. FOIA provides that, regardless of the fee category under which a requester falls (commercial, news media/scientific or educational research institution, or other), “[d]ocuments may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.”²⁰⁰ In some ways, this provision is a very strong one – indeed, stronger than its federal counterpart. By leaving open the question of how the documents must primarily benefit the general public, it allows requesters to explain how the request is in the public interest, which could potentially mean anything from helping the public to understand how the District's government operates to protecting the public's health and safety to exposing corporate malfeasance in the District. In contrast, the federal FOIA is much narrower: It requires that a request primarily help the public to understand the operations and activities of government to qualify as a public interest request.²⁰¹

Although the District's fee-waiver provision allows agencies to consider any type of public interest in the request, it does not *require* agencies to waive fees

199 *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

200 D.C. CODE § 2-532(b) (2001).

201 5 U.S.C. § 552(a)(4)(A)(iii) (2006) specifically states:

Documents shall be furnished without any charge or at a charge reduced below the fees established under [the three fee categories] if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Id.

when the request is in the public interest. The D.C. FOIA should replace the permissive “may” with a mandatory “shall” so that public interest requests are exempt from processing fees.²⁰² This change would encourage public interest organizations, community groups, and activists to use FOIA to benefit the public.

Additionally, the District should amend FOIA to make clear that, if an agency denies a request for a public interest fee waiver, the denial may be independently challenged in court. As it stands, the D.C. FOIA is silent on the ability of a requester to appeal or challenge in court an agency’s denial of a public interest fee waiver request.²⁰³ Although there have been administrative appeals of fee waiver denials,²⁰⁴ there are no reported decisions in the District that squarely establish the right of a requester to challenge the denial of a fee waiver either on administrative appeal or in court.

To fill this gap, the District should amend its section of the FOIA on review of FOIA denials to govern the review of denials of fee-waiver requests.²⁰⁵ Currently, that section states that “any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be withheld”²⁰⁶ Furthermore, if the Mayor makes no determination within the prescribed time period or denies the petition, the requester may institute proceedings for injunctive or declaratory relief in the D.C. Superior Court.²⁰⁷ The District can simply amend these provisions to each say “any person denied the right to inspect a public record or denied a request for a public interest waiver of processing fees” This change would make clear that fee waiver denials are subject to the same review as denials of requests for records.

Finally, the District should insert an additional provision under the review section that would enumerate the standard of review for fee waiver denials. The federal FOIA dictates: “In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, that the court’s review of the matter shall be limited to the record before the agency.”²⁰⁸ This type of provision eliminates confusion about the standard of review, ensures that the court does not give undue deference to an agency’s denial of a fee waiver request, and also ensures that agencies have the first chance to make the correct determination with all of the relevant facts before them. Clari-

202 See D.C. CODE § 2-532(b)(2001).

203 *Id.* at § 2-537 (2001) (Explaining the methods of appealing a denial of a FOIA request administratively or challenging a denial of a FOIA request in court).

204 See, e.g., FY 2008 FOIA Report, *supra* note 42, at 14, citing MCL 2008-1, IQ 523678 (received Oct. 4, 2007), noting that subject of appeal was denial of fee waiver.

205 The FOIA section governing review may be found at D.C. CODE § 2-537 (2001).

206 *Id.* at § 2-537(a) (2001).

207 *Id.* at § 2-537(a)(1), (2) (2001).

208 5 U.S.C. § 552(a)(4)(A)(vii) (2006).

fyng the review process of fee waiver request denials will facilitate the use of FOIA in the public interest.

B. *Attorney Fees*

Attorney fee provisions, most common when private enforcement is in the greater public interest, departs from the underlying “American Rule,” under which each party bears his own attorney fees and costs of a lawsuit.²⁰⁹ Both the federal FOIA and the District’s FOIA provide for the payment by a defendant of reasonable attorney fees and costs to a successful FOIA plaintiff.²¹⁰ These provisions encourage private enforcement of FOIA violations through civil lawsuits; indeed, attorney fees provisions are particularly needed in FOIA cases - both for plaintiffs to bring cases and for lawyers to take such cases - because plaintiffs in FOIA cases are not seeking monetary relief and therefore do not have any financial incentive to bringing a costly lawsuit even with meritorious claims.²¹¹

Historically, the courts of the District of Columbia have used the interpretation of the federal FOIA’s provisions as guidance in interpreting the D.C. FOIA, including the attorney fees provisions.²¹² Noting that “the fee award provision of the DC FOIA is patterned after, and substantially the same as, that contained in the federal FOIA,” the D.C. Court of Appeals has followed federal courts’ holdings about the scope of the availability of attorney fees to a FOIA litigant.²¹³

Because of the historical reliance on federal FOIA interpretations, and the relative scarcity of precedential FOIA decisions in the District, the District should amend its attorney fee provision to keep up with changes that have occurred on the federal level, both judicial and statutory. In particular, the 2007 amendments to the federal FOIA corrected a problem of judicial interpretation that threatened the functioning of the federal FOIA by drastically narrowing the availability of attorney fees for FOIA plaintiffs. The District should adopt the

209 *Travelers Cas. And Sur. Co. of America v. Pacifica Gas and Elec. Co.*, 549 U.S. 443, 448 (2007) (“Under the American Rule, ‘the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.’”) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)).

210 The D.C. FOIA provides: “If a person seeking the right to inspect or to receive a copy of a public record prevails in whole or in part in such suit, he or she may be awarded reasonable attorney fees and other costs of litigation.” D.C. CODE § 2-537(c) (2001). The federal FOIA provides: “The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i) (2006).

211 See 5 U.S.C. § 552(a)(4)(B) (2006) (suits under FOIA are for injunctive relief).

212 *McReady v. Dep’t of Consumer & Regulatory Affairs*, 618 A.2d 609, 613 (D.C. 1992).

213 *Id.* (holding attorney fees not available to attorney-plaintiff litigating pro se and relying on federal FOIA interpretations); see also *Donahue v. Thomas*, 618 A.2d 601, 605 (D.C. 1992) (holding attorney fees not available to non-attorney-plaintiff litigating pro se and relying on federal FOIA interpretations).

same type of amendment to prevent any problem for requesters exercising their rights under the District's FOIA.

In *Buckhannon Home and Board Care, Inc. v. West Virginia Department of Health and Human Resources*, decided in 2001, the U.S. Supreme Court held that the attorney's fees provisions found in two federal civil rights statutes did not allow for recovery of attorney's fees under a "catalyst theory"; that is, when a plaintiff's lawsuit catalyzed the defendant's change in behavior before a judicial ruling ordered such change.²¹⁴ Whatever the merit of such a ruling in the civil rights context,²¹⁵ FOIA advocates immediately sensed the danger of applying *Buckhannon* to the attorney fees provision under FOIA.²¹⁶ As the Senate Judiciary Committee noted:

As a policy matter, *Buckhannon* raises serious and special concerns within the FOIA context. Under *Buckhannon*, it is now *theoretically* possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests. Here's how: A government agency refuses to disclose documents even though they are clearly subject to FOIA. The FOIA requestor has no choice but to undertake the time and expense of hiring an attorney to file suit to compel FOIA disclosure. Some time after the suit is filed, the government agency eventually decides to disclose the documents—thereby rendering the lawsuit moot. By doing so, the agency can cite *Buckhannon* for the proposition that, because there is no court-ordered judgment favoring the requestor, the requestor is not entitled to recover attorneys' fees. This straightforward application of the *Buckhannon* ruling effectively taxes all potentially FOIA requestors. As a result, many attorneys could stop taking on FOIA clients—and many FOIA requestors could stop making even legitimate and public-minded FOIA requests—rather than pay what one might call the "Buckhannon tax."²¹⁷

Indeed, *Buckhannon* was soon applied in the FOIA context and used to deny attorney fees to litigants to whom records were released after they filed suit but before a judicial ruling.²¹⁸ As the Senate Judiciary Committee stated, "The 'Buckhannon tax' is not theoretical; it is a reality to FOIA requestors and liti-

214 *Buckhannon*, 532 U.S. at 598.

215 For an argument that the elimination of a catalyst theory is detrimental in the civil rights context, *see id.* at 635 (Ginsburg, J. dissenting) (explaining the need for catalyst theory attorney fees in civil rights cases).

216 *See, e.g.*, David Arkush, *Preserving "Catalyst" Attorneys' Fees Under The Freedom Of Information Act In The Wake of Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 37 HARV. C.R.-C.L. L. REV. 131 (2002).

217 S. REP. NO.110-59, at 4, n.3 (2007).

218 *See, e.g.*, *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. INS*, 336 F.3d 200, 203 (2d Cir. 2003); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002).

gators. In recent years, oversight hearings in both the House and Senate have exposed the reality of government stonewalling in FOIA cases.”²¹⁹

Certainly, *Buckhannon* is not controlling law with regards to the D.C. courts’ interpretation of the attorney fees provision in the D.C. FOIA. Additionally, differences between the statutory language in the civil rights statutes analyzed in *Buckhannon* and the attorney fees provision in the D.C. FOIA could support a D.C. court’s conclusion that *Buckhannon* does not apply to prevent catalyst theory attorney fees awards under the D.C. FOIA. Specifically, the civil rights statutes at issue in *Buckhannon* allowed a court to award attorney fees to a “prevailing party.”²²⁰ The D.C. FOIA allows attorney fees to be awarded to the arguably broader category of parties who have “prevailed in whole or in part.”²²¹ Such a statutory language distinction, however, also could have been made between the civil rights statutes and the federal FOIA,²²² which allows attorney fees to be awarded to FOIA plaintiffs who have “substantially prevailed”—also arguably broader than the “prevailing party” language analyzed in *Buckhannon*—and federal courts declined to find that distinction meaningful.²²³ Even though the D.C. courts have yet to rule on whether the *Buckhannon* analysis would apply to the D.C. FOIA attorney fees provision, the federal analysis and D.C.’s reliance on federal FOIA interpretation for guidance demonstrate at the very least a substantial risk that D.C. courts would apply *Buckhannon* and may deter litigants from pursuing attorney fees in this context.

Because the federal FOIA’s efficacy was threatened by the application of *Buckhannon* to its attorney fees provision, Congress amended that provision in the OPEN Government Act of 2007 to “clarif[y] that *Buckhannon* does not apply to FOIA cases.”²²⁴ Congress added to the FOIA attorney fees provision: “For the purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either: (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstan-

219 S. REP. NO.110-59, at 4 n.3 (2007). There are, of course, many instances of agency failure to disclose records until suit is brought in which no bad faith is evident. Frequently, agencies face resource issues in processing FOIA requests, a failure of the left hand to know what the right hand is doing, and simple mistakes. Lawsuits often provoke a closer look at the records at issue and often prompt further releases from the agency. Even without bad faith on the agency’s part, however, it is imperative that plaintiffs who had to sue to get the records are able to recover the cost of the suit and of hiring an attorney, or such records will remain out of public view indefinitely.

220 *Buckhannon*, 532 U.S. at 600.

221 D.C. CODE § 2-537(c) (2001).

222 For a detailed argument for distinguishing the FOIA attorney fees awardable to a party who “substantially prevails” from the civil rights statutes attorney fees provision covering only “prevailing parties.” See generally Arkush, *supra* note 216.

223 Compare *Buckhannon*, 532 U.S. at 600 and 5 U.S.C. §552(a)(4)(E)(i) (2006). See also Oil, Chem. & Atomic Workers Int’l Union, *supra* note 218, at 456-57.

224 S. REP. NO.110-59, at 4 (2007).

tial.”²²⁵ The District should adopt similar language in its attorney fees provision. Such language will prevent would-be FOIA plaintiffs from being deterred from filing suit by the uncertainty of the availability of attorney fees if the suit is successful. It will also encourage lawyers in the District to accept such cases on a *pro bono* basis. Preserving the ability to recover attorney fees in a successful FOIA suit is critical to ensuring the basic functioning of the D.C. FOIA.

VI. REDUCE THE NEED FOR FOIA: PROACTIVE DISCLOSURE

The various measures proposed in this Article would go a long way in increasing the public’s access to the records held by the District’s government officials. These proposals would help to ease the financial and time burdens associated with using FOIA and make access to information more prompt and therefore relevant. Some of the problems with the efficacy of FOIA, however, are less tangible. Government employees, by human nature, may have a general resistance to disclosing records that would lead to more public input, oversight, or commentary about how those employees are doing their jobs.²²⁶ As seasoned FOIA litigator David Vladeck noted, “[p]eople do not want to work in a fishbowl.”²²⁷ Individual decisions about specific FOIA requests are always subject to some employee discretion, which may be influenced by this more “entrenched resistance.”²²⁸ While working to fight that resistance through education and incentives, the District’s FOIA laws should simultaneously require public bodies to affirmatively disclose much broader categories of records, thereby eliminating the need for an individualized determination about each FOIA request as to those records and allowing the public much faster access to the records than by the request process. David Vladeck points out that the Internet has “made obsolete the request-and-wait-for-a-response approach designed for paper records.”²²⁹

Currently, the District’s FOIA requires some affirmative disclosure by public bodies.²³⁰ One problem with this disclosure requirement, however, is that there

225 The Honest Leadership and Open Government Act, Pub. L. No. 110-175, 121 Stat. 135 (2007) (codified at 5 U.S.C. § 552(a)(4)(E)(ii) (2006).

226 David C. Vladeck, *Info. Access - Surveying the Current Legal Landscape of Federal Right to Know Laws*, 86 TEX. L. REV. 1787, 1792 (2008).

227 *Id.*

228 *Id.*

229 *Id.* at 1973.

230 D.C. CODE 2-536(a) (2001). This requirement includes the names, salaries, title, and dates of employment of all employees and officers of a public body; administrative staff manuals and instructions to staff that affect a member of the public; final opinions made in the adjudication of cases; statements of policy and interpretations of policy, acts, and rules that have been adopted by a public body; correspondence and materials referred to in correspondence with a public body relating to any regulatory, supervisory, or enforcement responsibilities of the public body; information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public funds; budget 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; the min-

is no mandate for a public body to assemble all of these materials on one publicly available website. Instead, these materials are found piecemeal in a number of locations, including linked from the D.C. Government's main FOIA webpage,²³¹ within the D.C. Public Records Office,²³² and the Office of the Chief Technology Officer's webpage.²³³ The District should first strengthen this affirmative disclosure provision by requiring every public body to maintain a website that lists each of these items and links to those items for current and future records, and require that such website be accessible from a link prominently displayed on the public body's homepage.

This requirement would be akin to the federal FOIA's "electronic reading rooms," which are federal agency websites where members of the public can access information held by that agency.²³⁴ Although the federal FOIA has always required agencies to make certain categories of information available to the public without the need for filing a FOIA request, this requirement was, for the first thirty years of FOIA's history, largely met by the use of "conventional" reading rooms; that is, physical rooms at the agency where members of the public could look through hard copies of the records.²³⁵ The 1996 E-FOIA amendments added the requirement that for records created after November 1, 1996, "each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the

utes of all public body proceedings; names and mailing addresses of absentee real property owners and their agents; pending applications for building permits and authorized building permits; copies of all records that have been released to any person under the D.C. FOIA and that the public body determines have come or are likely to become the subject of subsequent requests for substantially the same records; and a general index of the records referred to above, unless the materials are promptly published and copies offered for sale. *Id.*

231 See District of Columbia Gov't., Freedom of Info. Act, <http://grc.dc.gov/grc/cwp/view,a,1175,q,457152.asp> (last visited Jan. 10, 2010).

232 See District of Columbia Gov't., Office of Pub. Records, <http://os.dc.gov/os/cwp/view,a,1207,q,522721,osNav,—31374—.asp> (last visited Jan. 10, 2010).

233 See District of Columbia Gov't., Data Catalog, <http://data.octo.dc.gov/> (last visited Jan. 10, 2010).

234 See 5 U.S.C. § 552(a)(2)(e) (2006). Although not addressed by this Article, potential also exists for reform by inclusion of more categories in the mandatory affirmative disclosure provision. On the federal level, these requirements have been described as "minimal affirmative duties of disclosure" and proclaimed that "[a]gencies need not be forthcoming" under the law. Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHS J. 577, 584 (2009). Hertz also provides a sort of indexing of the type of information that the government typically holds that may be of interest to the public. See *id.* at 579-80. A review of the District's information holdings for possible revision of the FOIA disclosure requirements would be another way of approaching the problem of affirmative disclosure.

235 THE NAT'L. SECURITY ARCHIVE, GEO. WASH. UNIV., THE KNIGHT OPEN GOV'T. STUDY, at 7 (2007), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf [hereinafter "KNIGHT OPEN GOV'T. STUDY"].

agency, by other electronic means.”²³⁶ As a result, agencies were required to create electronic versions of their reading rooms accessible on their websites. Although the District’s FOIA has a provision requiring that records subject to affirmative disclosure be made available electronically after November 1, 2001,²³⁷ this provision has not led to the implementation of electronic reading rooms in the same way.

Admittedly, the electronic reading room implementation at the federal level has been inconsistent. As one study found, ten years after the E-FOIA amendments, only twenty one percent of agencies had all of the required categories of information in their electronic reading rooms.²³⁸ The District could improve upon the federal government model by requiring an annual audit of compliance by a central authority. In addition, the equivalent of electronic reading rooms may be easier to implement in the District because public bodies are smaller and more centralized.²³⁹ The District should also require public bodies that do not maintain any records in a given category for which affirmative disclosure is required to indicate this fact on the website, which would allow members of the public to determine conclusively whether a public body has complied with the disclosure requirements.²⁴⁰ Adding the requirement that all of the mandatorily disclosed records be posted to a single website for each public body linked from the public body’s homepage would greatly increase access to records in the District.

Second, the District should strengthen its current provision requiring the affirmative disclosure of records released under FOIA to other requesters. As it stands, a public body is only required to affirmatively disclose responses that the public body determines have come or are likely to become the subject of subsequent requests for substantially the same records. A similar provision under the federal FOIA has proved unworkable. An audit of agency compliance demonstrated that compliance was spotty, at best, and that “agencies have failed to implement this provision in a comprehensive way.”²⁴¹ In particular, most agencies required a specific record to be requested three times before it was considered a

236 5 U.S.C. § 552(a)(2)(e) (2006); Electronic Freedom Of Information Act Amendments (E-FOIA Amendments), Pub. L. No. 104-231, 110 Stat. 3048 (1996).

237 D.C. CODE § 2-536(b) (2001).

238 KNIGHT OPEN GOV’T. STUDY, *supra* note 235, at 7.

239 The Knight Open Government Study found that larger, more decentralized agencies in the federal government had a harder time complying with the requirements of electronic reading rooms. KNIGHT OPEN GOV’T. STUDY, *supra* note 235, at 9.

240 See KNIGHT OPEN GOV’T. STUDY, *supra* note 235, at 11 (recommending the same for federal agencies).

241 KNIGHT OPEN GOV’T. STUDY, *supra* note 235, at 9.

frequently requested record, even if records on a given topic (albeit not precisely the same records) were being requested by dozens of requesters.²⁴²

Instead, the District should require *every* response to a FOIA request to be automatically posted on the public body's website containing affirmative disclosures.²⁴³ Once the processing of the request is complete, including search, review, and duplication required to respond to the individual requester, there is minimal additional effort required to post the records. Particularly because many FOIA releases are made electronically to the individual requester, records are easily uploaded to a website or, if they were released in hard copy, scanned and uploaded. In this way, it is not left to agency discretion or coordination to determine which requests are of public interest; rather, it is for the public to decide.

Strengthening the affirmative disclosure requirements in the D.C. FOIA not only has the potential to vastly improve the public's access to District government held information, but also to reduce the costs to the District's government of processing individualized requests. The more that information is available without the need for a FOIA request, the less time will be spent by FOIA professionals in the District's government responding to often duplicative or overlapping requests for information. As such, proactive disclosure will save resources and make a FOIA request an option of last resort.

CONCLUSION

FOIA is a powerful tool for democratic participation in our government. It is "truly an experiment in open government."²⁴⁴ As this Article has explained, however, the effectiveness of FOIA has been undermined in many ways. A lack of agency resources for processing FOIA requests, agency delay and backlog, the cost in both time and money associated with litigating a FOIA denial, and the monetary costs of FOIA fees and attorney fees all serve to make it more difficult for residents of the District to access public information. This Article proposes

242 *Id.* at 11. The "rule of three" was established in DOJ guidance but agencies mostly took a very narrow approach to implementing the rule. Meredith Fuchs and Kristin Adair, *On The Sidelines of the Information Revolution: How the Freedom of Information Act Amendments of 1996 Failed to Transform Public Access*, 33 FALL ADMIN & REG. L. NEWS 12, 13 (2007). Exceptions, of course, exist. Anticipating a deluge of requests after the loss of the 2003 Columbia Space Shuttle, NASA affirmatively posted a large volume of records related to that incident on its FOIA website. *Id.* Nonetheless, the National Security Archive's study of 149 agency and component websites in 2007 demonstrates that such examples are the exception, not the rule. *See id.* One example of failure was articulated by Michael Herz, who explained that every Environmental Impact Statement prepared by an agency, all of which are subject to disclosure under FOIA, should be automatically posted in the electronic reading room because it would be very rare for an EIS not to be requested at least three times. Herz, *supra* note 235, at 588-89. Yes, there are hardly any EIS's in agency reading rooms, and Herz points out that "the gap is hardly limited to EIS's." *Id.* at 589.

243 Some open government advocates have suggested a short delay in posting responses to requests made from members of the media, so as not to discourage media use of FOIA.

244 Vladeck, *supra* note 226, at 1795.

ways to improve the District's FOIA laws in each of those areas to enhance the public's right to request and receive information held by the District government.

In addition to proposing those improvements, this Article recognizes the limitations of a request-and-response system for accessing government-held information, especially in light of the changing nature of information technology. As such, this Article proposes enhanced requirements on public bodies to affirmatively disclose, via centralized websites, certain categories of information. Affirmative disclosure both increases the speed and consistency with which the public can access government information, and decreases the government's costs associated with processing FOIA requests. A combination of these measures will help the D.C. FOIA reach its potential.

